



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 311
December 2020**

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Carrie Bland
Acting Associate Chief Judge for Black Lung

Yelena Zaslavskaya
Senior Counsel for Longshore

Francesca Ford
Senior Counsel for Black Lung

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

A. U.S. Circuit Courts of Appeals¹

[Wilson v. Director, OWCP, 984 F.3d 265 \(3rd Cir. 2020\).](#)

The Third Circuit held that the LHWCA does not create a presumption of situs. Reversing the Board,² the court held that claimant established that he was injured on the navigable waters of the United States and thus satisfied the coverage requirements under the Act.

Claimant sustained hearing loss while working for employer on the New Jersey Route 3 bridge replacement project. He sought compensation benefits under the LHWCA. The Route 3 Bridge spans the Lower Passaic River at River Mile 11.8. The ALJ found that claimant sustained work-related hearing loss, but dismissed the claim, finding that claimant failed to establish that the waters on which he was injured were navigable. The Board affirmed, and claimant appealed.

To be eligible for coverage, the LHWCA requires (1) that a worker be "engaged in maritime employment," pursuant to § 2(3); and (2) that his injury occur on "navigable waters of the United States" or an "adjoining [land] area," pursuant to § 3(a). These requirements are known as the "status" and "situs" requirements. In this case, the situs requirement was at issue. If a worker is injured on the actual navigable waters in the course of his employment on those waters, then he also satisfies the status requirement, as he was required to perform his employment duties in a historically maritime locale.

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

² *Wilson v. Creamer-Sanzari Joint Venture*, 53 BRBS 19 (2019).

As a threshold matter, the court rejected claimant's contentions (1) that § 20(a) creates a situs presumption for claimants, and (2) that it shifts the burden of proving (or disproving) situs to respondents. Section 20(a) provides that "it shall be presumed, in the absence of substantial evidence to the contrary[,] . . . [t]hat [a] claim [for compensation under this chapter] comes within the provisions of this chapter." The court reasoned that situs is a threshold issue that must be resolved before § 20(a) can be applied. Congress enacted the LHWCA under its admiralty and maritime jurisdiction, which gives it the authority to alter or revise the maritime law. This authority is constrained by the constitutional limits of admiralty and maritime jurisdiction, which for maritime torts includes only injuries that occur on navigable waters of the United States and certain adjoining land areas. Thus, the LHWCA's situs requirement is essentially a jurisdictional determination, which means its existence is a condition precedent to the operation of the statutory scheme.

The court further reasoned that the burden of proving situs lies with the claimant. Under § 19(d) of the LHWCA, administrative adjudications shall be conducted in accordance with the Administrative Procedure Act ("APA"). The APA states that, "[e]xcept as otherwise provided by statute, the proponent of a[n] . . . order has the burden of proof." 5 U.S.C. § 556(d); *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). A claimant bears the burden of proving entitlement to benefits under the LHWCA by a preponderance of the evidence. It follows that § 20(a) does not apply to situs determinations. Even if it did, *Greenwich Collieries* held that § 20(a) does nothing more than create a rebuttable presumption that eases the claimant's burden of proof. It does not shift the burden of proof to the respondent, but only places a burden of production on the respondent.

Nevertheless, in this case, claimant provided sufficient evidence to show that the Lower Passaic River was navigable in fact in 2010. Navigability is a vast concept. Depending on the legal context, the definition greatly varies. Because the LHWCA is federal maritime law, the court must apply a definition of navigable waters that is used for demarcating Article III admiralty jurisdiction. Under the "navigable-in-fact" standard,³ a body of water is navigable for purposes of federal admiralty jurisdiction if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce. The ALJ and Board misconstrued the definition of navigable waters, as they seemed to require evidence that a waterway is capable of sustaining "commonly-used large commercial ships" or evidence of present commercial use. A waterway, however, is navigable in fact simply if it is capable of sustaining any type of interstate or foreign commerce. Demonstrating present commercial use is only one of the acceptable methods that a claimant may use to establish navigability.

At River Mile 11.8, the channel depth exceeded four feet and was 150 feet wide. Commercial vessels were able to transit portions of the river where the channel was as shallow as four feet and as wide as seventy-two feet. In 2008, the United States Army Corps of Engineers ("ACE") conducted a survey and noted that the authorized federal navigation channel extends from the mouth of the river through River Mile 15.4. The ALJ and Board acknowledged that the channel had been dredged to ten feet deep, but reasoned that it was unclear whether natural siltation had since reduced its depth. However, the ACE report noted that that River Mile 8.1 was last dredged to ten feet in 1932 yet, in 2008, its depth was nine feet. Claimant also cited a navigation chart showing that this portion of the channel was seven feet deep in 2017. There were no impediments blocking the navigation channel between the Newark Bay and the Route 3 bridge. Accordingly, claimant established that the waterway was navigable in fact.

³ The court noted the OWCP Director's statement that claimant also could have argued the river was navigable under the "ebb-and-flow" test, but did not address this alternative basis for admiralty jurisdiction.

The decision was reversed and the case remanded for a determination of benefits.

[Section 3(a) – SITUS – Section 20(a) Presumption; Navigable Waters]

B. Benefits Review Board

Pierce v. Electric Boat Corp., BRBS (2020).

The Board held that the most recent version of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (“AMA Guides”), as of the time doctor renders a rating opinion, must be used to determine a retiree’s impairment under the LHWCA.

Claimant, a voluntary retiree, was awarded compensation in 2015 for an asbestos-related lung injury based on a 57.5% impairment based on the 6th Edition of the AMA *Guides*. In 2017, claimant filed a motion for modification alleging that his impairment had increased to 100%, based on the 5th Edition of the *Guides*. At the hearing, however, claimant argued that his impairment should be rated under the 3rd edition of the *Guides*, the version in effect at the time of his injury. Based on claimant’s credible testimony and two medical opinions, the ALJ found that his whole-man impairment increased to 65% based on the 6th Edition of the *Guides*, and awarded benefits accordingly.

On appeal, claimant asserted that retroactive application of the newer versions of the AMA *Guides* deprived him of vested rights and was an unconstitutional *ex post facto* modification. He also raised additional challenges to the 6th Edition of the *Guides*, detailed below. Employer and the OWCP Director urged affirmance of the ALJ’s award.

Statutory Interpretation

The Board initially rejected claimant’s challenge to the use of the 6th Edition of the *Guides* premised on statutory interpretation. Congress first incorporated the AMA *Guides* into the LHWCA in 1984 in three sections related to hearing loss and retiree benefits, 33 U.S.C. §§ 902(10), 908(c)(13)(E), 908(c)(23). As a voluntary retiree whose occupational disease manifested after his retirement, claimant’s compensation is determined under § 8(c)(23) as 2/3 of his average weekly wages (“AWW”) “multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title.” Section 2(10) defines “disability” in such cases as “permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association.” This provision is reasonably interpreted as a mandate to use the *Guides* with the acknowledgement they would undergo periodic modifications. But § 2(10) is silent on the matter of which edition of the *Guides* is to be used. This gap renders the statute ambiguous (contrary to the OWCP Director’s assertion), and thus the Board must look to the regulation promulgated by the Department to interpret the statute, in accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

Under *Chevron*, if Congress leaves a gap for the agency to fill, there is an express delegation of authority to do so by regulation. Such legislative regulations are given controlling weight, and the question is whether the agency’s answer is based on a permissible construction of the statute. The regulation at 20 C.F.R. § 702.601(b) fills the gap in § 2(10) of the Act by specifying that “the most currently revised edition” is to be used in awarding retiree benefits. The legislative history of the 1984 Amendments confirms the regulation is a permissible construction of the statute.

Next, the Board rejected claimant’s contention that § 702.601(b) should be interpreted as requiring use of the most current edition in relation to the “time of injury.” The equation

for retiree benefits consists of two components, AWW and percent of impairment. Only one, AWW, is restricted by the "time of injury" (which is a term of art defined in occupational disease cases as when the employee becomes aware of the relationship between his employment, his disease, and his disability). 33 U.S.C. § 910(d)(2). Moreover, the phrase "the most currently revised edition" of the AMA *Guides* in § 702.601(b) means doctors are to use the most recent edition as of the date they render their medical opinions. The Board had previously stated that the most recent edition of the AMA *Guides* represents state of the art standards for evaluating and rating impairment.

Constitutional Challenges

Claimant further asserted that Congress improperly delegated, or the Department of Labor ("Department") improperly sub-delegated, legislative powers for calculating benefits to the AMA, a private entity. The Board disagreed.

First, the Board laid out the general principles of the non-delegation doctrine. Pursuant to Article I of the Constitution, Congress is vested with all legislative powers and is not allowed transfer to others its essential legislative functions. However, the Supreme Court has recognized that, so long as Congress lays out by legislative act an intelligible principle for exercising delegated authority, there is no forbidden delegation of legislative power. The intelligible principle must clearly delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Even a broad delegation is sufficient. While it is not unusual for Congress to permit the executive agencies to promulgate regulations to administer Congressional statutes, Congress may not give legislative power to private entities. Congress may, however, rely on the work of private entities in matters of a more or less technical nature to use their expertise by, for example, adopting their well-established, uniform standards.

Next, the Board concluded that the LHWCA and its implementing regulations do not improperly delegate legislative power to the AMA. Congress legislated as far as reasonably possible, and then, for a small subset of claims under the Act, adopted the pre-existing expertise of the AMA for the purpose of assessing retiree impairments. This enactment was made with the understanding the AMA would modify its *Guides* occasionally to keep up-to-date with the most current scientific and medical knowledge. The mandate to use the *Guides* for retiree benefits does not delegate power to the AMA. Instead, it merely prescribes the method by which doctors may calculate a retiree's impairment.

The AMA publishes the *Guides*, the industry standard, to assist physicians in the difficult task of rating an injured person's impairment, generally for workers' compensation benefits. It would be impractical to expect Congress to establish standards for evaluating physical or psychological impairment in workers' compensation claims. Moreover, Longshore Act participants are not the only users of the AMA *Guides*, and the AMA did not create the *Guides* for Congress or the LHWCA. Consequently, mandating use of a private entity's standards cannot be construed as a deliberate law-making act when they have a significance independent of a legislative enactment. Similarly, the Board rejected claimant's assertion that the regulatory phrase "most currently revised" causes a delegation violation. The AMA published the 2nd Edition of the *Guides* prior to the enactment of the 1984 Amendments. Congress clearly adopted this standard and acknowledged the *Guides* would be "modified from time to time," and the AMA has updated its work four times since the 2nd Edition. Periodic revisions of the standard do not translate an otherwise constitutional and non-delegatory statutory provision into an unconstitutional delegation of legislative power.

The Board concluded that:

Congress instructed the Department and its administrative law judges to use the AMA *Guides* to award retiree benefits under the Longshore Act; it did not delegate to the AMA the power to control a claimant's award of benefits. As no delegation occurred, we need not examine whether an intelligible principle was provided. The Department then required the most current edition be used to assess impairment. It did not sub-delegate power to award benefits to the AMA, but only adopted the industry standard's periodic updates to ensure uniform application of the newest developments in medical approaches to impairment ratings. Accordingly, we hold the regulation, consistent with Congressional intent, is properly interpreted as requiring application of the "most current" edition of the AMA *Guides*, meaning the edition in effect at the time a doctor renders a determination on a retiree's impairment. This mandate is not an unconstitutional delegation of power to the AMA.

Id. at 16-17 (citations and footnote omitted). Further, under the Act, an ALJ considers all relevant evidence in rendering a decision on benefits, including the doctors' impairment ratings. While the ALJ cannot substitute his opinion for that of a medical professional, he may address differences among the doctors' impairment ratings by considering the pertinent facts, resolving any conflicts, and deciding which among the medical ratings is entitled to greater weight. Therefore, the Board rejected claimant's assertion that use of the most recent AMA *Guides* for retiree benefits deprives the ALJ of his decision-making authority.

Challenges to 6th Edition

In the alternative, Claimant argued that the application of the 6th Edition of the AMA *Guides* is an unconstitutional violation of due process because the editors acknowledged that it represents a "paradigm change" and because the changes are not based on any scientific or updated medical method, resulting in greatly reduced impairment ratings. Claimant pointed out that the 6th Edition is the first edition to adopt its classification scheme from the International Classification of Functioning, Disability and Health of the World Health Organization, which did not exist when the 1984 Amendments were enacted.

To the extent claimant's contention constituted an as-applied or a facial due process challenge to the statute, the Board rejected it. The ALJ correctly applied the law, and, using the 6th Edition, awarded claimant additional benefits for his deteriorating condition. Consequently, Claimant's claim the Act is an unconstitutional violation of his due process is without merit. To the extent claimant was challenging the substantive merits, value, appropriateness, and methodology of the 6th Edition, such allegations must be brought to the attention of Congress or the Department.

The ALJ's decision was affirmed.

[DEFINITIONS – Section 2(10) – Disability; Section 8(c) – Permanent Partial Disability – Section 8(c)(23); Authority of the Benefits Review Board]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. There were no published black lung decisions in December.
2. There were no unpublished black lung decisions in December.

B. Benefits Review Board

1. There were no published BRB black lung decisions in December.
2. Unpublished Decisions:

[*Knight v. Heritage Coal Company, LLC*](#), BRB No. 19-0435 BLA (Dec. 15, 2020)(unpub.): Claimant's last coal mine employment was at Peabody Coal where he worked from November 1971 to April 1984. Peabody Coal was a subsidiary of Peabody Energy Corporation (Peabody Energy). After Claimant retired, Peabody Coal changed its name to Heritage Coal. Peabody Energy sold Heritage to Patriot Coal Corporation (Patriot) in 2007. In 2011, DOL authorized Patriot to self-insure for black lung claims including claims for employees of Peabody Coal from before Patriot purchased it. This authorization required Patriot to pay a deposit of \$15 million to DOL. Patriot paid this deposit. Patriot subsequently went bankrupt on 2015. Claimant filed his claim for benefits on July 13, 2017. The Director named Heritage Coal as a self-insured entity of Peabody Energy. Benefits were awarded in the PDO. Peabody Energy asked for a hearing before OALJ.

Before the ALJ, Peabody Energy argued that it was not liable for the claim since its private contract with Patriot released it from liability from the payment of claims by miners. In addition Peabody Energy argued that, since the DOL authorized Patriot to self-insure, it approved the liability shift. Peabody Energy filed evidence before the ALJ, including documentary evidence and the depositions of former DOL employees, David Benedict and Steven Breeskin. The documentary evidence was excluded by the ALJ as it was not filed while the claim was before the Director and no extraordinary circumstances existed. The deposition testimony was also excluded since the ALJ found that it was not relevant to the issue of responsible operator or carrier liability. The ALJ awarded benefits and found that Peabody Energy was liable for the payment of the benefits.

Before the Board, Peabody Energy argued that the Director lacks the authority to determine the responsible operator or process the claim since the Director is an inferior officer and is not appointed under the Appointments Clause. The Board declined to address this argument as it was inadequately briefed.

Peabody Energy then argued that the ALJ erred in excluding its liability evidence. It argued that the exclusion of this evidence was erroneous. The Board upheld the ALJ's exclusion of the documentary evidence based on 20 CFR §725.465(b)(1), which states that an ALJ must reject liability evidence that was not first submitted to the DD. It also found that since Peabody Energy gave no reason for the delay in filing the documentary evidence that "extraordinary circumstances" did not exist. The Board went on to affirm the ALJ's finding that the deposition testimony was not relevant and there was no abuse of discretion by the ALJ.

Peabody Energy further argued that the regulatory scheme that allows the Director to determine liability for the payment of claims as well as be the administrator of the Trust Fund creates a conflict of interest that violates due process. The Board stated that due process only requires that the parties be given notice of a claim and the opportunity to respond. Since

Peabody Energy was given both of these, the Board found that its due process rights had not been violated.

Peabody Energy went on to argue that the release of a letter of credit financed under Peabody Energy's self-insurance absolved it of liability. The Board found that the ALJ correctly rejected this argument since there is no indication in the Act or the regulations that the liability is created when a self-insurer post a security nor that the liability ceases when the security is released. Further, it adopted the Director's argument that the security deposit is an additional obligation separate from the responsibility to pay benefits. The Board affirmed the ALJ's finding that Peabody Energy could not be relieved of liability under equitable estoppel, which requires affirmative misconduct by the DOL that was reasonably relied on to the party's detriment. Peabody Energy argued that the Director released it from liability without securing proper funding by Patriot. The Board affirmed the ALJ's rejection of this argument since there was no admissible evidence of a release of Peabody Energy by the DOL, or any evidence that Peabody Energy relied upon actions of the DOL to its detriment, or any allegation that the DOL acted intentionally or recklessly.

The Board then rejected Peabody Energy's argument that the ALJ erred in not finding that the Director's failure to secure proper funding for Patriot under 20 CFR §725.495(a)(4) absolved it of liability. 20 CFR §725.495(a)(4) states that if the most recent self-insured employer of a year's duration is unable to pay benefits, the Trust Fund has liability for the claim. The Board agreed with the ALJ's opinion that this regulation does not apply in this claim since Claimant never worked for Patriot.

[Appointments Clause; Liability of Self-Insured RO; Equitable Estoppel]