MISCELLANEOUS DEFINITIONS

Section 2(1)-Person

Section 2(1) provides: "[t]he term 'person' means individual, partnership, corporation or association." 33 U.S.C. §902(1).

Digests

After discussing the plain language of Section 2(1), and the definitions of the term "person" in other statutes, the Board holds that the definition of the term "person" in Section 2(1) of the Act does not include the United States government. Consequently, claimant's settlement with the U.S. government under the Federal Tort Claims Act for an amount less than he is entitled under the Act does not invoke the Section 33(g) bar, as the United States is not considered a "third person" under that section. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting).

Section 2(9) - United States

Section 2(9) defines the term "United States," when used in a geographical sense as "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. §902(9).

Digests

The Longshore Act applies to the territory of Guam. Section 2(9) defines the United States as including "Territories." Guam is a lower case "territory" as it is unincorporated, but this is not determinative. As Guam's status is more analogous to the Virgin Islands (to which the Act as been held to apply) than to Puerto Rico (to which it does not), the Board reverses the administrative law judge's finding that the Act does not apply to Guam. *Tyndzik v. Univ. of Guam*, 27 BRBS 57 (1993) (Smith, J, dissenting on other grounds), *rev'd on other grounds sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995).

After discussing the history of the political status of the Commonwealth of the Northern Mariana Islands and the various implications of the term "territory," the Board held that the territorial waters of the CNMI are included in the "navigable waters of the United States" under Section 3(a). The Board determined that, although the Act does not apply to Puerto Rico, a politically similar entity, the provisions of the Covenant establishing the CNMI make the Act applicable because it applies to Guam. The Board also rejected employer's argument that its decision in *Tyndzik*, 27 BRBS 57, that the Act is applicable to Guam is *dicta*. Additionally, the Board stated that concurrent jurisdiction over maritime employees by state and federal workers' compensation laws may exist and is not dispositive of the issue, and it noted its rejection of employer's "practical" challenges to the application of the Act over such a great distance. *Uddin v. Saipan Stevedore Co., Inc.*, 30 BRBS 117 (1996), *aff'd sub nom. Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.3d 717, 31 BRBS 187(CRT) (9th Cir. 1998).

Affirming the Board's decision in *Uddin*, the Ninth Circuit held that the Longshore Act applies to the Commonwealth of the Northern Mariana Islands, based on, *inter alia*, the Act and the history of the Commonwealth. Section 2(9) defines the United States as including "Territories." The Commonwealth is a lower case "territory" as it is unincorporated, but this is not determinative, as the term "territory" when used in the Act is comprehensive and Congress intended the Act to apply to the fullest extent possible with no restrictions on federal coverage short of the limits of maritime jurisdiction. The court further notes that the Act applies to Guam, and the Covenant of the CNMI states that federal laws applicable to Guam apply to the Marianas. *Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.3d 717, 31 BRBS 187(CRT) (9th Cir. 1998).

The Board stated that as the Republic of the Philippines is not a territory of the United States pursuant to Sections 2(9) and 3(a), the Longshore Act, of its own force, does not apply to the Philippines. The Board reviewed the findings as to DBA and NFIA coverage (*see* Extensions). *A.P. [Panaganiban] v. Navy Exch. Serv. Command*, 43 BRBS 123 (2009).

The First Circuit affirmed the grant of summary judgment for employer on the ground that employer was immune from personal injury suit brought by family of decedent who died in explosion at a naval station in Puerto Rico, holding that Puerto Rico is considered a "territory" for purposes of Defense Base Act coverage. The Longshore Act is therefore the sole remedy. *Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 34 BRBS 67(CRT) (1st Cir. 2000).

Section 2(10) – Disability

Prior to the 1984 Amendments, Section 2(10) defined "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. §902(10)(1982)(amended 1984).

Thus, traditionally, disability under the Act has been described as an economic concept, based on a medical foundation. *Owens v. Traynor*, 274 F. Supp 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir.), *cert. denied*, 393 U.S. 962 (1968). *See* Section 8 of the deskbook.

The 1984 Amendments altered this definition significantly, adding to the definition above the following provision: "but such term shall mean 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, in the case of an individual whose claim is described in section 10(d)(2)."

Section 10(d)(2) provides the average weekly wage for a person who is retired at the time of injury under Section 10(i), which provides that in the case of a claim for compensation for an occupational disease which does not immediately result in death or disability, the time of injury is the date of awareness of the relationship between the employment, the disease and the death or disability. *See also* Section 8(c)(23).

Digests

In occupational disease cases, benefits commence under Section 8(c)(23) when the employee's impairment becomes permanent, because Section 2(10) as amended provides that "disability shall mean permanent impairment" in the case of certain retirees. The date of awareness is rejected as the date of onset because disability can commence before awareness. In this case, the date of the asbestosis diagnosis represents the date the impairment became permanent due to the lack of evidence supporting an earlier onset date. *Barlow v. W. Asbestos Co.*, 20 BRBS 179 (1988); *see also Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Board will apply the "aggravation rule" to determine extent of compensable permanent impairment under Sections 8(c)(23) and 2(10) in post-retirement injury cases. Thus, the Board modified the decision to reflect a 50 percent permanent impairment where 30 percent of the breathing impairment is not work-related and 20 percent of the impairment is due to asbestosis. *Johnson v. Ingalls Shipbuilding Div., Litton Sys., Inc*., 22 BRBS 160 (1989).

A decedent, who indicated to claimant, his widow, that he "decided to retire" at age 62, and who began receiving Social Security retirement benefits at the time, but who returned to part-time employment several months later and was subsequently diagnosed as having work-related lung cancer which ultimately lead to his death, was held to be a retiree as of the time he left his full-time job, and consequently, the provisions of Section 2(10) apply. The Board remanded the case for the administrative law judge to calculate the degree of impairment under the AMA *Guides* and the onset of permanent disability. *Jones v. U.S. Steel Corp.*, 22 BRBS 229 (1989).

The Board affirmed the administrative law judge's denial of benefits for temporary total disability claimed after voluntary retirement. A claim for temporary total disability requires that claimant establish a loss of wage-earning capacity. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989), *overruled by Robinson v. AC First, LLC*, 52 BRBS 47 (2018) (*see infra*).

The congressional definition of disability as an economic concept set forth in Section 2(10) does not apply to Section 8(f). *Todd Pac. Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990).

As there was no evidence that claimant is medically impaired because of his lung condition, the Board affirmed the administrative law judge's finding that claimant retired voluntarily, rather than due to his lung condition. The Board rejected the Director's request that the case be remanded for further findings in accordance with the decision of the First Circuit in *White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). In a later decision, *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992), the First Circuit clarified its *White* decision, holding that the mere diagnosis of an occupational disease does not constitute a disability as a matter of law. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994).

The administrative law judge's finding that claimant is a voluntary retiree is supported by substantial evidence, as there is no evidence indicating that claimant was instructed by his physician to stop working because of his acute bronchitis and because claimant never asked to be rehired and sought no other employment since he requested to be and was laid-off. 20 C.F.R. §702.601(c). His disability compensation, therefore, must be based only on the degree of his permanent physical impairment, and not on economic factors. *Smith v. Ingalls Shipbuilding Div., Litton Sys. Inc.*, 22 BRBS 46 (1989).

The Board held that although a voluntary retiree is not entitled to an award for permanent total disability, he nonetheless may be entitled to an award for a 100 percent permanent impairment. The Board also held that the administrative law judge impermissibly substituted his own opinion for that of the physician by applying a table from the AMA *Guides* relating to respiratory impairment different from the table applied by the physician upon whom the administrative law judge relied to evaluate the degree of claimant's permanent impairment. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

The definition of disability at Section 2(10) has an economic as well as a medical component. In order to give effect to this concept, a claimant's disability becomes partial on the date that suitable alternate employment is established and not on the date of maximum medical improvement. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991) (decision on recon.).

In this traumatic injury case, the Board affirmed the administrative law judge's finding that a claimant who becomes totally disabled after voluntary retirement is barred from receiving permanent total disability benefits as the claimant cannot establish that he has suffered a loss in wage-earning capacity. The Board noted that "retirement" is defined as the voluntary withdrawal of an individual from the work force with no realistic expectation of return. *Hoffman v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 148 (2001).

The Board reversed the administrative law judge's award of temporary total disability for the period claimant recuperated from shoulder surgery shortly after he had voluntarily retired. Claimant was able to perform his usual employment prior to his retirement. Accordingly, claimant did not have a loss of wage-earning capacity "because of injury," and he is not entitled to disability compensation for his work-related shoulder injury. Claimant's retirement already resulted in a complete loss of wage-earning capacity. *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *rev'd*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

The Fourth Circuit reversed the Board's decision that a voluntary retiree with a traumatic work-related injury is not entitled to total disability benefits. The court held that such a claimant is entitled to benefits during the period that his injury caused his "incapacity" to earn wages. Though retired, claimant retained the ability, if not the willingness, to work except for the period during his recovery from surgery for the work-related shoulder injury. Section 2(10) of the Act addresses the loss of wage-earning *capacity*, not the loss of actual earnings. As "voluntary retirement is not a form of total incapacity," a worker is "entitled to disability benefits when an injury is sufficient to preclude the possibility of working." *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018).

The Board reversed the award of permanent total disability to a retired worker commencing on the date he was prescribed work restrictions that would have prevented him from performing his former employment. Claimant was able to perform his usual employment prior to his retirement. Accordingly, claimant did not have a loss of wage-earning capacity "because of injury" within the meaning of Section 2(10). *Christie v. Georgia-Pacific Co.*, 51 BRBS 7 (2017), *rev'd*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

The Ninth Circuit reversed the Board's decision and reinstated the award of benefits, adopting the Fourth Circuit's reasoning in *Moody*, 879 F.3d 96, that an employee's retirement status does not preclude an award of benefits if his injury causes lost capacity to earn after retirement, pursuant to Section 2(10). In this case, two years after he retired, claimant's work-related traumatic injury precluded his returning to his usual work and employer did not demonstrate suitable alternate employment. Therefore, the court reinstated the permanent total disability award as of the date claimant was informed he could not return to work. *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

Pursuant to *Moody* and *Christie*, the Board vacated the denial of total disability benefits. The claimant voluntarily left overseas employment in May 2014 and obtained lower-paying work in the United States. Subsequently, he was diagnosed with PTSD, which he alleged prevented his return to work for employer. The administrative law judge denied the claim for loss of wage-earning capacity from the date of diagnosis because the PTSD had not influenced claimant's decision to pursue lower paying work. The Board held that if claimant is unable to return to his former work for employer due to the PTSD, he is entitled to compensation for any loss of wage-earning capacity based on the "deprivation of economic choice" caused by the work injury. In view of *Moody* and *Christie*, the Board overruled *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989) is overruled. (*Hoffman*, 35 BRBS 148 implicitly overruled by *Moody*). *Robinson v. AC First, LLC*, 52 BRBS 47 (2018).

In retiree occupational disease cases, benefits commence under Section 8(c)(23) when the employee's impairment becomes permanent, because Section 2(10) provides that "disability shall mean permanent impairment" in the case of certain retirees. The Board

affirmed the administrative law judge's denial of compensation as claimant has not been diagnosed with a permanent impairment under the AMA *Guides*. *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018).

The Board affirmed the administrative law judge's denial of a few days of permanent total disability benefits. The administrative law judge rationally found that claimant's inability to work on those days was not due to his injury, as he had been released to return to his usual work and was attempting to get a job through the hiring board. Rather, claimant's inability to work on those days was solely due to the number of jobs available on the hiring board. The Board also rejected claimant's newly-raised theory that his injury caused him to be placed too far down on the board; that theory was not raised before the administrative law judge. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

In this case involving a voluntary retiree with an asbestos-related lung condition, benefits are to be awarded based on a percentage of permanent impairment pursuant to the AMA *Guides*. Claimant challenged the administrative law judge's use of the 6th Edition instead of the 3rd Edition which was in effect at the time of his injury. The Board concluded the statutory language in Section 2(10) of the Act, "under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association," is ambiguous as to which version of the AMA *Guides* to use, but the regulatory language of 20 C.F.R. §702.601(b), "according to the *Guides to the Evaluation of Permanent Impairment* which is prepared and modified from time-to-time by the American Medical Association, using the most currently revised edition of this publication," is unambiguous. Following a review of the legislative history of the 1984 Amendments, the Board held the regulation comports with Congressional intent. Thus, the Board held the "most currently revised edition" requires a doctor to rate the retiree under the most recent edition as of the date he renders his medical opinion. The Board rejected claimant's contentions concerning the "non-delegation doctrine" and due process. The Board affirmed the administrative law judge's award of benefits for a 65% impairment as determined under the 6th Edition of the AMA *Guides* as it was supported by substantial evidence and in accordance with law. *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020).

Section 2(11) - Death

Section 2(11) states that "'[d]eath' as a basis for a right to compensation means only death resulting from an injury." 33 U.S.C. §902(11).

The Board stated that Section 2(11) cannot be construed as limiting compensation for death where pre-1984 Section 9 applies, as that provision, which is applicable in this case, provided that an employee's death is compensable if the injury causes death or if an employee who is permanently totally disabled due to the injury thereafter dies from causes other than the injury. 33 U.S.C §909 (1982) (amended 1984). The Board accordingly held that the deputy commissioner did not err in imposing a Section 44(c)(1) assessment on employer despite the fact that claimant's death was not work-related, since both prerequisites to Section 44(c)(1) applicability--a compensable death and the absence of any survivor eligible to receive death benefits--were met in this case. *Swasey v. Willamette Iron & Steel Co.*, 20 BRBS 52 (1987).

Section 2(12) - Compensation

Section 2(12) defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein." 33 U.S.C. §902(12).

Digests

The payment of medical benefits is not "compensation" for purposes of the provision of Section 13 stating that a claim is timely if filed within one year of the last payment of compensation. *Marshall v. Pletz*, 317 U.S. 383 (1943).

Employer's continued payment of a claimant's salary or payments of salary under a "benefits plan" does not entitle employer to a credit under Section 14(k) [now (j)] because the payments are not "advance payments of compensation." The Board stated that the payments, such as sick leave benefits, earned by the employee on the basis of seniority and good continuous service are not "compensation" pursuant to Section 2(12) because they were not paid pursuant to the Act. *Jones v. The Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979) (S. Smith dissenting) (Miller, dissenting on other grounds), *aff'd sub nom. Chesapeake & Potomac Tel. Co. v. Director, OWCP*, 615 F.2d 1368 (D.C. Cir. 1980) (table); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321 (1976).

Relying on the principle of statutory construction that a term may have different meanings in different sections of a statute depending upon the purpose of a specific statutory provision, the Board held that claimant's receipt of funeral benefits did not make her a "person entitled to compensation" for purposes of Section 33(g). *Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result) (Kalaris, J., dissenting), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984). The holding in *Kahny* was overruled following the 1984 Amendments to Section 33(g). *Wyknenko v. Todd Pac. Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting), *infra.*

The Board agreed with Director that the administrative law judge erred in assessing funeral expenses against the Special Fund pursuant to Section 8(f) on the rationale that such expenses are included within the definition of "compensation" found in Section 2(12). Relying on *Kahny*, the Board stated that the word "compensation" may have different meanings under different sections of the Act depending on the purpose of the section in which it is being used and held that Section 8(f) was intended to limit employer's liability for periodic payments of compensation. *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

The Board held that employer is liable for interest on untimely paid funeral expenses as such are included in the term "compensation" under Section 2(12). *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Board determined that interest is not "compensation" within the meaning of Section 2(12) of the Act. Accordingly, given that Section 14(j) of the Act allows an employer to credit its overpayments of compensation against only "compensation" later found to be due, the Board held that the administrative law judge properly declined to allow employer to reduce its liability for awarded interest by the amount it had previously overpaid in compensation. *Castronova v. Gen. Dynamics Corp.*, 20 BRBS 139 (1987).

The Board held that employer may not reduce its liability for medical benefits by the amount of its voluntary disability payments. Employer is limited to a credit against unpaid installments of compensation due under Section 14(j) and medical expenses are not paid in installments and are not "compensation" under Section 2(12). *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991) (table).

The Board affirmed the deputy commissioner's denial of a Section 14(f) penalty on untimely paid medical benefits as such are not "compensation" under Section 2(12). *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Board rejected claimant's contention that he is entitled to a Section 14(e) penalty on accrued unpaid medical benefits, as medical benefits are not "installments of compensation." *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

The Fifth Circuit held that employer is not entitled to offset its liability for an attorney's fee against its overpayments of compensation, as Section 14(j) states that employer shall be reimbursed out of unpaid "installments of compensation." An award of an attorney's fee is separate from an award of compensation. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

"Compensation" and "medical benefits" are distinct terms under the Act. "Compensation" refers to money payable for a disability and "medical benefits" refers to actual medical expenses. Thus, a claimant entitled only to medical benefits need not comply with Section 33(g)(1) but must give notice in compliance with Section 33(g)(2). *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988).

The Fifth Circuit held that medical benefits which are paid to claimants as reimbursement for medical costs are included in "compensation" for purposes of enforcement proceedings under Section 18(a). "Compensation" includes only money payable to an employee or his dependents, not payments to health care providers directly. Thus, where employer refuses or neglects to furnish medical services, and the employee incurs expense or debt in incurring such services, the amounts are compensation and enforceable as such. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992).

Pursuant to *Lazarus*, the Board held that if employer did not timely reimburse claimant pursuant to the administrative law judge's compensation order for medical expenses paid directly by claimant, employer may be held liable under Section 14(f) for an additional assessment of compensation. This holding is limited to medical expenses paid by claimant which employer must reimburse, and thus *Caudill,* 22 BRBS 10(1988), is distinguishable. Under these circumstances, the medical expenses payable to claimant are "compensation" under Sections 2(12), 4(a), and 7. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

In addressing whether a claimant is a "person entitled to compensation" within the meaning of Section 33(g)(1), the Board held that the term "compensation" refers to periodic disability benefits and not to payments for medical treatment under Section 7. The Board held that this construction is consistent with the decisions of the Supreme Court and the Ninth Circuit, respectively, in *Marshall v. Pletz*, 317 U.S. 383 (1943), and *Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988), interpreting the term "compensation" as meaning periodic disability benefits in varying contexts. The Board noted the Fifth Circuit's decision in *Lazarus*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992), that payments to a claimant as medical reimbursement are "compensation," but stated that a different definition is appropriate for enforcement purposes. Thus, a person entitled only to medical benefits is not subject to the requirements of Section 33(g)(1). Similarly, in determining if the amount of the third-party settlement is for an amount greater or less than the "amount of compensation to which the person would be entitled," medical benefits are not included in the computation of "compensation." *Harris v. Todd Pac. Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc* 30 BRBS 5 (1996) (Brown and McGranery, concurring and dissenting); *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

The Board held that interest is "compensation" for purposes of Section 14(f) such that employer's failure to timely pay an interest award will result in a Section 14(f) penalty. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd and modified on other grounds on recon. en banc*, 28 BRBS 271 (1994), *aff'd in part and rev'd in part sub. nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). In affirming the Board's holding on this issue, the Ninth Circuit adopted the Director's view that interest is a necessary and inherent component of "compensation" because it ensures that the delay in payment of compensation does not diminish the amount to which the employee is entitled. *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT) (9th Cir. 1996), *aff'g in pert part Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd and modified on other grounds on recon. en banc*, 28 BRBS 271 (1994), *cert. denied*, 520 U.S. 1155 (1997); *but see Nelson v. Stevedoring Services of Am.*, 29 BRBS 99 (1995) (en banc).

In interpreting the term "compensation" under Section 14(f), the Board held that interest is not compensation as defined in Section 2(12). Thus, employer's failure to timely pay interest cannot serve as a basis for imposing a penalty under Section 14(f). This decision overruled the Board's holding to the contrary in *Sproull*, 25 BRBS 100, and adopted Judge Brown's dissent therein. *Nelson v. Stevedoring Services of Am.*, 29 BRBS 99 (1995) (en banc); *but see Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Second Circuit held that Section 28(a), which allows for an award of an attorney's fee only if the employer "declines to pay any compensation," does not authorize an award of fees where the employer unsuccessfully contests a Section 14(f) penalty payment. The court held that an assessment pursuant to Section 14(f) is a "penalty" and not "compensation." Accordingly, the court denied claimant's request for fees, costs and interest for defending employer's appeal. *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied*, 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Fourth Circuit held a Section 14(f) late payment award constitutes "compensation" under the Act such that claimant is entitled to an attorney's fee payable by employer. In so holding, the court stated that the additional 20 percent amount based on employer's failure to timely pay her original award fits within the Act's definition of "compensation" under Section 2(12), as it is paid to claimant; fines and penalties are paid to the Special Fund. The court also observed that the language of Section 14(f) supports the holding that the payment thereunder is additional compensation. *Newport News Shipbuilding & Dry Dock Co v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004).

The Ninth Circuit held that the Act authorizes attorney's fees for work an attorney performs to enforce a default order awarding a Section 14(f) assessment. In making this determination, the Ninth Circuit, referring in part to the reasoning espoused by the Fourth Circuit in *Brown*, 376 F.3d 245, 38 BRBS 37(CRT), held that the plain language of the Act, as well as its general compensation scheme and legislative history, supports the finding that a Section 14(f) late payment award is "compensation." *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The Board held there is no basis for treating Section 14(e) payments differently from Section 14(f) payments because they contain substantially similar language and their purposes are similar. Acknowledging that those payments have punitive characteristics, but distinguishing them from "penalties" because they are linked to a claimant's benefits and paid to the claimant, the Board held that payments under Section 14(e) are "additional compensation." Interest is awardable on past-due compensation; therefore, the Board held that claimant is entitled to post-judgment interest on past-due Section 14(e) payments. Accordingly, the Board overruled its decision to the contrary in *Cox v. Army Times Publ'g*

Co., 19 BRBS 195 (1987). *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

In holding that payments under Section 14(e) are "additional compensation" and that interest is awardable thereon, the Board noted the courts' statements that casual reference by courts to the Section 14(e) or (f) payments as "penalties" does not change their nature as compensation – it is merely a convenient way of distinguishing the Section 14(e) or (f) payments from the underlying awards. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

Overruling *Kahny*, the Board held that since funeral benefits are explicitly included in the definition of "compensation" at Section 2(12) of the Act, funeral benefits are also included in the term "compensation" under Section 33(g). Therefore, holding that funeral benefits are subject to forfeiture where compensation is barred by Section 33(g), the Board reversed the administrative law judge's award of funeral benefits. *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting).

The Board held that employer's continuing voluntary payment of medical benefits directly to claimant's health care providers does not constitute the payment of "compensation" for purposes of tolling the one-year period for requesting Section 22 modification. The Board found no basis for adopting a different construction of the term "compensation" for purposes of the Section 22 limitations period than that adopted by the Supreme Court in *Marshall v. Pletz*, 317 U.S. 383 (1943) in the context of the Section 13(a) statute of limitations. Distinguishing the Fifth Circuit's decision in *Lazarus*, 958 F.2d at 1301, 25 BRBS at 148(CRT), the Board stated that this case does not present facts involving the payment of medical benefits to a claimant as reimbursement for expenses or debts incurred in obtaining medical treatment. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 43 BRBS 179 (2010), *aff'd*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011).

The Fourth Circuit affirmed the decision of the Board that the administrative law judge properly denied claimant's request for modification as untimely. The court held that employer's voluntary payment of medical benefits to claimant's health care providers did not constitute "compensation" for purposes of tolling the Section 22 statute of limitations. The court stated that its construction of "compensation" in Section 22 as not including the payment of medical benefits is consistent with that section's legislative history, the purposes of Section 7, and the Supreme Court's holding in *Marshall v. Pletz*, 317 U.S. 383 (1943), that medical care is not "compensation" within the meaning of Section 13(a). The court further stated that equating medical benefits with compensation under Section 22 would effectively write out of the statute the one-year limitations period for requesting modification. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011).

The Board held that payments made by employer under a state workers' compensation act constituted payment of compensation as defined in Section 13(a) so as to toll the running of the one year statute of limitations. *Saylor v. Ingalls Shipbuilding, Inc.*, 9 BRBS 561 (1978) (Smith, dissenting); *accord Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004); *Smith v. Universal*

Fabricators, Inc., 21 BRBS 83, *aff'd*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

In a case of first impression under Section 13(b)(2), the Board held that the payment of settlement proceeds under a state workers' compensation law constituted "payment of compensation." As claimant's claim was filed within one year after "the last payment of compensation" it was timely filed. *Robinson v. Elec. Boat Corp.*, 51 BRBS 1 (2017).

Where employer paid claimant's medical benefits within 30 days of notice of the claim for compensation, but declined to pay any disability benefits, and claimant was awarded one week of disability benefits, the Board reversed the administrative law judge's denial of an employer-paid attorney's fee under Section 28(a). Following a discussion of the meaning of the term "compensation," and acknowledging the purposes of Section 28(a), the Board adopted the interpretation espoused by the Director. The Board held that "compensation" is to be read as "disability benefits and/or medical benefits" with the precise meaning in the phrase "declines to pay any compensation" dependent on what benefits the claimant claimed and what benefits the employer paid or declined to pay. Thus, whether a claimant files a claim for both disability and medical benefits or for just one type of benefit, fee liability under Section 28(a) depends on whether there is success in obtaining the claimed but denied benefit(s). As claimant here filed a claim for both disability and medical benefits, employer declined to pay any disability benefits, and claimant successfully obtained some disability benefits, employer is liable for claimant's attorney's fee. The Board remanded the case for consideration of the fee petition and objections. *Taylor v. SSA Cooper, L.L.C.*, 51 BRBS 11 (2017).

Section 2(13) – Wages

The 1984 Amendments altered the definition of "wages." Pre-amendments, "wages" were defined as

> the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing and gratuities received in the course of employment from others than the employer.

33 U.S.C. §902(13) (1982) (amended 1984).

The amended version continues the language referring to the money rate in the contract of hiring at the time of injury, but then states,

> including the reasonable value of any advantage which is received from the employer and included for purposes of withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other dependent's benefit, or any other employee's dependent entitlement.

The exclusion of fringe benefits codifies the Supreme Court's holding in *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983), that fringe benefits are not wages under Section 2(13).

See Section 10 of the deskbook for additional cases and discussion of the calculation of average weekly wage.

Digests

The Board held that tax benefits (tax losses) do not constitute wages under pre-amendment Section 2(13) of the Act because they cannot be readily converted into a cash equivalent on the basis of their market value, citing *Morrison-Knudsen*. *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

The Board held that amended Section 2(13) codifies the *Morrison-Knudsen* holding. The Board thus affirmed the administrative law judge's finding that under either the pre- or post-1984 Amendments version, overseas allowances, incentive compensation, completion award, foreign housing allowance and cost of living adjustments are included as wages. Their value is readily ascertainable, they are included for purposes of income tax withholding, and are not fringe benefits. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

Guaranteed Annual Income payments, made where employees are guaranteed a certain number of hours of work per year but that number is not available, constitute wages under both pre- and post-

1984 Amendments Section 2(13). Under pre-amendment Section 2(13), the GAI payments are made directly to employees, albeit through a trust fund, and the value of the payment is readily calculable. Thus the payments are not a fringe benefit under the holding of *Morrison-Knudsen*. Under amended Section 2(13), the GAI payments are subject to income tax withholding and thus fall within the plain language of the amended section. *McMennamy v. Young & Co.*, 21 BRBS 351 (1988).

Although the language regarding the rate under the contract of hiring at the time of injury indicates Section 2(13) may more closely relate to pre-injury average weekly wage than to post-injury wage-earning capacity, it provides guidance in interpreting other statutory references to "wages." *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

The Board stated that inasmuch as GAI payments, and holiday and vacation pay are "wages" under Section 2(13), the administrative law judge properly offset these payments against employer's liability for back pay for violating Section 49. *Rayner v. Mar. Terminals, Inc.*, 22 BRBS 5 (1988).

The Board held, based on the facts of this case and the union contract in effect, that the administrative law judge erred in finding payments under the holiday pay provision constituted a "fringe benefit." Rather, the Board held that employer was entitled to credit its liability for compensation under the Act for its payment of "holiday pay" under the union contract. The Board held that, based on the facts of this case, claimant incurred no wage loss on the days he received holiday pay and therefore employer was not required to pay him compensation under the Act on those days. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

Pursuant to Section 28(e)(1) of the 1984 Amendments, the amended definition of wages at Section 2(13) of the Act applies, since claimant's injury occurred after the date of enactment of the amendments. Under the 1984 Amendments, the Board held that container royalty payments to claimant should be included in average weekly wage, and rejected the argument that they constitute a fringe benefit. The value of the container royalty payment is readily calculable and the payments are made directly to the employee on the basis of seniority and career hours worked. *Lopez v. S. Stevedores*, 23 BRBS 295 (1990).

The Board reversed the administrative law judge's finding that container royalty payments decedent received are not to be included in the calculation of average weekly wage. The Board has held that such payments, when made pursuant to a contract, are included in an employee's average weekly wage, as they are readily calculable, made directly to the employee, and are part of an employee's taxable income. *See Lopez*, 23 BRBS 295; *McMennamy*, 21 BRBS 351. In the instant case, it was undisputed that the container royalty payments decedent received were made pursuant to a collective bargaining agreement and that employer was bound by that agreement. *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165, 167 (1996).

The Board affirmed the administrative law judge's inclusion of funds paid by decedent's employer into a tax-sheltered annuity (TSA) in decedent's average weekly wage. TSA payments are within the 1984 Act's definition of wages even though they are not subject to tax withholding. The plain language of amended Section 2(13) does not mandate that a benefit not subject to withholding is not a wage. The amount paid into the TSA by decedent's employer was included in his contract

of hiring, and was therefore intended to compensate him for his employment services. The Board further holds that the TSA payment does not constitute a fringe benefit. The Board relied on *Morrison-Knudsen*, holding that the fluidity of the TSA, as evidenced by claimant's rolling over of the TSA into an IRA, places it within the Court's definition of wages, which was formulated pursuant to the 1972 Act. Furthermore, the TSA contribution was earned when paid, it immediately vested, and the payment was included in the salary agreed to under decedent's employment contract. Accordingly, the Board concluded that a TSA payment is a wage as defined by both the 1972 and 1984 Act. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds sub nom. Cretan v. Director, OWCP*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Board held that the administrative law judge properly declined to include claimant's taxed unemployment benefits in his calculation of claimant's average weekly wage and that the holding in *Strand v. Hansen Seaway Serv. Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980) (unemployment compensation benefits are not includable in calculating average weekly wage), continues to state a valid principle of law which is applicable under the current version of Section 2(13) as well as under the pre-1984 provision. These benefits are not an advantage received from employer pursuant to a contract of hire. *Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992).

The Board affirmed the administrative law judge's determination that a post-injury bonus claimant did not receive because of her work injury cannot be included in average weekly wage, as it is a contingent right to a future benefit, which, like a fringe benefit, is too speculative too be considered "wages" under Section 2(13). *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992).

Inasmuch as "subsistence and quarters" was provided to claimant by employer under the terms of claimant's employment contract, and the value of these services is readily ascertainable at a daily rate of $30, the room and board provided by employer cannot be deemed a fringe benefit as the amount is readily calculable under Section 2(13) of the Act. The fact that the funds are not subject to withholding tax under the Internal Revenue is not dispositive of this issue. These funds therefore are "wages" within the meaning of the Act and the Board modified the administrative law judge's decision to include them in average weekly wage. *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd in pert. part sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). Reversing this decision, the Ninth Circuit held that this issue is controlled by the Internal Revenue Code's criteria. Under 26 U.S.C. §119(a), claimant's meals and lodging were not income, as they were provided for the convenience of employer, the meals were furnished on employer's business premises, and claimant was required to accept such lodging as a condition of employment. Thus, the court held that the value of claimant's meals and lodging should not have been included as wages under Section 2(13). *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), *rev'g in pert. part Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

In addressing the issue of whether tips may be included in the calculation of a claimant's average weekly wage under amended Section 2(13), the Board held that if the contract of hire between claimant and employer contemplated tips as part of the "money rate" at which claimant was to be compensated, then claimant's tips must be included in her average weekly wage. As the

administrative law judge did not address this question, and there was evidence in the record which, if credited, could support a finding that tips were part of the "money rate" at the time of claimant's contract of hire, the Board vacated the determination that tips are not to be included in the calculation of claimant's average weekly wage and remanded the case for reconsideration of this issue. *Story v. Navy Exch. Serv. Ctr.*, 30 BRBS 225 (1997).

Considering employer's contention in its motion for reconsideration, the Board reaffirmed its previous holding that the term "including any advantage received from employer and included for purposes of tax withholding" as used in Section 2(13) is meant to be exemplary, not exclusive, and that claimant's tips must be included in her average weekly wage if they were part of the "money rate" under the contract of hiring. In rendering its decision, the Board declined to follow *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT), since this case is outside the Ninth Circuit, and instead followed its decision in *Quinones*, 32 BRBS 6 (1998), and the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998). *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

The Board affirmed the administrative law judge's inclusion in claimant's average weekly wage of the value of room and board provided by employer, as room and board are not fringe benefits under a benefit plan. The Board declined to follow *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), outside the Ninth Circuit, explaining that the court's restriction on the term "wages" in Section 2(13) is not consistent with the rules of statutory construction. Section 2(13) states that wages includes the reasonable value of any advantage received from employer and subject to withholding, but the term "including" is not a limit on the definition of wages but is merely one item that is clearly included. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *rev'd in pert. part*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000). However, on appeal the Fifth Circuit agreed with the Ninth Circuit's holding in *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), that Section 2(13), on its face, excludes from the definition of "wages" the value of meals and lodging that are exempted from federal income taxation by Section 119 of the Internal Revenue Code (furnished for convenience of employer, on employer's premises, as condition of employment). The court stated the Board's construction of Section 2(13) reads the phrase "and included for purposes of any withholding of tax under subtitle C of title 26" out of the statute. The court concluded that "wages" equals monetary compensation plus taxable advantages. *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), *rev'g in pert. part* 32 BRBS 6 (1998).

The Ninth Circuit held that, consistent with its holding in *Wausau Ins. Co. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), while the *per diem* the claimant in this case received from employer in order to pay for his room and board while working abroad was an "advantage," it was not a "wage" because it was not subject to withholding under the Internal Revenue Code. *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir. 1998).

The Fourth Circuit, after analyzing the language of the Act and the legislative history, determined that the phrase "any advantage" should be given its usual meaning while the term "fringe benefits" must be limited to only certain types of fringe benefits. Therefore, the court held that the term "fringe benefits" as used in Section 2(13) refers to those advantages given to an employee, in addition to a monetary salary, whose value is too speculative to be converted into a cash equivalent.

Thus, "fringe benefits" are not included in "wages," and "wages" are defined as a dollar measure of compensation provided for 1) an employee's services; 2) by an employer; and 3) under a contract of hiring in force at the time of the injury. (The court questioned 9th Cir. decisions in *Wausau* and *McNutt* in a footnote). Using this definition, the Fourth Circuit affirmed the Board and concluded that holiday, vacation and container royalty payments are included as "wages" if the employee earned these payments for services rendered, *i.e.*, the employee satisfied the contract by actually working the requisite number of hours. Because the record lacks evidence as to whether claimant met the contractual hours through actual work or due to a disability credit (in which case the payments would not be "wages" because they would not have been awarded for services), the court remanded the case for the administrative law judge to make this determination. *Universal Mar. Serv. Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), *aff'g and remanding* 31 BRBS 195 (1997).

The Fifth Circuit affirmed the administrative law judge's inclusion of container royalty payments in claimant's average weekly wage under Sections 2(13) and 10(c) because they constitute monetary compensation/taxable advantage and not a fringe benefit. They are paid based on a number of hours worked, and thus are in paid in exchange for services rendered. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

Although the Board held that the one-time payment of $4,000 claimant received in 1996 in return for the termination of the GAI program constituted "wages" under Section 2(13), it reversed the administrative law judge's inclusion of that amount in the calculation of claimant's average weekly wage. The Board held that the one-time payment is more akin to a bonus and is a singular event which, if included, would inflate claimant's weekly wage beyond what he is reasonably expected to earn in future years. As claimant's injury had no effect on his ability to receive this amount in 1996 or on his inability to receive it in the future, it should not be included to compensate him for earnings lost due to his injury. In addition to guidance from the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), the Board considered this situation analogous to other Section 10(c) cases wherein an unusual event occurred during the year, making the claimant's actual earnings for that year not representative of his annual earning capacity. In those situations, the administrative law judge is not restricted to using actual earnings to approximate earning capacity. Accordingly, the Board modified the administrative law judge's decision to exclude the $4,000 payment from claimant's average weekly wage. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

The Board reversed the administrative law judge's exclusion of the value of the *per diem* claimant receives from employer from claimant's average weekly wage, in this case arising in the Fourth Circuit. The *per diem* at issue here is part of the money claimant receives from employer, and is thus includable in average weekly wage under the first clause of Section 2(13), regardless of whether it is subject to tax withholding, as it is included in claimant's pay check from employer every week and was part of the agreement, or contract, under which claimant was hired. The Fourth Circuit, in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), and the Board interpret the term "including" which prefaces the second clause of the first sentence of Section 2(13) as exemplary, rather than exclusive, and the disparate interpretations of this section by the Fifth and Ninth Circuits are discussed. The value of the free room and board claimant receives, however, is not includable in addition to the *per diem* to avoid double recovery. *Roberts v. Custom Ship Interiors,*

35 BRBS 65 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

On appeal, the Fourth Circuit rejected employer's argument that claimant's *per diem* was a nontaxable payment intended to reimburse claimant for his meal and lodging expenses. The court relied on *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), and distinguished *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT), and *Wausau*, 114 F.3d 120, 31 BRBS 41(CRT). The court reasoned that claimant's *per diem* was paid weekly in claimant's paycheck pursuant to his employment contract, and the money was paid with no restrictions and despite employer's knowledge that Carnival Cruise Lines provided free food and lodging to ship remodelers. Thus, the payment was not a true reimbursement linked to any actual expenses, and it was virtually indistinguishable from claimant's regular wages. Accordingly, the Fourth Circuit affirmed the Board's decision and held that claimant's *per diem* is to be included in his average weekly wage. *Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002).

The Fifth Circuit affirmed the finding that the *per diem* payments to claimant constituted wages within the meaning of Section 2(13) for purposes of calculating claimant's average weekly wage. The court rejected employer's argument that the *per diem* payments are not "wages" because they are not taxable. The court restates its holding in *Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), that "wages" are "the money rate at which the employee is compensated" plus any taxable advantages. The "money rate" prong does not require taxability. The *per diem* in this case is monetary compensation paid in the same paycheck as salary and is based on the number of hours worked. That the *per diem* payments were not tied to claimant's actual expenses is not controlling; the taxability of the payments is not an issue before the court. *B & D Contracting v. Pearley*, 548 F.3d 338, 42 BRBS 60(CRT) (5th Cir. 2008).

The Second Circuit affirmed the administrative law judge's finding that claimant did not establish that certain disputed payments made to a comparable worker were "wages," as well as the consequent finding that these payments should not be included in calculating claimant's benefits. The administrative law judge found that the record contained evidence establishing that these payments were listed as "other" rather than "reg. hours," and may have been related to the comparable employee's position on the board of directors of an employee-owned company that leased property to employer. *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008).

The Board rejected employer's assertion that claimant's travel expenses should not have been included in his average weekly wage calculation as they are "fringe benefits" and not "wages." The Board stated that the contract clearly enumerated the amounts to be paid for travel and that they would be paid at the six- and twelve-month employment marks. Thus, the Board concluded that the travel expenses are "wages" and affirmed the administrative law judge's inclusion of the amounts that are contractual, earned, and readily calculable. However, because claimant was not working at the time the final installment of the travel expenses, $600, was to be paid, the Board analogized that final installment to a post-injury contingent bonus and held that the administrative law judge erred in including it in claimant's average weekly wage calculation. Accordingly, the Board modified claimant's average weekly wage by excluding that $600. *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

In this case arising in the Fourth Circuit, the Board held that the administrative law judge properly relied on the Fourth Circuit's decision in *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), to exclude claimant's vacation, holiday and container royalty payments from the calculation of his average weekly wage. The court held in *Wright* that a claimant's vacation, holiday and container royalty payments can be included in his average weekly wage only when they are earned with the requisite number of hour of actual work and that such payments received on the basis of disability credit are not paid for "services" and therefore are not "wages." As claimant in this case did not have the requisite number of actual hours of work to earn vacation, holiday and container royalty payments for the contract years ending on September 30, 2010 or September 30, 2011, and received those payments in both contract years based on a combination of actual hours worked and workers' compensation disability credit hours, the Board affirmed the administrative law judge's finding that those payments are not "wages" and cannot be included in his average weekly wage. *Jackson v. Ceres Marine Terminals, Inc.*, 48 BRBS 71 (2014), *aff'd sub nom. Ceres Marine Terminals, Inc. v. Director, OWCP*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016).

Section 2(14)

Section 2(14) defines "child," "grandchild," "brother" and "sister."

A "child" includes "a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in *loco parentis* for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him." 33 U.S.C. §902(14). A "grandchild" is a "child as above defined of a child as above defined."

"Brother" and "sister" include "stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee."

These definitions generally include only persons under 18; if claimant is over 18, he must be (1) wholly dependent upon the employee and incapable of self-support or (2) a student as defined in Section 2(18). *Smith v. Sealand Terminal Inc.*, 14 BRBS 844 (1982). A legitimate child under 18 is entitled to benefits merely by virtue of his minority without regard to whether the employee contributed to the child's support. *Ingalls Shipbuilding Corp. v. Neuman*, 322 F. Supp. 1229 (S.D. Miss. 1970), *aff'd*, 448 F.2d 773 (5th Cir. 1971); *Maryland Drydock Co. v. Parker*, 37 F. Supp. 717 (D. Md. 1941); *Doe v. Jarka Corp. of New England*, 16 BRBS 318 (1984).

A totally disabled quadriplegic child over 18 is not *per se* dependent upon the employee and must prove either dependency or status as a student. *Doe*, 16 BRBS 318. Under Section 9(f), grandchildren, brothers and sisters must establish dependency upon decedent at the time of injury in order to receive benefits. Thus, a decedent's sisters may recover only if they establish that they were dependent upon the employee. *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22, 27 (1983). *See also Henderson v. Kiewit Shea*, 39 BRBS 119 (2006) (dependency must be established at time of death).

The Board has held that an administrative law judge may look to state law in determining the meaning of in *loco parentis*. *Franklin v. Port Allen Marine Serv.*, 16 BRBS 304 (1984) (affirming administrative law judge's conclusion that decedent did not stand in *loco parentis* to his nephews). *See Trainer v. Ryan-Walsh Stevedoring Co., Inc.*, 8 BRBS 59 (1978), *aff'd in pert. part*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979) (reversing administrative law judge and holding decedent stood in *loco parentis* to the claimant child); *Ingalls Shipbuilding Corp. v. Newman*, 448 F.2d 773 (5th Cir. 1971).

Illegitimate children must establish in every case that they were "acknowledged" by the employee and dependent upon him/her for support at the time of injury. It is not necessary to look to state law to define these terms. As the definition in the federal statute is complete,

it controls. In *Jones v. St. John Stevedoring Co., Inc*., 18 BRBS 68 (1986), *aff'd in pert. part sub nom. St. John Stevedoring Co., Inc. v. Wilfred,* 818 F.2d 397 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987), the Board held that as the term "acknowledged" can be given a clear meaning, the administrative law judge erred in looking to state law for a definition. Because the overwhelming evidence supported a finding of acknowledgment, claimant was held acknowledged as a matter of law. *See Weyerhaeuser Timber Co. v. Marshal,* 102 F.2d 78 (9th Cir. 1939) (state statute requiring that paternity be acknowledged in writing does not apply; child acknowledged orally is entitled to benefits).

The Board has held that "dependency" is defined by looking to its common meaning, *i.e.*, "not self-sustaining," "relying on for support." *Bonds v. Smith & Kelly Co.*, 17 BRBS 170 (1985). *See Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5th Cir. 1945). The administrative law judge makes the determination of dependency based on all of the circumstances of a particular case. *Bonds*, 17 BRBS 170; *see also Jones*, 18 BRBS 68 (claimant dependent as a matter of law); *Texas Employers Ins. Ass'n v. Shea*, 410 F.2d 56 (5th Cir. 1969) (illegitimate child born after employee's death held entitled as substantial evidence supported a finding she was acknowledged and dependent prior to the employee's death); *Ellis v. Henderson*, 204 F.2d 173 (5th Cir.), *cert. denied*, 346 U.S. 873 (1953); *Henderson v. Avondale Marine Ways*, 204 F.2d 178 (5th Cir.), *cert. denied*, 346 U.S. 875 (1953) (where decedent did not bring an action to disavow paternity in his lifetime, his paternity could not be challenged in compensation proceedings, although the children had been recognized as children of another and had been so registered until the employee's death)**.**

Digests

The term "child" includes an "acknowledged illegitimate child dependent upon the deceased." The terms "acknowledged," "illegitimate," and "dependent" are all complete in themselves and can be defined by reference to their common meanings rather than to state law. Moreover, requiring an illegitimate child to prove acknowledgment and dependence is not unconstitutional. The Board affirmed the administrative law judge's finding that the child was neither acknowledged nor dependent based on her mother's admission that the deceased never contacted her after the child's birth, never paid any expenses, and denied paternity. *Hicks v. Southern Illinois Univ.*, 19 BRBS 222 (1987).

Acknowledgment may be found despite the absence of the father's name on an illegitimate child's birth certificate, where both parents stated under oath that the child is theirs, the child is identified as a child in her father's will and is listed as such in his obituary. An illegitimate child conceived but not yet born at the time of an employee's accident is "dependent" upon the employee if, at the time of the accident, her mother was dependent on the employee. *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *aff'g in pert. part Jones v. St. John Stevedoring Co.*, 18 BRBS 68 (1986), *cert. denied*, 484 U.S. 976 (1987).

The Board affirmed the administrative law judge's finding that claimant, 18 years old and not a student, was not a "child" within the meaning of Section 2(14) because she was not "wholly dependent" on the employee at the time of the employee's injury pursuant to Section 9(f) because part of her support was derived from public welfare funds. *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

The administrative law judge rationally found that decedent's acknowledged illegitimate child was dependent upon decedent based on evidence establishing that decedent made regular payments to the child for her support and gave her gifts. The Board noted that "dependency" means not self-sustaining, relying on for support, or relying on for contributions to meet the reasonably necessary expenses of living. *Bonds v. Smith & Kelly Co.*, 21 BRBS 240 (1988).

The Board reversed the administrative law judge's finding that decedent's adult disabled daughter was not a "child" within the meaning of Section 2(14). The administrative law judge concluded that the daughter was not "wholly dependent" on decedent at the time of his injury pursuant to Section 9(f) because the funds expended by decedent for his daughter's support were repaid after his death. The Board held that the administrative law judge's characterization of the support as a loan was not supported by substantial evidence and that, moreover, if, at the time of decedent's injury, the daughter was wholly dependent on the monies received from decedent to meet the necessities of life, this "wholly dependent" status would be unaffected by any promise to repay the funds. The Board further reversed the administrative law judge's alternate finding that the daughter would have lost her status as a "child" under the Act at the time, subsequent to decedent's death, that she received money from the sale of her house and Social Security disability benefits. The Board held that once "wholly dependent" status is established, as of the time of decedent's injury, a wholly dependent individual may lose her status as a "child" only through a change in her capacity for self-support. *Lucero v. Kaiser Aluminum & Chem. Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chem. Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991).

Where decedent's son, age 34, had been afflicted with polio, lived at home, and was incapable of self-support, and where decedent had paid for almost all of his son's living expenses, the Board held that the administrative law judge properly found that the son was wholly dependent upon decedent and incapable of self-support, and therefore is a "child" within the meaning of Section 2(14). In so holding, the Board noted its agreement with the administrative law judge's finding that the son's receipt of Social Security benefits in the amount of $97.33 a month was an inconsequential amount of independent income, insufficient to preclude him from being "wholly" dependent on decedent. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

Where the evidence credited by the administrative law judge demonstrates that claimant's child is not the biological child of decedent, the Board reversed the administrative law judge's alternate finding that the child is the acknowledged illegitimate daughter of decedent. However, the Board affirmed the administrative law judge's decision that decedent stood in *loco parentis* to the child because his actions from the early 1980s until his death in 1993 indicate his intent to act as her father. Further, the record contains evidence of decedent's desire to adopt her and his decision to provide for her through his Social Security benefits, and the Mississippi state law defining in *loco parentis* identifies support as a factor to consider. Although the administrative law judge did not cite the pertinent state law in defining the phrase in *loco parentis,* his analysis of the case encompassed the primary elements of the state definition and his conclusion that decedent acted as the child's "father" is rational. *Brooks v. Gen. Dynamics Corp.*, 32 BRBS 114 (1998).

The Board affirmed the finding that the decedent did not stand in *loco parentis* to his grandson. The administrative law judge properly looked to the one year before the decedent's death to make this determination, as Section 2(14) states that the adult had to so stand "for at least one year prior to the time of [death.]" Applying the law of the District of Columbia, the Board stated that substantial evidence supported the finding that claimant had moved out of decedent's house, and that his aunt subsequently provided his care and supervision, more than one year prior to decedent's death. Thus, claimant was not decedent's "child" and dependency upon decedent had to be shown to establish entitlement to death benefits under Section 9(d). Thus, the Board remanded the case for the administrative law judge to fully address the evidence relevant to claimant's dependency consistent with the law that partial dependency may suffice. *L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008).

The Board rejected the contention that the requirement of Section 2(14) that acknowledged illegitimate children be dependent upon the decedent violates the Equal Protection Clause of the Fifth Amendment. Applying the Supreme Court's decision in *Mathews v. Lucas*, 427 U.S. 495 (1976), the Board held that Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but merely withholds a presumption of dependency "in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 U.S. at 513. In so doing, the Board distinguished this case from Supreme Court decisions in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), which invalidated statutes denying all benefits to illegitimate children solely because of their status. The Board held that the administrative law judge properly looked to the common meaning of the term "dependency," *i.e.*, not self-sustaining, relying on for support, or relying on for contributions to meet the reasonably necessary expenses of living, in determining whether decedent's illegitimate daughter was, at the time of his death, dependent upon him for purposes of determining her entitlement to survivor benefits under the Act. The Board affirmed the administrative law judge's finding that the child was not

dependent on decedent, and thus not entitled to survivor's benefits, as it is supported by substantial evidence. *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002).

As claimant offered no evidence that he remained a full-time student, his entitlement to death benefits as a "child" ceased at age 18, and employer is entitled to a Section 14(j) credit for amounts it paid in excess of that due claimant. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

In a case where claimant was over the age of eighteen at the time of his father's allegedly work-related death, the administrative law judge denied benefits under Section 9(b) because claimant was not wholly dependent upon the decedent. The Board affirmed this finding as it was supported by substantial evidence. Claimant received monthly Social Security disability benefits of at least three times greater that the monthly sums he received from decedent. The Board rejected claimant's contention that "public funds" should not be taken into account in addressing the "wholly dependent" clause, as it was unsupported by any citation and is contrary to Board precedent. The Board thus did not need to address the "incapable of self-support due to a physical or mental ailment" prong of Section 2(14). *Smith v. Mt. Mitchell, LLC,* 48 BRBS 1 (2014).

Where decedent was survived by claimant, an adult child, and her mother, decedent's widow, the Board reversed the administrative law judge's order granting employer's motion for summary decision. The Board held that claimant's entitlement to death benefits as decedent's "child" is not derivative of her mother's entitlement as the widow; rather, it is based on whether claimant satisfied the Act's criteria for being a "child" at the time of decedent's death. Because the administrative law judge did not address claimant's allegation that she was a dependent adult child of decedent, pursuant to Section 2(14), it is unknown whether she is entitled to any death benefits. Accordingly, the Board remanded the case for consideration of this issue. *Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017).

Section 2(16) - Widow or Widower

Section 2(16) defines "widow" and "widower" as including "only decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart by justifiable cause or by reason of his or her desertion at such time." 33 U.S.C. §902(16). This definition hinges upon the claimant's status as the decedent's wife or husband. The Act does not define "wife" or "husband."

In *Trainer v. Ryan-Walsh Stevedoring Co., Inc.*, 8 BRBS 59 (1978), the Board attempted to establish uniform guidelines for determining status as a "widow/widower" for purposes of the Act, without reference to the various state laws. In *Trainer*, claimant and decedent were married in 1952. However, claimant had previously been married to another man, and there was no divorce; claimant testified she believed she was not married because, *inter alia*, the official performing the marriage was not a preacher. The Board determined that the denial of death benefits could not be affirmed because the administrative law judge had not made necessary findings on the official's authorization to perform the ceremony or other relevant questions, but found it unnecessary to remand the case based on its "uniform guidelines," under which a claimant could conclusively establish status as a widow if, at the time of death of the employee and for at least ten years prior thereto, the employee and claimant lived together in the same household and held themselves out as husband and wife. The Board discussed prior cases relying on the state law of domestic relations in defining familial relationships, but concluded that the Act should be construed to apply uniformly to all claimants without regard to state law. The Fifth Circuit reversed the Board's decision in *Trainer*, holding that state law must control on the issue of status as a wife or husband. *Ryan-Walsh Stevedoring Co., Inc. v. Trainer*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979).

The Board initially followed the Fifth Circuit's opinion only in cases arising in that circuit. *Smith v. Sealand Terminal Inc.*, 14 BRBS 844 (1982) (holding claimant qualifies as decedent's widow under both the *Trainer* test and Mississippi law). In *Smith*, the Board stated it was bound by the Fifth Circuit's reversal of *Trainer*, and therefore applied state law. The Board, however, stated its disagreement with the court's opinion and reasserted its opinion that "it is inappropriate for state law to control issues involving entitlement to compensation under this federal statute." *Smith*, 14 BRBS at 852. *See also Bowman v. Riceland Foods*, 13 BRBS 747 (1981) (applying Arkansas law in holding that claimant's prior marriage to another man was void and her marriage to decedent was valid and noting that the same result would be reached under *Trainer*).

However, in *Jordan v. Virginia Int'l Terminals*, 32 BRBS 32 (1998), the Board held that state law must be used to define the term "wife" in Section 2(16). Thus, the Board held that its decision in *Trainer v. Ryan-Walsh Stevedoring Co.*, 8 BRBS 59 (1978), *aff'd in part and rev'd in pert. part*, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), is not valid precedent and should not be followed in this or any case. The Board therefore vacated the

administrative law judge's determination that claimant was a widow under the *Trainer* guidelines and remanded the case for him to consider whether claimant and decedent had established a valid common law marriage in South Carolina. In *Jordan*, 32 BRBS at 34, the Board stated that the "normal course of action, with the notable exception of the 1978 Board decision in *Trainer* has been … to look to state law for the definition" of husband or wife, citing *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489 (1916) (when Congress does not define a term in a federal statute, the proper course is to look to state law). The Board also stated that, aside from the Fifth Circuit's decision in *Trainer*, two other appellate courts had applied the law of the forum of the marriage in determining status as a wife or husband under the Act. *Marcus v. Director, OWCP*, 548 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976); *Powell v. Rogers*, 496 F.2d 1248 (9th Cir.), *cert. denied*, 419 U.S. 1032 (1974); *Albina Eng. & Mach. Works v. O'Leary*, 328 F.2d 877 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964).

A finding that claimant was "dependent for support" upon decedent requires a determination of dependency utilizing its common meaning, *i.e.*, "not self-sustaining," "relying on for support." *Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5th Cir. 1945).

The Supreme Court established the test for determining whether the widow/widower and decedent were living apart for justifiable cause or by reason of desertion in *Thompson v. Lawson*, 347 U.S. 334, 336-7 **(**1954), stating that "the essential requirement is a conjugal nexus between the claimant and decedent subsisting at the time of the latter's death, which, for present purposes, means that she must continue to live as the deserted wife of the latter." In *Thompson*, decedent deserted claimant and both engaged in purported remarriages. The Court held that claimant was not entitled to benefits due to her "conscious choice to terminate her prior conjugal relationship by embarking upon another permanent relationship." *Id.*

In *Gen. Dynamics Corp. v. Director, OWCP*, 585 F.2d 1168, 9 BRBS 188 (1st Cir. 1978), *aff'g Murphy v. Gen. Dynamics Corp*, 7 BRBS 960 (1978), the First Circuit, following *Thompson*, found no need to refer to state domestic relations law for a definition of "desertion." The court found substantial evidence to support the conclusion that claimant lived as a deserted wife until decedent's death.

The Board has held that before reaching the issue of whether a conjugal nexus existed, claimant must establish that he/she and the decedent were living apart for a justifiable cause. *Meister v. Ranch Rest.*, 8 BRBS 185 (1978), *aff'd*, 600 F.2d 280 (D.C. Cir. 1979) (table). In *Meister*, the Board found no need to determine whether a conjugal nexus existed as it affirmed the administrative law judge's finding that the claimant-widower had not established a justifiable cause for living apart from decedent. The Board concluded on the facts of the case that claimant's drinking was not cause for their separation, but rather that claimant voluntarily deserted or abandoned his wife, based on the administrative law

judge's findings, *inter alia*, that he left his wife some 16 years before her death, lived with another woman for several years, and purchased property solely in his name. The Board distinguished the holding in *Matthews v. Walter*, 512 F.2d 941 (D.C. Cir. 1975), *aff'g* BRB No. 73-103 (Sept. 9, 1973), that excessive drinking may be justifiable cause for living apart.

Where justifiable cause exists for the initial separation, subsequent conduct of the parties may sever the conjugal nexus, and, thus, claimant will not be considered the widow/widower. *Henderson v. Avondale Marine Ways, Inc.*, 204 F.2d 178 (5th Cir.), *cert. denied*, 346 U.S. 875 (1953) (despite justifiable cause at time of claimant's separation, subsequent relationships with other men provided a new reason for living apart and severed nexus). In *Leete v. Petroleum Helicopters, Inc.*, 17 BRBS 134 (1985) (R. Smith, J., dissenting), *rev'd*, 790 F.2d 41 8, 18 BRBS 93(CRT) (5th Cir. 1986), the Board affirmed an administrative law judge's decision that the conjugal nexus had been terminated at the time of death where claimant had engaged in a relationship with another man and had no contact with decedent for a six month period. In reversing the Board's decision, the Fifth Circuit found that the Board and administrative law judge improperly relied on conduct after decedent's death and held that the relevant evidence established claimant's status as a widow under Fifth Circuit and Supreme Court cases. *See Matthews*, 512 F.2d 941 (conjugal nexus existed where decedent continued to visit claimant during their 16-year separation despite claimant's relationship with another man during that time).

The Board has held that Section 20(a) does not apply to aid claimant in establishing status as a widow/widower. *Meister*, 8 BRBS 185. In *Meister*, the Board further stated that if applicable, the administrative law judge had cited ample facts to rebut the presumption.

Digests

The Board affirmed the administrative law judge's finding that claimant was a widow entitled to death benefits under the Act. Claimant and the decedent were living apart for justifiable cause because of his adulterous relationships. A conjugal nexus was established through evidence of their continuing relationship. *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Where the employee consistently stayed out until early morning, failed to return home at all one evening, had his suitcase packed and given to him the next day by his wife and then never attempted to return to or support his wife and daughter, the administrative law judge's finding that decedent deserted his wife is supported by substantial evidence. Where employee's wife remained in the same area as employee for one year after separation, maintained her status publicly as "married but separated," never filed for divorce and never had sexual relations with anyone else after separation, the administrative law judge's finding that a conjugal nexus existed at the time of employee's death is supported by substantial evidence. *Hicks v. S. Illinois Univ.*, 19 BRBS 222 (1987).

The Board affirmed the administrative law judge's finding that claimant was a widow entitled to benefits under the Act, since the parties were physically separated due to the requirements of the decedent's job, which constituted justifiable cause, their marriage was never finally dissolved, and a conjugal nexus existed between the parties, as evidenced by their correspondence, commingling of funds and joint purchase of property during the separation. If the spouses live apart for justifiable cause, there is no need to determine whether the claimant was dependent on the decedent. *Denton v. Northrop Corp.,* 21 BRBS 37 (1988).

The following factors constitute substantial evidence supporting the administrative law judge's finding that claimant and decedent lived apart for justifiable cause, that a conjugal nexus existed and that, therefore, claimant is a "widow" under Section 2(16) entitled to death benefits: (1) decedent suffered severe mental problems; (2) decedent forced claimant to sign a separation agreement at gunpoint; (3) decedent frequently abused claimant while they lived together; (4) decedent and claimant never divorced; (5) they maintained frequent contact and a friendly relationship after their separation; (6) claimant cared for decedent immediately after his mother died; and (7) claimant never remarried after decedent's death. *Lynch v. Washington Metro. Area Transit Auth.*, 22 BRBS 351 (1989).

In applying the conjugal nexus test, the focus is on the claimant, rather than on decedent, and claimant must have made a "conscious choice to terminate her prior conjugal relationship." *Thompson v. Lawson,* 347 U.S. 334 (1954). In this case, the administrative law judge improperly considered the intent of the decedent in referring to his conduct in living with another woman as severing the marital bond. The Board also rejected the administrative law judge's test for justifiable cause. Justifiable cause for living apart is not limited to only temporary separations or to situations in which a spouse is fearful of an infectious disease or bodily injury. Rather it is necessary to analyze each case on its facts. The facts found by the administrative law judge here establish that the couple was living apart for justifiable cause and that a conjugal nexus remained. Thus, the denial of death benefits was reversed. *Kennedy v. Container Stevedoring Co.*, 23 BRBS 33 (1989).

The Board reversed the administrative law judge's denial of the claim based on a finding that claimant was not married to or dependent upon decedent at the time his lung condition was first diagnosed. The plain language of Section 2(16) states its requirements in the disjunctive; thus, a widow is a wife who at the time of the employee's death is living with the employee or is dependent for support on the employee. Claimant need not be decedent's spouse at the time of injury, as Section 2(16) looks to the time of death. As claimant was married to and living with decedent at the time of death, she need not establish dependency at any time; thus, Section 9(f) is inapplicable. *Griffin v. Bath Iron Works Corp.,* 25 BRBS 26 (1991).

For purposes of determining whether claimant is decedent's widow under the Act, the Board held that state law must be used to define the term "wife" in Section 2(16). Thus,

the Board held that the Board's decision in *Trainer v. Ryan-Walsh Stevedoring Co.,* 8 BRBS 59 (1978), *aff'd in part and rev'd in pert. part,* 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), is not valid precedent. The Board thus vacated the administrative law judge's determinations that claimant is a widow under the *Trainer* guidelines and that claimant failed to establish the existence of a common law marriage and remanded the case for further consideration of whether claimant and decedent had established a valid common law marriage in South Carolina. *Jordan v. Virginia Int'l Terminals,* 32 BRBS 32 (1998).

Where at the time of the employee's death his widow was legally married to him but neither living with him nor financially dependent on him, the D.C. Circuit held that the conjugal nexus was not severed and the widow was entitled to death benefits even though she refused to allow decedent to return home as he left her with ten children, had given them no support, wished to return only to reclaim his property, and was a "controlling husband" feared by claimant. The court relied on the following: that claimant remained in the marital home for more than 35 years, did not enter into another relationship or change her married name, and maintained a relationship with her husband through their children, spent holidays with him, and occasionally cooked meals for him; she also did not complete divorce proceedings which she twice initiated. While Section 2(16) fixes the decedent's date of death as the proper time for inquiring into the reasons for a couple's separation, the court held that the administrative law judge properly found that decedent's desertion of his family some 25 years before his death, coupled with his non-support for his ten children and his controlling behavior, constitutes justifiable cause for living apart. The court rejected employer's argument that decedent's "controlling behavior" in this case cannot be equated with alcoholism, adultery, severe mental problems or physical abuse, conditions constituting justifiable cause in other cases. The court stated that courts of appeals as well as the Board have affirmed findings of justifiable cause supporting separation on grounds less severe than decedent's behavior here. The court also rejected employer's argument that serious misconduct rising to the level of a "matrimonial offense" is needed to sustain a finding of justifiable cause for living apart, as such a construction is too narrow and more relevant to state domestic relations law than to the Longshore Act. Noting that employer raised the issue for the first time at oral argument, the court nevertheless addressed and rejected employer's contention that, in addition to "conjugal nexus" and "justifiable cause for living apart," death benefits under the Act turn on whether the surviving spouse had a reasonable expectation of support from decedent. The court held that nothing in either the statute or case law supports such a test. *New Valley Corp. v. Gilliam,* 192 F.3d 150, 33 BRBS 179(CRT) (D.C. Cir. 1999).

The Board affirmed the administrative law judge's finding that claimant was ineligible to recover death benefits as a widow under Section 9(b). The Board first held that the administrative law judge properly applied Louisiana state law to determine claimant's marital status, as opposed to federal common law. Next, as it was undisputed that claimant and decedent lived together but did not formally participate in a marriage ceremony, under

Louisiana law, claimant failed to establish that she was decedent's wife at the time of his death. *Angelle v. Steen Prod. Serv., Inc.*, 34 BRBS 157 (2000).

The Board affirmed the administrative law judge's finding that claimant, who was living with decedent at the time of his death, is not entitled to recover death benefits as a "widow" under Section 9(b), since it is undisputed that claimant and decedent did not participate in a marriage ceremony, which is a requisite for a valid marriage contract in Louisiana. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010)

In a case arising under the DBA, the Board affirmed the administrative law judge's finding that employer is liable to claimant Lily, decedent's putative wife whom he "married" in California in 1996 and with whom he was living at the time of his death, and not to his arguably "legal" wife Shahira whom he married years earlier in Jordan, despite the alleged reaffirmation of his marriage to her in 2005. The Board held, contrary to employer's assertions, that a "widow" under Section 2(16) of the Act requires more than just being a lawful spouse of the deceased. In addition to having a legal marriage, to be a "widow" the claimant also must establish that she was either living with or dependent upon the decedent or that she was living apart due to desertion or for another justifiable reason by showing a conjugal nexus or that she was holding herself out as the deserted wife. Because there was no evidence establishing that Shahira satisfied any of the elements of Section 2(16), the Board held that the administrative law judge properly denied her death benefits under Section 9(b). *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

In a case involving the question of whether claimant is decedent's "widow," the Board declined to address claimant's assertion on appeal that she is his widow because she was dependent upon him at the time of his death. This issue had not been raised before the administrative law judge. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

In a case where claimant and decedent had legally separated over four years prior to decedent's death, the Board vacated the administrative law judge's denial of death benefits because his analysis of whether claimant and decedent were living apart for justifiable cause was incomplete. As the administrative law judge made no specific findings on the matter, but instead determined that their conjugal nexus was severed as of May 2009, the Board remanded the case for him to address whether they were living apart for justifiable cause at the time of decedent's death in September 2009. The administrative law judge must consider evidence and case precedent to determine if, in a case involving a mutually-agreed upon legal separation, there remains justifiable cause for them living apart. If they were, then the administrative law judge must address whether a conjugal nexus remained between them. If they were not, then claimant cannot be decedent's widow, and death benefits must be denied. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

In a case where claimant and decedent had legally separated over four years prior to decedent's death, the Board vacated the administrative law judge's finding that a conjugal

nexus between claimant and decedent had been severed at least as of May 2009 when decedent filed for divorce because the administrative law judge improperly gave greatest weight to decedent's actions in making his determination. While the proper focus is on claimant's actions, the Board rejected claimant's assertion that only her actions and "wishes" should be credited. Rather, the administrative law judge's finding should rest on all the relevant evidence of record. The Board remanded the case for the administrative law judge to assess the weight and credibility of the relevant testimony and evidence to determine whether claimant's actions maintained or severed the conjugal nexus. For example, the administrative law judge must assess the significance of the mutually-agreed upon legal separation as well as the testimony that claimant had not seen decedent for the five months before his last hospitalization and death. If severed as of the date of decedent's death, then claimant is not his "widow" and is not entitled to death benefits. If the conjugal nexus remained, then she is decedent's "widow," and the administrative law judge must address whether decedent's death was work-related such that claimant would be entitled to death benefits. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

Section 2(18) – Student

Section 2(18) defines "student" as "a person regularly pursuing a full-time course of study or training" at certain institutions who has not reached the age of 23 or completed four years of education beyond high school. 33 U.S.C. §902(18). A child, grandchild, brother or sister over age 18 may recover benefits if a student. *See* Section 2(14).

Mere enrollment in an educational institution is not sufficient; thus, a student's enrollment in a vocational program did not confer student status. *Smith v. Sealand Terminal Inc.*, 14 BRBS 844 (1982). Interruption of an education does not necessarily remove a person from "student" status. Where there is a gap in claimant's education, the Secretary must make a discretionary determination of student status. The Board, therefore, has remanded a case for this finding. *Smith*, 14 BRBS 844.

Digests

The Board held that there was substantial evidence to support the administrative law judge's finding that claimant's son was entitled to benefits after his 18th birthday, since he was a full-time student in high school and then in college from the age of 18. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The Board affirmed the administrative law judge's finding that pursuant to Section 2(18), claimant's son who attended a non-accredited private high school after his eighteenth birthday was not a student for that period of time, and therefore not a dependent child under Section 2(14). The Board rejected claimant's contention that the accreditation provision of Section 2(18) was not meant to apply to high schools, as such an interpretation was contrary to the plain meaning of the statute. Thus, the Board held that claimant was not entitled to dependency benefits for the period her son attended the non-accredited school, holding that such denial did not violate the freedom of religion clause of the First Amendment and the equal protection clause of the Fourteenth Amendment. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

The Board affirmed the administrative law judge's findings that Josh Valdez was a full-time college student during periods in which he did not complete 12 credit hours as the administrative law judge properly looked to Josh's conduct during his entire college tenure to determine if he had a *bona fide* intention of pursuing full-time studies on a continuous basis. Although the administrative law judge did not explicitly address employer's contention that Josh Valdez's benefits should have ceased upon his completion of four years of education beyond the high school level, the Board nevertheless rejected it since the statutory language, as bolstered by the intent set out in the legislative history, supports the conclusion that student benefits continue through age 23 or cease prior to that time if the individual has obtained a four-year college degree. The Board affirmed the administrative law judge's denial of benefits to Brad Valdez for the period that he served

in the Army Reserve after age 18 but before he graduated from high school as the statutory language is clear that one is not a "student" while serving in the Armed Forces. The Board affirmed the administrative law judge's finding that Brad never really attended college and thus was not entitled to student benefits after high school. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

As claimant offered no evidence that he remained a full-time student, his entitlement to death benefits as a "child" ceased at age 18, and employer is entitled to a Section 14(j) credit for amounts it paid in excess of that due claimant. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

Section 2(21) - Vessel

The 1972 Amendments added Section 2(21), which defines "vessel" as

> any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer or crew member."

33 U.S.C. §902(21) (1982) (amended 1984). The 1984 Amendments added the clause "unless the context requires otherwise" to the beginning of the subsection.

This definition most commonly arises in Section 5(b) negligence suits, 33 U.S.C. §905(b). However in *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the Fifth Circuit held that the exclusion of employees "engaged by the master to load or unload or repair any small vessel under eighteen tons net" did not apply as claimant was not "engaged by the master." 33 U.S.C. §903(a) (1982) (amended 1984). The court used the absence of a minimum weight requirement in Section 2(21) to find coverage under Section 2(3) for a small vessel repairman. *See* 33 U.S.C. §903(d)(1)-(3) (added in 1984, this provision excludes certain employees engaged on work on small vessels, defining such in terms of tonnage).

Prior to the 1972 Amendments, the definition of vessel applied for Longshore Act purposes was that of 1 U.S.C. §3, which 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.

See Norton v. Warner Co., 321 U.S. 565 (1944). This definition continues to be applicable following the addition of Section 2(21), as that section does not define the type of craft included in the term "vessel."

Thus, the Fifth Circuit applied the 1 U.S.C. §3 definition in *Burks v. Am. River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982), stating it provides the meaning of "vessel" as used in the Longshore Act. The court held that non-propelled river barges are vessels. The Second Circuit also relied on this definition after stating that the definition at Section 2(21) obviously did not provide precise guidance as to what is included within its terms. *McCarthy v. The Bark Peking*, 716 F.2d 130, 15 BRBS 182(CRT) (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). In finding that a museum ship, with its rudder welded into place, is a vessel for purposes of Section 5(b), the court stated that "the ship rests upon navigable waters and may be returned to the sea, if only in tow." 716 F.2d at 136, 15 BRBS at 191(CRT).

In *Lundy v. Litton Sys., Inc.*, 624 F.2d 590 (5th Cir. 1980), *reh'g denied*, 629 F.2d 1349, *cert. denied*, 450 U.S. 913 (1981), the Fifth Circuit held that incomplete ships upon which Section 2(3) employees are working at a Section 3(a) site are vessels within the meaning of Section 2(21). Citing *Lundy*, the court also held that a hull floating on navigable waters during ship construction is a vessel for purposes of a Section 5(b) action. *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 17 BRBS 1(CRT) (5th Cir. 1984). The court stated that the hulls had been launched and were afloat in navigable waters although moored to shore and found they met the definition in 1 U.S.C. §3.

Where a claimant is injured on a floating structure, it need not be a vessel in order for claimant to be covered under Sections 2(3) and 3(a) on the basis that he or she was injured on actual navigable waters and thus is entitled to coverage under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). *See Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

Digests

The Fifth Circuit held that the work platform on which an employee was injured was not a "vessel" pursuant to Section 5(b). The platform was anchored to a riverbed, was moved only once or twice a year to accommodate tide changes, and could not be moved without assistance of motorized vehicles. *Davis v. Cargill, Inc.*, 808 F.2d 361, 19 BRBS 65(CRT) (5th Cir. 1986).

Citing *Davis v. Cargill, Inc.*, 808 F.2d 361, 19 BRBS 65(CRT) (5th Cir. 1986), the Fifth Circuit held that a formerly navigable barge with no means of self-propulsion which was firmly moored to provide painting services, was not used for navigation, and was seldom moved, is not a vessel within the meaning of 1 U.S.C. §3, which defines "vessel" for purposes of Section 5(b). It also is not a vessel for Jones Act purposes. *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989).

A jackup rig that is under construction on land, not on or in navigable waters, and that is incapable of flotation, is not a vessel for either admiralty jurisdiction or Section 5 negligence purposes. *Richendollar v. Diamond M Drilling Co., Inc.*, 819 F.2d 124 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 944 (1987).

Where hull under construction was floating on navigable waters but was not itself navigable, in that it did not yet have navigation equipment installed, had not undergone dock and sea trials, and had no crew assigned to it, the hull did not qualify as a "vessel." *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083 (5th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

A time chartered vessel is a vessel under Section 2(21) and the employer who chartered the vessel may be sued under Section 5(b), but only in its capacity as the charterer. Therefore, employer cannot be held liable unless the cause of the harm is within the charterer's traditional sphere of control and responsibility or has been transferred thereto by the clear language of the charter agreement. Section 5(b) eliminated an injured worker's right to bring actions against third parties based on unseaworthiness, but preserves the worker's right under prior law to recover for negligence. *Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332 (5th Cir. 1987).

The Fifth Circuit held that a submersible drilling platform on which claimant was working at the time of his injury was not a "vessel" under the Jones Act since the platform had been fixed in its present location for 24 years, had no navigational devices, and was classified as a production platform rather than a vessel by the Coast Guard. Thus claimant's exclusive remedy is under the Longshore Act. *Johnson v. ODECO Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989).

The Board affirmed the administrative law judge's use of the definition of vessel at 1 U.S.C. §3 in finding that claimant was injured while repairing a vessel, an amphibious military vehicle, and therefore was covered by the Act. The amphibious vehicle has a fully loaded cruising range on water of 75 miles, and is used to transport vehicles and general cargo from ship to beach and inland transfer points. *Stevens v. Metal Trades, Inc.*, 22 BRBS 319 (1989).

Claimant, whose work involved the fabrication of gear box units which control the raising and lowering of legs of floating offshore drilling rigs, was found to be an employee pursuant to Section 2(3) because a floating offshore drilling rig with retractable legs capable of floating and as being used as a means of transportation on water is a vessel under the Act, *see Burks v. Am. River Transp. Co.*, 679 F.2d 69 (5th Cir. 1982). Thus, claimant was a shipbuilder. *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989).

The Ninth Circuit affirmed the district court's grant of summary judgment in favor of employer on the ground that a floating fish processing plant is not a vessel for purposes of Section 5(b) of the LHWCA. *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992).

The Fifth Circuit held that a midstream bulk cargo transfer unit built on a barge in the Mississippi River is not a vessel for purposes of the Jones Act. The unit has been permanently moored to the riverbed since 1982, has no engines or means of locomotion other than a winch and cable system, is not registered with the Coast Guard, and was constructed and used primarily as a work platform. The fact that it is capable of being towed short distances does not make it a vessel. *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995).

The Supreme Court held that the *Super Scoop*, a floating platform with a dredging bucket used to dig a trench beneath Boston Harbor, is a "vessel" under the Jones Act. The dredge has some characteristics of sea-going vessels such as navigational lights, ballast tanks and a crew dining area, but had limited means of self-propulsion. Under 1 U.S.C. §3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Dredges carry machinery, equipment and crew over water. Because the *Super Scoop* was engaged in maritime transportation at the time of claimant's injury, it was a "vessel" within the meaning of both the Jones Act and the Longshore Act, specifically, Sections 2(3)(G) and 5(b). *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005).

The Supreme Court held that a "floating home" is not a "vessel" under 1 U.S.C. §3. The phrase "capable of being used as a means of transportation on water" requires practical, not theoretical, application. The structure at issue was a house on a floating platform. A reasonable observer, looking to the home's physical characteristics and activities, would not consider it "designed to a practical degree for carrying people or things over water." This structure had no rudder and no steering mechanism; it had no source of power other than connections to land sources. It was moved twice, only by towing, and it did not carry passengers or cargo. As the structure was not a vessel, it was not subject to federal admiralty jurisdiction. *Lozman v. The City of Riviera Beach, Florida*, 133 S.Ct. 735, 46 BRBS 93(CRT) (2013).

Claimant, a marine carpenter hired by employer to fabricate topside living quarters to be incorporated onto the tension leg oil platform *Big Foot*, did not satisfy the Section 2(3) status requirement because his work did not involve "shipbuilding." Addressing the 1 U.S.C. §3 definition of "vessel," and the Supreme Court's decisions in *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005), and *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735, 46 BRBS 93(CRT) (2013), the Board affirmed the administrative law judge's finding that *Big Foot* is not a "vessel" under the Act. Specifically, in light of *Lozman* and *Stewart*, in this "'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." As *Big Foot* can float but lacks the capability of self-propulsion and will be towed to its final destination, and as its end-purpose is to be a tension leg platform for oil extraction on the Outer Continental Shelf, tethered to the bottom of the sea, a reasonable person looking at the purpose and characteristics of *Big Foot* could rationally conclude it is not a vessel. As *Big Foot* is not a "vessel," the administrative law judge properly found that claimant was not involved in shipbuilding and is not covered under Section 2(3) of the Act. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff'd sub nom. Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Fifth Circuit affirmed the Board's holding that claimant lacked status as a maritime employee. Claimant was injured while working on modules for Big Foot, which is a tension leg offshore oil platform. The circuit court held that Big Foot is not a "vessel" as it has no means of self-propulsion, has no steering mechanism or rudder, and has an unraked bow. Big Foot can be moved only by being towed, and when towed to its permanent location, Big Foot will not carry items being transported from place to place in maritime commerce, and is intended to remain anchored to the floor of the OCS for twenty years. Therefore, claimant is not a shipbuilder or otherwise engaged in maritime employment. *Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).