

TOPIC 2 DEFINITIONS

2.1 SECTION 2(1) PERSON

Section 2(1) of the LHWCA defines "person" as follows:

**The term "person" means individual, partnership, corporation,
or association.**

33 U.S.C. § 902(1).

2.2 SECTION 2(2) INJURY

Section 2(2) of the LHWCA defines "injury" as:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902(2).

This definition comprises the two **traditional requirements** of workers' compensation law: the injury or death must (1) arise out of employment and (2) in the course of employment. The definition also includes an occupational disease or infection which arises naturally out of employment or unavoidably results from the accidental injury. See Bober, *Compensable Injury or Death Arising Under the Longshore and Harbor Workers' Compensation Act*, 35 Loyola L. Rev. 1129 (1990).

2.2.1 Section 2(2) Vis-a-Vis Section 20(a) Presumption

In determining whether the employee has sustained an injury compensable under the LHWCA, the judge must consider the relationship between Sections 2(2) and 20(a), the LHWCA's statutory presumption. This latter section provides "in the absence of substantial evidence to the contrary," it is **presumed** "(t)hat the claim comes within the provisions of this Act."

It is well-settled that the judge, in arriving at a decision in the claim, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968); Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962); Scott v. Tug Mate, Inc., 22 BRBS 164, 165, 167 (1989); Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Anderson v. Todd Shipyards Corp., 22 BRBS 20, 22 (1989); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Seaman v. Jacksonville Shipyards, 14 BRBS 148.9 (1981); Brandt v. Avondale Shipyards, 8 BRBS 698 (1978); Sargent v. Matson Terminals, 8 BRBS 564 (1978).

It further must be recognized that all factual doubts must be resolved in favor of the claimant. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969). But cf. Director, OWCP v. Greenwich Collieries (Maher Terminals), 512 U.S. 267 (1994) (Held, an injured worker claiming compensation must prove the elements of her claim by a "preponderance of the evidence;" the "true doubt" rule under which

the claimant wins if the evidence is evenly balanced, is inconsistent with Section 7(c) of the APA as that section is applied to the LHWCA.).

[ED. NOTE: *Under Section 556(d) of the APA, 5 U.S.C. § 556(d), the claimant bears the ultimate burden of persuasion by a preponderance of the evidence. Because of this allocation of the burden of proof, the APA prohibits the application of the "true doubt" rule to claims for benefits under the LHWCA. The "true doubt" rule is contrary to the provisions of the APA because it allows the claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence.]*

Furthermore, it consistently has been held that the LHWCA must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). Based upon the humanitarian nature of the LHWCA, claimants are to be accorded the benefit of all doubts. Durrah v. Washington Metro. Area Transit Auth., 760 F.2d 322 (D.C. Cir. 1985); Champion v. S&M Traylor Bros., 690 F.2d 285 (D.C. Cir. 1982); Harrison v. Potomac Elec. Power Co., 8 BRBS 313 (1978).

It is now well-settled that this presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Anderson, 22 BRBS at 21; Miranda v. Excavation Constr., 13 BRBS 882 (1981); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980).

This statutory presumption, however, does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "*prima facie*" case. The **Supreme Court** has held that a *prima facie* claim for compensation, to which the statutory presumption refers, "must at least allege an injury that arose in the course of employment as well as out of employment." U.S. Indus./Fed. Sheet Metal v. Director, OWCP, 455 U.S. 608 (1982), rev'g Riley v. U.S. Indus./Fed. Sheet Metal, 627 F.2d 455 (D.C. Cir. 1980).

Moreover, the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. U.S. Indus., 455 U.S. at 600. The claimant's theory as to how the injury occurred must go beyond "mere fancy." Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982). The presumption, though, is applicable once the claimant establishes that he has sustained an injury, i.e., harm to his body. Preziosi v. Controlled Indus., 22 BRBS 468, 470 (1989); Brown v. Pacific Dry Dock, 22 BRBS 284, 285 (1989); Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only:

- (1) the claimant sustained physical harm or pain, and
- (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.

Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita, 13 BRBS at 330-31.

Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Parsons Corp. v. Director, OWCP (Gunter), 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980), aff'g 6 BRBS 607 (1977); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Hampton, 24 BRBS at 144; Ranks v. Bath Iron Works Corp., 22 BRBS 302, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Sam v. Lofeland Bros. Co., 19 BRBS 228, 231 (1987); Kier, 16 BRBS at 129.

Once the claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain, the burden shifts to the employer to establish that the claimant's condition was not caused or aggravated by the employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982). In such cases, the judge must weigh all of the evidence relevant to the causation issue, resolving all doubts in the claimant's favor. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986).

In Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989), the Board, in discussing the parameters of the Section 20(a) presumption, stated that the presumption applies to the issue of whether an injury is causally related to employment. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976). Where an employment-related injury aggravates, combines with, or accelerates a pre-existing condition, the entire resultant condition is compensable. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); Laplante v. General Dynamics Corp./Elec. Boat Div., 15 BRBS 83 (1982). In order for Section 20(a) to apply, the claimant must establish a *prima facie* case by proving that she suffered some harm or pain and that working conditions existed or an accident occurred which could have caused the harm or pain. Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981), decision and order after remand, 17 BRBS 10 (1984), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986).

In Sinclair, 23 BRBS 148, the Board rejected the employer's argument that the presumption does not apply unless the claimant establishes that her psychological condition is caused by a psychiatric reaction to the physical symptoms she suffered while at work and held that the claimant **need not affirmatively prove causation**. Once claimant establishes the elements of a *prima facie* case, i.e., the existence of physical harm and working conditions which **could have caused** such harm, the presumption provides the causal nexus.

The Section 20(a) presumption attaches only to claims actually made. U.S. Indus./Fed. Sheet Metal v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982), rev'g 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980). Thus, a *prima facie* claim must at least allege an injury that arises out of and in the course of employment. In Sinclair, the claimant specifically alleged that her exposure to chemicals at work aggravated her pre-existing psychiatric condition, resulting in a permanent psychiatric disability insofar as claimant can no longer work around chemicals.

Moreover, the **District of Columbia Circuit** has indicated that the claimant's theory as to how the injury occurred must go beyond "mere fancy." See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982); Wheatley v. Adler, 407 F.2d 307, 313 (D.C. Cir. 1968). Although the Board and the courts have never required the claimant to introduce affirmative medical evidence establishing that the working conditions in fact caused the harm, the claimant must show the existence of working conditions which could conceivably cause the harm alleged.

In Sinclair, the Board also affirmed the judge's conclusion that the employer had failed to rebut the presumption, holding that Section 20(a) places the burden on employer to go forward with substantial countervailing evidence to rebut the presumption that the claimant's injury was caused by her employment. 23 BRBS at 154. See Swinton, 554 F.2d 1075, 4 BRBS 466.

The employer's evidence must sever the potential connection between the disability and the work environment. Hensley v. Washington Metro. Area Transit Auth., 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), cert. denied, 456 U.S. 904 (1982), rev'g 11 BRBS 468 (1979); Webb v. Corson & Gruman, 14 BRBS 444 (1981); but cf. Maher Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), cert. granted sub nom. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

Furthermore, it is well-settled that mere hypothetical probabilities are insufficient to rebut the presumption, Smith v. Sealand Terminal, 14 BRBS 844 (1982), and that the presumption is not rebutted merely by suggesting an alternate way that the claimant's injury might have occurred. Williams v. Chevron, U.S.A., 12 BRBS 95 (1980).

2.2.2 Arising Out Of Employment (See also Topic 20.1 Presumption *infra*.)

Section 2(2) of the LHWCA requires that the claimant's injury arise out of and in the course of employment. 33 U.S.C. § 902(2). As indicated above, the statutory presumption applies to the

issue of whether an injury arises out of and in the course of employment. Travelers Ins. Co. v. Donovan, 221 F.2d 886 (**D.C. Cir.** 1955) (citing O'Leary v. Brown-Pacific Maxon, Inc., 340 U.S. 504 (1951)). This presumption is grounded in the humanitarian purpose of the LHWCA, favoring awards in arguable cases. Leyden v. Capitol Reclamation Corp., 2 BRBS 24 (1975), aff'd mem., 547 F.2d 706 (**D.C. Cir.** 1977).

The "**arising out of employment**" language of the LHWCA refers to the **causal connection** between the claimant's injury and an employment-related risk. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (**9th Cir.** 1966). The Board has held that in order for an injury to be considered "arising out of and in the course of employment," the injury must be shown to have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Wilson v. Washington Metro. Area Transit Auth., 16 BRBS 73 (1984); Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981). See I A. Larson, Workmen's Compensation Law §§ 6.00, 14.00 (1992) (where a claimant's injury occurs on the work premises, the injury occurred within the space boundaries of the claimant's employment).

Whether an injury arises out of one's employment refers to the cause or the source of the injury, Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981), and the necessary causative nexus is established when there is "a causal relationship between the injury and the business in which the employer employs the employee--a connection substantially contributory though it need not be the sole or proximate cause." Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423-24 (1923).

In Twyman v. Colorado Security, 14 BRBS 829, 832-33 (1982), the Board reversed a finding that the claimant's injuries did not arise out of her employment where the injuries occurred during a physical altercation between a receptionist and a male employee, even though the altercation took place at the work site but at least one half hour prior to the claimant's reporting time, and even though she "was not allowed to be in the lobby prior to her reporting time."

The Board held that no evidence was introduced to contradict the claimant's testimony that she had no personal or social contacts with the other employee outside of the employment. Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 13 (**D.C. Cir.**), cert. denied, 310 U.S. 649 (1940) (a finding that an injury occurred in the course of employment strengthens the presumption that the injury also arose out of the employment). See also Vendemia v. Cristaldi, 221 F.2d 103, 105 (**D.C. Cir.** 1955).

In Preskey v. Cargill, Inc., 12 BRBS 917 (1980), the claimant's accident occurred on the employer's premises prior to the beginning of a shift, when he arrived early at the employer's premises solely for his own personal reasons. The judge concluded that the claimant's injury had arisen "out of and in the course of employment" because (1) an accident occurring on the employer's premises prior to the beginning of a shift was effectively indistinguishable from accidents occurring on the premises during the course of the workday, and (2) the claimant's early arrival was to the mutual benefit of the employer and the claimant.

The Board reversed the award of benefits, holding that neither the time of the injury nor the activity engaged in (i.e., picking up his paycheck at the union hiring hall) was within the course of his employment. 12 BRBS at 920. On appeal, however, the **Ninth Circuit** granted the claimant's petition for review and, in a three line memorandum opinion, reversed the Board's decision and remanded the claim "to the Board with instructions to reinstate the decision of the Administrative Law Judge." Preskey v. Cargill, Inc., 667 F.2d 1031, 14 BRBS 340 (**9th Cir.** 1981).

The **D.C. Circuit** had the opportunity to review a factual situation testing the limits of the "arising out of" and "in the course of" language of Section 2(2) in Durrah v. Washington Metropolitan Transit Authority, 760 F.2d 322, 17 BRBS 95 (CRT) (**D.C. Cir.** 1985).

In that case, the Board affirmed the denial of benefits because the claimant, a security guard at the employer's Metrobus depot, had left his guardhouse, without obtaining a replacement, and had purchased a soda from a vending machine that the employer had installed in the employees' lounge on the premises. As the claimant was returning to his post, he slipped on a staircase and sustained a knee injury. Benefits were denied because he did not obtain permission to leave his post and he did not obtain a substitute to cover for him. Durrah v. Washington Metro. Area Transit Auth., 16 BRBS 333 (1984).

The **D.C. Circuit** reversed, however, because the claimant's "fall was securely within the time and space boundaries of his employment." Durrah, 760 F.2d at 324, 17 BRBS at 97 (CRT). The fact that the claimant did not report that he was leaving the guardhouse and obtain a substitute to cover his post for him in his absence did not rebut the statutory presumption in his favor because there was no clear evidence that the claimant was ever made aware that he was forbidden to leave his guardhouse.

Even assuming, *arguendo*, that he knowingly violated the employer's rules, **such violation did not place him in the path of new risks** not inherent in his employment situation, as the lounge and staircase were facilities the employer expected its employees to use and "the fateful staircase here came with the territory," and, most important, "had [claimant] followed the employer's alleged instructions to the letter in obtaining permission to take a mid-shift break at the employees' lounge soda machine, his injury would have occurred in the very same place on [the employer's] premises, at the same time and in the same manner." Durrah, 760 F.2d at 326, 17 BRBS at 97 and 101 (CRT) (emphasis added).

In Compton v. Avondale Industries, Inc., 33 BRBS 174 (1999), although the Board found that the Section 20(a) presumption was applicable to the issue of course of employment, it upheld the ALJ's finding that this claimant was injured because he **left his work area to smoke marijuana and therefore had taken himself out of the course of employment**. The ALJ noted that he had been injured in what was described as an "unauthorized/unsanctioned personal mission which did not benefit his employer." The Board similarly stated that the claimant was acting for personal reasons, was violating the employer's policy regarding the use of drugs and alcohol, was participating in an illegal activity had detoured from his job to a remote area of the ship to smoke

marijuana in a “personal frolic” which served no purpose related to his employment and was sufficient to sever the employment nexus.

[ED. NOTE: See also Topic 1.11.4 Intoxication as the sole cause of injury.]

In Wilson v. Washington Metropolitan Area Transit Authority, 16 BRBS 73 (1984), the Board held that the judge erroneously applied a "**reasonable interval**" rule to deny benefits to a claimant who was injured while performing a work-related errand five hours before he was scheduled to arrive at work. The time of the claimant's performance of the task was irrelevant since it was allowable to perform the task at any time that a supervisor was present. The claimant thus sustained an injury which arose out of and in the course of employment when he fell down a flight of stairs while looking for a supervisor to authorize the purchase of a uniform, even though the injury occurred prior to the time that the claimant was due at the garage where he was employed.

Accordingly, the judge, in these cases, must determine whether an activity's purpose was related to the claimant's employment and whether the injury took place within the time boundaries of employment.

2.2.3 Injury (fact of)

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. § 902(2). The **D.C. Circuit** in Wheatley v. Adler, 407 F.2d 307 (**D.C. Cir.** 1968), interpreting this language, concluded that if **something goes wrong within the human frame**, there has been an injury within the meaning of the LHWCA.

Similarly, Professor Larson, in discussing the concept of a personal injury, notes:

In common speech the word "injury" as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.

1B A. Larson, The Law of Workmen's Compensation § 42.11 (1992), citing Burns' Case, 218 Mass. 8, 105 N.E. 601, 603 (1914).

In order for a claimant to avail himself of the Section 20(a) presumption, he must show that he sustained an injury, i.e., physical harm, and that an accident occurred or working conditions existed that could have caused the harm. See Clophus v. Amoco Prod. Co., 21 BRBS 261, 265 (1988); Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981), decision and order after remand, 17 BRBS 10 (1984), aff'd, 799 F.2d 1308 (**9th Cir.** 1986). Once the claimant establishes these elements

of a *prima facie* case, the Section 20(a) presumption applies to link the harm with the claimant's employment. Lacy v. Four Corners Pipe Line, 17 BRBS 139 (1985).

As defined above, the term "**injury**" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment, or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. § 902(2); U.S. Indus./Fed. Sheet Metal v. Director, OWCP, 455 U.S. 608 (1982), *rev'g* Riley v. U.S. Indus./Fed. Sheet Metal, 627 F.2d 455 (D.C. Cir. 1980).

A work-related **aggravation** of a pre-existing condition is an injury pursuant to Section 2(2) of the LHWCA. Preziosi v. Controlled Indus., 22 BRBS 468 (1989); Januszewicz v. Sun Shipbuilding & Dry Dock Co., 22 BRBS 376 (1989) (Decision and Order on Remand); Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160 (1989); Madrid v. Coast Marine Constr. Co., 22 BRBS 148 (1989); Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). In fact, an aggravation to an initial asbestos-related injury by further exposure to pulmonary irritants can be a new injury. Bath Iron works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (1st Cir. 1999) (Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Indus. N.W., 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

Also, when the claimant sustains an injury at work which is followed by the occurrence of a **subsequent injury or aggravation** outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. Bludworth Shipyard v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mijangos, 19 BRBS 15; Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). The term "injury" includes the aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Care v. Washington Metro. Area Transit Auth., 21 BRBS 248 (1988).

An "**accidental injury**" is "an unlooked-for mishap or untoward event which was not expected or designed;" "something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." Gardner v. Bath Iron Works Corp., 11 BRBS 556, 560 n.1 (1979).

It may be either an unexpected "cause" or "result." Therefore, an "accidental injury" may be said to have occurred, even though the injured employee is engaged in his usual and ordinary employment activity, if something unexpectedly goes wrong with the human frame, as happened in this case (Gardner), or where the worker suffered a heart attack while performing normal job duties. See Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (**5th Cir.** 1954) (deceased who suffered heart attack while performing his normal job duty of loading grain undoubtedly suffered an accidental injury within the meaning of the LHWCA).

2.2.4 Physical Harm as an Injury

It is now well-settled that the claimant need not show that he has a specific illness or disease in order to establish that he has suffered an injury under the LHWCA, but need only establish some physical harm, i.e., that something has gone wrong with the human frame. Crawford v. Director, OWCP, 932 F.2d 152, 24 BRBS 123 (CRT) (**2d Cir.** 1991); Wheatley v. Adler, 407 F.2d 307 (**D.C. Cir.** 1968) (en banc); Southern Stevedoring Corp. v. Henderson, 175 F.2d 863 (**5th Cir.** 1949); Romeike v. Kaiser Shipyards, 22 BRBS 57, 59 (1989) (the existence of pleural plaques, resulting from exposure to asbestos, aided by the statutory presumption, established, as a matter of law, a work-related injury as the employer failed to rebut the presumption); Johnson v. Brady-Hamilton Stevedore Co., 11 BRBS 427 (1979); Brown v. Washington Metro. Area Transit Auth., 9 BRBS 233 (1978); Shoener v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 630 (1978); Cornell v. Beltway Carpet Serv., 8 BRBS 126 (1978); Adkins v. Safeway Stores, 6 BRBS 513 (1977).

A **psychological impairment** can be an injury under the LHWCA if work-related. Director, OWCP v. Potomac Elec. Power Co. (Brannon), 607 F.2d 1378, 10 BRBS 1048 (**D.C. Cir.** 1979) (work injury results in psychological problems, leading to suicide); Butler v. District Parking Management Co., 363 F.2d 682 (**D.C. Cir.** 1966) (employment caused **mental breakdown**); American Nat'l Red Cross v. Hagen, 327 F.2d 559 (**7th Cir.** 1964) (work environment precipitates acute **schizophrenia** reaction); Urban Land Inst. v. Garrell, 346 F. Supp. 699 (**D.D.C.** 1972) (**nervous reaction** precipitated by stressful pressures of job; no one physical or external cause of psychological injury necessary).

See also Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984) (benefits allowed for **depression** due to work-related disability); Whittington v. National Bank, 12 BRBS 439 (1980) (remand to determine whether stress and pressure at work aggravated psychiatric condition); Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979) (although claimant's **anxiety condition** is not an occupational disease, it is compensable as an accidental injury). Moreover, **headaches** resulting from a work-related incident may be compensable under the LHWCA. Spence v. ARA Food Serv., 13 BRBS 635 (1980).

In Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778 (1981), the Board affirmed an award of permanent total disability as a result of the employee's "**functional overlay**" and "**related negative rehabilitation potential**," holding that "a psychological impairment is compensable where

a work-related accident has psychological repercussions." Tezeno, 13 BRBS at 782 (quoting Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936 (**5th Cir.** 1976)); Moss, 10 BRBS 428.

Although a psychological impairment can be compensable, Conatser v. Pittsburgh Testing Laboratory, 9 BRBS 541 (1978), in order for it to be so, it must be disabling in the economic sense. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984); Simerly v. Sea-Land Serv., 9 BRBS 483 (1978). See also Reilly v. Washington Metro. Area Transit Auth., 20 BRBS 8 (1987) (benefits were awarded for a psychiatric injury as a result of **harassment** by his supervisor). A psychological injury resulting from a legitimate personnel action, such as a **reduction-in-force**, is not compensable under the LHWCA, however, because to hold otherwise would unfairly hinder an employer in making legitimate personnel decisions and in conducting its business. Marino v. Navy Exch., 20 BRBS 166, 168 (1988).

In order to **invoke the presumption**, the claimant must prove not only that he has a psychological impairment, **but** that an accident occurred or working conditions existed which could have caused the impairment. Adams v. General Dynamics Corp., 17 BRBS 258 (1985); Kelaita v. Triple A Mach. Shop, 13 BRBS 326 (1981), decision and order after remand, 17 BRBS 10 (1984), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (**9th Cir.** 1986). Compare Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340 (1989) (benefits were denied where claimant's testimony regarding his working conditions was **nonspecific, uncorroborated**, and **contradicted** by his fellow workers, and the medical testimony indicated that claimant's problems [i.e., severe headaches, lethargy, slurred speech and staggering] would have existed regardless of whether he was employed by the employer).

In Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989), the Board, in discussing the parameters of the Section 20(a) presumption, stated that the presumption applies to the issue of whether an injury is causally related to employment and the Board rejected the employer's argument that the presumption does not apply unless the claimant establishes that her psychological condition is caused by a psychiatric reaction to the physical symptoms she suffered while at work, and held that the claimant **need not affirmatively prove causation**. Once the claimant establishes the elements of a *prima facie* case, i.e., the existence of physical harm and working conditions which **could have caused** such harm, the presumption provides the causal nexus.

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Moreover, the **District of Columbia Circuit** has indicated that the claimant's theory as to how the injury occurred must go beyond "mere fancy." See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (**D.C. Cir.** 1982); Wheatley v. Adler, 407 F.2d 307, 313 (**D.C. Cir.** 1968). Although

the Board and the courts have never required a claimant to introduce affirmative medical evidence establishing that the working conditions in fact caused the harm, the claimant must at least show the existence of working conditions which could conceivably cause the harm alleged.

In Sinclair, 23 BRBS at 154, the Board also affirmed the judge's conclusion that the employer had failed to rebut the presumption, holding that Section 20(a) places the burden on employer to go forward with substantial countervailing evidence to rebut the presumption that claimant's injury was caused by her employment. See Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976); but cf. Maier Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), cert. granted sub nom. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 751 (1994).

The employer's evidence must sever the potential connection between the disability and the work environment. Hensley v. Washington Metro. Area Transit Auth., 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), rev'g 11 BRBS 468 (1979), cert. denied, 456 U.S. 904 (1982); Webb v. Corson & Gruman, 14 BRBS 444 (1981). Furthermore, it is well-settled that mere hypothetical probabilities are insufficient to rebut the presumption, Smith v. Sealand Terminal, 14 BRBS 844 (1982), and that the presumption is not rebutted merely by suggesting an alternate way that the claimant's injury might have occurred. Williams v. Chevron U.S.A., 12 BRBS 95 (1980).

The Board has consistently held that **credible complaints of subjective symptoms and pain** can be sufficient to establish the element of physical harm necessary for a *prima facie* case for Section 20(a) invocation. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982). Moreover, the judge may properly rely on the claimant's statements to establish that he experienced a work-related harm, and where it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in the case.

Furthermore, the employer's general contention that the clear weight of the evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. See generally Miffleton v. Briggs Ice Cream Co., 12 BRBS 445 (1980).

It is now well-settled that an injury cannot be found absent some work-related accident, incident, exposure, event, or episode and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. Shoener v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 630 (1978).

In Luna v. General Dynamics Corp., 12 BRBS 511 (1980), the Board affirmed the denial of benefits to a claimant who could not work when his medically prescribed safety glasses broke during the course of his employment. Since nothing "went wrong within the human frame" as a result of the incident in which his glasses were broken, he did not suffer an injury within the meaning of the Act.

In McGuigan v. Washington Metropolitan Area Transit Authority, 10 BRBS 261, 263 (1979), the Board stated this well-settled proposition as follows: "if something unexpectedly goes wrong within the human frame, **even if this occurs in the course of usual and ordinary work**, claimant has sustained an accidental injury under the Act." See Williams v. Chevron U.S.A., 12 BRBS at 97 (benefits were awarded to an employee who felt a "pop" in his back, later diagnosed as a ruptured disc, while carrying a fifty-pound tool box up a flight of stairs on an offshore oil rig).

2.2.5 Multiple Injuries

In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), the Board was faced with the issue as to whether the claimant's disability resulted from a 1985 work accident or a 1987 non-work-related incident while bending over doing yard work. The resolution of this issue was crucial as it affected, *inter alia*, the average weekly wage and the employer's responsibility.

If the current disability is the natural and unavoidable consequence of a work-related injury, then any current disability is related to the first injury and benefits are paid on the basis of the average weekly wage as of the time of the first injury. See, e.g., Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954) (second leg injury at home due to leg instability resulting from the first work-related leg injury); Pakech v. Atlantic & Gulf Stevedores, 12 BRBS 47 (1980) (where claimant's back gave way both at home while rising from a chair and on the job with another employer one year after a work injury, the condition was the result of a natural progression of the work injury).

Occasionally, the Board will frame the employer's burden, in this context, in terms of having to rebut the presumption with substantial countervailing evidence. See Merrill, 25 BRBS at 144, wherein the Board held that:

Section 20(a) of the Act, 33 U.S.C. § 920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See, e.g., Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 U.S. 280 (1935).

If there has been a subsequent non-work-related event, employer can establish rebuttal of the Section 20(a) presumption by

producing substantial evidence that claimant's condition was not caused by the work-related event. See James, supra. Employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, employer is relieved of liability for that portion of disability attributable to the second injury. See, e.g., Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

The medical evidence submitted by the parties should enable the judge to determine whether any disability is the natural and unavoidable result of a prior injury or is due to acceleration, aggravation or exacerbation of a pre-existing condition, in which case the employee has sustained a new and discrete injury.

2.2.6 Aggravation/Combination

If a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

When a claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. See generally Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

Thus, if the disability results from the **natural progression** of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for which the claimant was working when he was first injured; however, if the second injury **aggravates** the claimant's prior injury, thus further disabling claimant, the second injury is the compensable injury, and liability therefor must be assumed by the employer or carrier for whom claimant was working when "**reinjured.**" Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'g 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982). However, it is possible for an aggravation to be considered a new injury. Bath Iron Works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (1st Cir. 1999)(Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

[ED. NOTE: Under certain circumstances, when there is a second injury, the employer/carrier may be entitled to relief for the payment of compensation benefits. See Topic 8.7 "Special Fund Relief,"

in this regard. When the employer/carrier is entitled to this relief, there must have been a timely request filed for this relief. See Topic 2.2.17 "Occupational Diseases and Section 8(f)."]

In Johnson v. Ingalls Shipbuilding, Inc., 22 BRBS 160, 162 (1989), the employee contended that the judge erred by finding that the percentage of compensable permanent impairment suffered by the claimant was 20 percent, rather than 50 percent. The judge based his finding on the opinion of one doctor, who diagnosed the claimant as 50 percent disabled due to chronic obstructive pulmonary disease combined with asbestosis. The doctor assigned 30 percent of the claimant's disability to the claimant's chronic obstructive pulmonary disease, which was unrelated to his employment, and 20 percent to work-related asbestosis.

The judge found, based on this opinion, that the claimant's degree of compensable permanent impairment was 20 percent, representing the percentage of the claimant's disability attributable to asbestosis. In Johnson, the Board concluded:

Under the "**aggravation rule**," where an employment-related injury combines with, or contributes to, a pre-existing impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of the work-related injury and the pre-existing condition are not weighed to determine claimant's entitlement. See, e.g., Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986). In the instant case, Dr. Childs, whose opinion was relied on by the judge in his discussion of the extent of claimant's compensable impairment, determined that both chronic obstructive pulmonary disease and asbestosis contribute to claimant's overall lung impairment. The judge did not discredit either this determination or Dr. Childs' assessment that claimant's breathing difficulties, taken together, result in a 50 percent permanent impairment. Under the aggravation rule, therefore, the employer would be required to compensate claimant for a 50 percent impairment, as claimant contends.

Johnson, 22 BRBS at 162 (emphasis added). See also, Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Delaware River Stevedores, Inc., v. Director, OWCP, ___ F.3d ___ (No 01-1709) (3rd Cir. Jan. 30, 2002). Accordingly, the Board saw no reason to refrain from applying the aggravation rule, and modified the judge's decision to reflect that the claimant was entitled to have his award based on the fifty (50) percent rating expressed by the physician. Johnson, 22 BRBS at 162.

The Board has held that lay evidence is not sufficient to establish an aggravation. Zea v. West State, Inc., (BRB No. 97-931)(Apr. 9, 1998)(Unpublished).

2.2.7 Natural Progression

The **crucial question** is whether the employee's condition is due to the aggravation, acceleration or exacerbation of a pre-existing condition, in which case a new injury has been sustained, or whether the condition is the natural and unavoidable consequence of a previous work-related injury, in which case the employer on the risk as of that injury is responsible for any benefits awarded.

As detailed above, Section 20(a) of the LHWCA provides claimant with a presumption that the disabling condition is causally related to employment, if it is shown that the claimant suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See, e.g., Gencarelle, 22 BRBS 170.

Once the claimant has invoked the presumption, the **burden shifts** to the employer to rebut the presumption with specific and comprehensive medical evidence severing the connection between such harm and the claimant's maritime employment. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the judge must weigh all the evidence and render a decision supported by substantial evidence. See Del Vecchio v. Bowers, 296 U.S. 280 (1935).

When a claimant sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. See generally Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

If the disability results, however, from the natural progression of an injury, and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer or carrier for when the claimant was working when he was first injured. If the second injury aggravates a claimant's prior injury, however, thus further disabling the claimant, the second injury is the compensable injury, and liability therefor must be assumed by the employer or carrier for whom the claimant was working when "reinjured." Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (en banc), aff'd 15 BRBS 386 (1983); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd mem. sub nom. Willamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982).

In Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991), the employee sustained a work-related low back injury on July 30, 1985. He was paid benefits while he was unable to work. He returned to work for approximately fourteen months and was then laid off on February 26, 1987. Six weeks later, while at home, he experienced back pain while bending over doing yard work. The employer paid additional benefits for five weeks but then terminated benefits, contending that the employee's April 10, 1987 accident was an intervening, non-compensable injury.

In Merrill, the Board held that it was undisputed that the claimant suffered a back injury while working in 1985 and that he suffered ongoing back problems; thus, the Section 20(a) presumption is invoked. See generally Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). The Board affirmed the judge's conclusion that the claimant did not sustain a new injury in 1987 and that his lumbar condition (i.e., recurring chronic pain), as the natural and unavoidable consequence of his 1985 injury, is causally related to his employment and, thus, is compensable. Merrill, 25 BRBS at 144-45. See also, Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Delaware River Stevedores, Inc., v. Director, OWCP, ___ F.3d ___ (No 01-1709) (3rd Cir. Jan. 30, 2002).

Where the employee's condition is the natural progression of a work-related injury, any compensation awarded is based on the average weekly wage as of the work-related injury. Merrill, 25 BRBS at 150.

If there has been a **subsequent non-work-related event**, employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that the claimant's condition was not caused by the work-related event. See James, 22 BRBS 271. The employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an **intervening cause**, however, the employer is relieved of liability for that portion of disability attributable to the second injury. See, e.g., Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987). (See Intervening Cause, Topic 2.2.8., infra).

Moreover, an employment injury need not be the sole cause of a disability for compensation liability. See Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Haynes v. Washington Metro. Area Transit Auth., 7 BRBS 891 (1978). Thus, if the disability resulted from the natural progression of an earlier injury and would have occurred notwithstanding the presence of a second incident, then the earlier injury is compensable and the carrier on the risk as of that date is responsible for the benefits due the claimant. Madrid v. Coast Marine Constr. Co., 22 BRBS 148, 153 (1989); Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988); Crawford v. Equitable Shipyards, 11 BRBS 646, 649-50 (1979), aff'd sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf &

Warehouse Co., 211 F.2d 454 (9th Cir. 1954); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979).

2.2.8 Intervening Event/Cause Vis-A-Vis Natural Progression

The **crucial question** is whether any disability is causally related to, and is the natural and unavoidable consequence of, the claimant's work-related accident or whether the subsequent incident constituted an independent and intervening event attributable to the claimant's own intentional conduct, thus breaking the chain of causality between the work-related injury and any disability the employee may be experiencing.

The basic rule of law in "**direct and natural consequences**" cases is stated in 1 A. Larson Workmen's Compensation Law § 13.00 at 3-502 (1992):

When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

Professor Larson writes at Section 13.11:

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

The simplest application of this principle is the rule that all the medical consequences and sequella that flow from the primary injury are compensable ... The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications.

Id. at 3-517.

This rule is succinctly stated in Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury." See also Bludworth Shipyard v. Lira, 700 F.2d 1046 (5th Cir. 1983); Mississippi Coast Marine v. Bosarge, 637 F.2d 994, modified and reh'g denied, 657 F.2d 665 (5th Cir. 1981); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981).

The area of inquiry is whether the factual pattern presents the judge with a situation in which the initial medical condition itself **progresses** into complications more serious than the original

injury, thus rendering the added complications compensable. See Andras v. Donovan, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable, as long as the worsening is not shown to have been produced by an independent or non-industrial cause. Hayward v. Parsons Hospital, 32 A.D.2d 983, 301 N.Y.S.2d 659 (N.Y. 1969).

Moreover, the subsequent disability is compensable, even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

A different question is presented, however, when the **triggering activity is itself rash** in the light of the claimant's knowledge of his physical condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. Matherly v. State Accident Ins. Fund, 28 Or. App. 691, 560 P.2d 682 (Or. Ct. App. 1977).

The consequences are compensable when a weakened body member contributed to a later fall or other injury. See Leonard v. Arnold, 218 Va. 210, 237 S.E.2d 97 (Va. 1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of intentional or rash action on the part of the claimant. J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967); Carabetta v. Industrial Comm'n, 12 Ariz. App. 239, 469 P.2d 473 (Ariz. Ct. App. 1970). The subsequent consequences are not compensable, however, when the claimant's conduct or intentional act broke the chain of causation. Sullivan v. B & A Constr., 122 N.Y.S.2d 571, 120 N.E.2d 694 (N.Y. 1954). If a claimant, knowing of certain weaknesses, intentionally undertakes activities likely to produce harmful results, the chain of causation is broken by his own actions. Johnnie's Produce Co. v. Benedict & Jordan, 120 So.2d 12 (Fla. 1960).

Thus, a subsequent incident on the way to the doctor's office for treatment of the original work-related accident is compensable. Laines v. WCAB, 40 Cal. Comp. Cases 365, 48 Cal. App.3d 872 (Cal. Ct. App. 1975); Fitzgibbons v. Clarke, 205 Minn. 235, 285 N.W. 528 (Minn. 1939). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. See Kearney v. Shattuck, 12 A.D.2d 678, 207 N.Y.S.2d 722 (N.Y. 1960).

The Board, however, reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house while attempting to repair his television antenna after his injured knee collapsed under him. Eighteen months earlier, claimant had injured his right knee in a work-related accident and received benefits for his temporary total disability and a rating of fifteen percent permanent partial disability of the leg. However, the Board reversed the award for additional compensation resulting from the second injury. Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979). The Board held, "[U]nder Section 2(2) of the Act, the second injury to be

compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, the administrative law judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Id. at 652.

Furthermore, the Board held, "[claimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation," i.e., whether that person has taken reasonable precautions to guard himself against re-injury. Id.; see also Wright v. Connolly-Pacific Co., 25 BRBS 161, 165-67 (1991) (where the employee had recovered from his work-related injury and had returned to work and then, within a two-year period, had been involved in two automobile accidents, including one altercation with a police officer, thereby worsening his cervical pain, benefits were denied due to the intervening causes).

In Willis v. Titan Contractors, 20 BRBS 11 (1987), it was undisputed that the claimant's injury occurred during work hours while he was boarding the employer's crew boat from a barge moored in the ship channel, thereby occurring within the time and space boundaries of his employment. The critical issue, however, was whether the claimant's injury occurred **in the course** of an activity whose purpose was related to his employment.

In Willis, there was no indication that the judge considered the Section 20(a) presumption in determining whether the claimant's injury occurred in the course of his employment. The judge, however, did credit the testimony that the claimant was neither authorized nor employed to use the crew boat for work, had no work duties associated with the crew boat or the barge, and was employed solely to operate heavy equipment on the mainland. This testimony, however, was found to be insufficient to sever the connection between the claimant's injury and his employment. See Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593 (1981).

The testimony indicates only that the claimant was not authorized by the employer to use the crew boat, but does not establish that the claimant was engaged in personal business at the time of his injury. The fact that an activity is not authorized is not sufficient alone to remove an injury from the course of employment. See Durrah v. Washington Metro. Area Transit Auth., 760 F.2d 322, 17 BRBS 95 (CRT) (D.C. Cir. 1985), rev'g 16 BRBS 333 (1984); Mulvaney, 14 BRBS 593. Pursuant to Section 20(a), the employer bears the burden of proving that the activity was unrelated to the employment. Since there was no evidence of record directly controverting the presumption, the Board reversed the judge's finding that the claimant's injury did not occur in the course of his employment. Willis, 20 BRBS 11.

Generally, an employee's activities on the business premises are covered for compensation purposes. Durrah, 760 F.2d 322, 17 BRBS 95 (CRT). The claimant's participation, however, in an unsanctioned activity at the time of her injury (i.e., she fell from the back of a friend's truck parked in the employer's parking lot as the group was planning to go to dinner to celebrate claimant's transfer

to another store) may sever the link between the activity and her employment. Alston v. Safeway Stores, 19 BRBS 86, 87 (1986).

Moreover, benefits were properly denied in Oliver v. Murry's Steaks, 21 BRBS 348 (1988), where the claimant was on his usual route home from work when the accident occurred and where he had severed the employment nexus by embarking on a personal mission when he stopped at a bar to have several drinks prior to his accident. See also Oliver v. Murry's Steaks, 17 BRBS 105 (1985) (wherein the Board remanded the claim to the ALJ for a determination as to whether claimant had embarked on a personal mission and had been injured solely as a result of his intoxication).

2.2.9 Course of Employment

"Course of employment" refers to the time and place of the injury, as well as the activity in which the claimant was engaged when the injury occurred. Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593, 595 (1981) (as the claimant was injured on the work premises during working hours, the injury occurred within the time and space boundaries of the employment--the focal issue is whether the injury was within the course of an activity whose purpose is related to claimant's employment).

In Boyd v. Ceres Terminals, 30 BRBS 218 (1997), the Board held that the employee's action would be considered to be "within the scope of employment" if it was of some benefit to the employer. The claimant was a forklift driver who took time following his break to try and help a fellow employee start his car. During the process the claimant received second and third degree burns over 15 percent of his body when the gas used to prime the carburetor exploded. The Board upheld the judge's finding that the activity was within the course and scope of the claimant's employment as he was benefitting the employer through maintaining employee relations. 30 BRBS 218, 219 (1997). This is a very liberal reading of the degree of benefit that the employer need receive for the actions of the employee to be covered.

The Board declined the invitation to apply the "recreational and social activities" test found in Section 22.00 of Larson's treatise, preferring to apply the test in Section 27.00 relating to acts outside the employee's regular duties. The Board held:

"that unless those acts are positively prohibited, whether or not they are the employee's own assigned work, they are considered within the course of employment. However, '[i]f the aid takes the form of merely helping the co-employee with some matter entirely personal to the co-employee, it is outside the course of employment, unless the deviation involved is insubstantial.'"

Boyd v. Ceres Terminals, 30 BRBS 218, 220 (1997), citing 1A Larson, The Law of Workmen's Compensation, §27.00 (1996). Applying this test as a supplement to the finding that the actions had an indirect benefit to the employer, the Board found that the injury was still within the course of employment. Though the act of pouring the gasoline may have been personal, the deviation from his employment would have been minimal but for the explosion. The car was directly between the break

area and the forklift and the process should not have taken more than a few seconds, thus the Board found that the deviation was extremely minimal.

In Shivers v. Navy Exchange, 144 F.3d 322 (4th Cir. 1998), a **parking lot** maintained by the employer for its employees was considered part of the employer's premises for purposes of the LHWCA's "course of employment" requirement. Although the Navy Exchange did not actually own the parking lot property, it did direct its employees to park there and had an active hand in controlling the lot. The Navy Exchange exercised significant control over where its employees parked. Therefore, the lot bore a significant connection to the Navy Exchange's workplace such that the parking lot should be considered part of its premises for purposes of recovery under the LHWCA.

In Sheerer v. Bath Iron Works Corp., 35 BRBS 45 (2001), the ALJ found that a worker injured on company property while playing ping pong on his break was covered under the LHWCA as being within the course and scope of his employment. The ALJ noted that the employer paid for and provided the ping pong table and equipment and thereby acquiesced in the activity. Since the claimant worked the third shift and took his break in the very early morning hours, he could not go anywhere off-premises for his breaks since nothing was opened. In upholding the ALJ, the Board cited approvingly to Larson's Workers' Compensation Law (2000). At Section 20.00, Larson's states:

The Act does not expressly say that the employee must at the time of injury have been benefitting the employer; it merely says that the injury must have arisen in the course of employment. If it can be shown that the particular activity, beneficial or not, was a part of the employment, either because of its general nature, e.g., activities falling within the personal comfort doctrine, or because of the particular customs and practices at the individual worksite, e.g., certain recreational and social activities, the statute is satisfied...This is, in essence, the general test applied by the Board in Boyd v. Ceres Terminals, 30 BRBS 218 (1997)...

2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law Section 20.00 (2000).

[ED. Note: *For a comprehensive treatment of the concept of "arising out of and within the course of employment," see Bober, Compensable Injury or Death Arising Under the Longshore and Harbor Worker's Compensation Act, 35 Loy. L. Rev. 1129 (1990).]*

2.2.10 Employee's Intentional Conduct/Willful Act of 3rd Person

If the subsequent injury is a result of the employee's intentional conduct or negligent non-work-related conduct or a third party's intentional or negligent conduct, such conduct can be an intervening cause relieving employer of liability. Cyr, 211 F.2d at 457; Marsala v. Triple A South, 14 BRBS 39, 43 (1981) (issue is whether subsequent fall from a bus was caused by third-party negligence).

In Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983), rev'g 14 BRBS 682 (1982), the **Fifth Circuit** held that where a prior drug addict who injured his back at work intentionally failed to inform treating physicians of his prior addiction, and this resulted in treatment with drugs leading to re-addiction, the employer was not liable for medical expenses incurred as a result of the **re-addiction**. The employee's intentional failure to inform constituted an intervening and independent cause which nullified the connection between the back injury and the subsequent re-addiction. Lira, 700 F.2d at 1051-52, 15 BRBS at 123-24 (CRT).

In Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979), benefits were denied for a second leg injury at home (claimant fell off roof while repairing antenna) where claimant failed to take reasonable precautions to guard himself against re-injury after the initial work-related leg injury.

The employer's liability depends on whether the subsequent injury resulted naturally or unavoidably from the work injury or whether there was some intervening cause of the subsequent injury. Thus, the subsequent injury must have a sufficient causal connection to the primary injury so that the employer should be held liable for disability arising from both injuries. Where the subsequent injury outside work, however, is caused by the negligent or intentional conduct of a third party, even under circumstances where the claimant's work-related weakened condition contributes in a causal sense to the subsequent injury, it is not compensable. The subsequent injury is not the natural result of the primary injury and the employer is not responsible as the employer had no control over the negligent or intentional conduct of the third party and this conduct had no relationship to the primary injury or to the claimant's employment.

The fundamental intent of the LHWCA is to compensate employees for the loss of wage-earning capacity attributable to an employment-related injury, but no more. Thus, the focus of the inquiry in these cases is whether the claimant has taken reasonable precautions in his injured or weakened condition to guard himself against re-injury. Marsala v. Triple A South, 14 BRBS 39, 43 (1981).

In Lasky v. Todd Shipyards Corp., 8 BRBS 263, 265-66 (1978), benefits were denied to a shipyard worker who was assaulted as he walked on his way **to begin his work day** through a public park located **across** the street from the shipyard entrance since (1) injuries sustained on the way to work generally are not compensable, and (2) the employer did not control the worker's route to work. (See "Coming and Going Rule," infra at 2.2.11.)

Benefits were payable, however, in Kielczewski v. Washington Post Co., 8 BRBS 428, 431 (1978), to a claimant who had a fight with another employee as the fight occurred on the employer's premises, but shortly after the end of the claimant's daily work when he "remained on the employer's premises at his own convenience" to discuss with his foreman certain employment matters. The Board, in reversing denial of benefits, held that the fight occurred in the course of claimant's employment within the meaning of Section 2(2) of the LHWCA.

It is now well-settled that the concept of "arising out of and within the course of employment" is not limited by the common law doctrine of scope of employment. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 481 (1947). It is not necessary that the particular act or event which causes the injury be itself a part of work done by the claimant for his employer. Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 14, 15 (D.C. Cir.), cert. denied, 310 U.S. 649 (1940). For example, going to lunch, going to the restroom or to the tool shed are considered by the Board to be incidental and routinely part of activities covered by the LHWCA. O'Leary v. Southeast Stevedore Co., 1 BRBS 498, 501 (1975).

The standard has been established that an employee must go so far from his employment and become so thoroughly disconnected from the service of the employer that it would be entirely unreasonable to say that injuries suffered by the employee arose out of the course of employment. O'Leary v. Brown-Pacific Maxon, 340 U.S. 504, 507 (1951). A judge's conclusion that claimant had remained on the employer's premises after the normal finish of the shift is not sufficient factual justification in itself to support a denial. More factors than leaving one's job situs for a short few minutes for combined personal/business reasons must be involved to render the claimant's activities so thoroughly disconnected from the employer's business that it is entirely unreasonable to grant him compensation, according to the Board in Kielczewski, 8 BRBS at 430-31.

The **Fourth Circuit** has held that Section 3(c) does not apply where the employee disregards his own safety by working and not taking his medication (in this case, to prevent grand mal seizures). This activity fell short of a willful intent to injure or kill. Carolina Stevedoring Co. v. Davis, 191 F.3d 447 (4th Cir. 1999).

Even if an injury can be considered to have arisen out of and in the course of employment under these broad parameters, however, it is **not compensable if the injury was occasioned solely** by the intoxication of the employee or by the **willful intention** of the employee **to injure** or kill himself or **another**. (See **Other Exclusions**, Topic 3.2, *infra*.)

2.2.11 Coming and Going Rule

Under the "Coming and Going" rule, an injury incurred while traveling to and from work **generally** is not compensable as traveling to and from work is not within the scope of employment. See, e.g., Sawyer v. Tideland Welding Serv., 16 BRBS 344 (1984). There are several **exceptions** to this rule, however, one of which is the **trip-payment exception**, which applies where the employer furnishes or pays for transportation to and from work. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947); Foster v. Massey, 407 F.2d 343 (D.C. Cir. 1968); Oliver v. Murry's Steaks, 17 BRBS 105 (1985). See also Oliver v. Murry's Steaks, 21 BRBS 348 (1988).

This exception to the so-called "Coming and Going" Rule has been recognized, in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." See Cardillo, 330 U.S. at 479. These exceptions include situations where: (1) the employer pays for the employee's travel expenses, or furnishes the transportation; (2) the employer controls the journey; (3) the

employee is on a special errand for the employer; or (4) the employee is subject to emergency calls. See generally Cardillo, 330 U.S. at 480. See also Perkins v. Marine Terminals Corp., 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982), rev'g 12 BRBS 219 (1980).

The Board has indicated that something more than the mere provision of transportation is necessary to qualify an employee for the trip-payment exception. Oliver, 17 BRBS at 107 n.2. This requirement is consistent with the **United States Supreme Court's** acknowledgment that there are many holdings which recognize that where an employer merely pays the cost of transportation, an injury occurring during the journey does not necessarily arise out of and in the course of employment; there must be something **more than mere payment of transportation costs**. Cardillo, 330 U.S. 469.

In Cardillo, the **Court** held that the employer's contractual obligation to provide transportation qualified for the exception. Similarly, in Oliver, although a contractual obligation did not exist, the Board noted that since the claimant was in an on-call status and needed the van provided by the employer to carry tools and equipment, his travel in the van served a special business need of the employer warranting application of the trip-payment exception. See also I A. Larson Workmen's Compensation Law § 16.30, at 4-208.62 n.52 (1992) (the extra pay involved merely amounted to additional compensation rather than a **special arrangement** for travel expenses); Filson v. Bell Tel. Laboratories, 82 N.J. Super. 185, 197 A.2d 196 (N.J. Super. Ct. App. Div. 1964).

In what the Board has referred to as “an issue of first impression under the Longshore Act,” in Broderick v. Electric Boat Corp., 35 BRBS 33 (2001), it upheld the ALJ's finding that a van pool operation was within the employer's conveyance exception to the comings and goings rule. Here the claimant was injured on his way home from work while utilizing the employer's van pool. The not-for-profit venture was started during the energy crisis to alleviate parking congestion at the employer's facility, and to aid those employees without reliable transportation to the shipyard. The employer owned or leased the vans, maintained them and provided insurance and special parking spots for the vans at its facility. Those employees who participated in the program have a set amount deducted from their paychecks to cover the salaries of those who administer the program and the costs of maintaining the vans. Maintenance occurred during the work day. The employer monitored its costs associated with the van and adjusted the employees' weekly fees in order to maintain the self-sufficiency of the program.

The riders separately reimbursed the driver for gasoline costs. The driver was not paid to drive the van, but did not have to pay any fees. The drivers, who were employees of the shipyard, had to pass the employer's screening and physical examinations necessary for a commercial driver's license. The rules governing the van pool were drafted by the employer's legal department, and the employer referred prospective riders to drivers with openings. Specific vans were assigned to specific routes, but the exact route to be traveled was arranged between the driver and the passengers. Employees were not paid while they were commuting to and from work in the van pools. In upholding the ALJ, the Board found that the ALJ's conclusion that the employer exerted sufficient control over the van operation takes the operation into the employer's conveyance exception. Additionally the Board noted that the van pool program actually benefitted the employer.

In Smith v. Fruin-Colnon, 18 BRBS 216 (1986), the employee sought benefits for an injury occurring while he was driving the employer's truck from the work site to his residence. The Board affirmed denial of benefits as the injury did not arise out of and in the course of his employment. The employer, in allowing the claimant to use a company truck, merely provided transportation; there was no contractual obligation or other agreement requiring the employer to provide the claimant with a truck, and no special business purpose was served by the employer's permitting the claimant to use it. Furthermore, the claimant was not an "on-call" employee. The Board also discounted evidence that the employer paid all of the truck's expenses, including repairs, after the employee was involved in an accident while driving the vehicle. Smith, 18 BRBS at 217-18.

In Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch, 23 BRBS 175 (1990), benefits were denied where the claimant was injured after work on her way to her car in the parking lot, which lot was not part of the employer's premises, because such injury occurred outside the time and space boundaries of her employment. The Board held that none of the exceptions to the "Coming and Going" Rule were applicable. The Board has consistently held that for an injury to be considered to arise in the course of employment, it must have occurred within the **time and space boundaries** of the employment and in the course of an activity whose purpose is related to the employment. See, e.g., Wilson v. Washington Metro. Area Transit Auth., 16 BRBS 73, 75 (1984); Mulvaney v. Bethlehem Steel Corp., 14 BRBS 593, 595 (1981).

In Harris, 23 BRBS 175, the Board noted that although the claimant was injured in a parking lot on the air base, the parking lot was not a part of the employer's premises, was a separate entity operated by non-appropriated funds, and the employer **lacked any control** over or responsibility for, the condition of the area surrounding the building it occupied, including the parking lot where the injury occurred. 23 BRBS at 178.

But see Shivers v. Navy Exchange, 144 F.3d 322 (4th Cir. 1998), where a **parking lot** maintained by the employer for its employees was considered part of the employer's premises for purposes of the LHWCA's "course of employment" requirement. Although the Navy Exchange did not actually own the parking lot property, it did direct its employees to park there and had an active hand in controlling the lot. The Navy Exchange exercised **significant control** over where its employees parked. Therefore, the lot bore a significant connection to the Navy Exchange's workplace such that the parking lot should be considered part of its premises for purposes of recovery under the LHWCA.

Thus, the Board distinguished those cases which allow a reasonable amount of time to enter and exit the employer's premises. See, e.g., Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928). Compare Cantrell v. Base Restaurant, Wright-Patterson Air Force Base, 22 BRBS 372 (1989), where benefits were denied a claimant who was injured when she fell while on base property **prior** to arriving at work because her injury did not occur in the course of her employment, as it occurred **prior** to her arrival on employer's premises and none of the exceptions to the "Coming and Going" Rule applied.

2.2.12 Zone of Special Danger (See infra, Defense Base Act, Topic 60.2.)

In order to establish entitlement to benefits under the Defense Base Act (DBA), the claimant must prove that the "obligations or conditions" of employment created a "Zone of Special Danger" out of which injury/death arose. O'Keeffe v. Smith, Hinchman & Grylls Assocs., 380 U.S. 359 (1965); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Gillespie v. General Elec. Co., 21 BRBS 56 (1988).

In two cases arising under the DBA, 42 U.S.C. § 1651 et seq., the **United States Supreme Court** allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "Zone of Special Danger." In O'Leary, 340 U.S. 504, the employee, while spending the afternoon in the employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The **Court** stated that "(a)ll that is required is that the obligations or conditions of employment create the Zone of Special Danger out of which the injury arose." 340 U.S. at 507.

In O'Keeffe, the employee drowned in a lake in South Korea during a weekend outing away from the job; the **Court** noted that the employee had to work "under the exacting and dangerous conditions of Korea." 380 U.S. at 364. See also Ford Aerospace & Communications Corp. v. Boling, 684 F.2d 640 (9th Cir. 1982) (heart attack while off duty in barracks provided by employer in Thule, Greenland, is covered under the "Zone of Special Danger" test).

In a case reversed by the **Ninth Circuit** without opinion, the Board held that the "Zone of Special Danger" doctrine only applies to the peculiar risks arising in foreign settings under the DBA. Preskey v. Cargill, Inc., 12 BRBS 917 (1980), rev'd mem., 667 F.2d 1031, 14 BRBS 340 (9th Cir. 1981). The **District of Columbia Circuit** has, however, applied this doctrine in **non-Defense Base Act cases**. Durrah v. Washington Metro. Area Transit Auth., 760 F.2d 322, 17 BRBS 95 (CRT) (D.C. Cir. 1985), rev'g 16 BRBS 333 (1984); Director, OWCP v. Brandt Airflex Corp., 645 F.2d 1053, 13 BRBS 133 (D.C. Cir. 1981) (where the employee sustained a heart attack while walking up nine flights of stairs to get to work because his assignment was on the ninth floor and the elevators were not operating, general coming and going rule not applicable because the stairway constitutes a "Zone of Special Danger").

In Kirkland v. Air America, Inc., 23 BRBS 348, 350-51 (1990), the Board affirmed the denial of death benefits to the claimant, widow of the deceased employee who worked in Laos as an administrative assistant to the employer's Director of Operations and who was murdered during the burglary of their home in Vietnam, approximately eleven months after the claimant and decedent had met and married in Vietnam. Benefits were denied the claimant, although the decedent was within the "Zone of Special Danger," because (1) she participated in the murder of her husband, and (2) any causal relationship which may have existed between the conditions created by his job and his death were effectively severed by the burglary and murder.

In Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch, 23 BRBS 175, 179 (1990), the Board held that the "Zone of Special Danger" doctrine is limited to claims filed under the DBA and under the District of Columbia Workmen's Compensation Act (DCWCA). The Board stated that "this test was formulated in cases arising under the Defense Base Act and is well-suited to those cases since the conditions of the employment place the employee in a foreign setting where he is exposed to dangerous conditions." In those cases the employer can be said to create a "Zone of Special Danger" by employing the employee in a foreign country.

In Harris, benefits were denied as the claim was brought under the Nonappropriated Funds Instrumentalities Act (NFIA). Accord Cantrell v. Base Restaurant, Wright-Patterson Air Force Base, 22 BRBS 372 (1989). See generally Forlong v. American Sec. & Trust Co., 21 BRBS 155, 162 (1988) (claimant fell down a flight of stairs in Lima, Peru, while staying at the home of a relative; claim was allowed).

Benefits were denied, however, to a bartender, filing a claim under the DCWCA, who ran across the street with a waiter from a bar to assist a patron in a fight with previously-ejected people from the bar, the Board agreeing that the bartender "was thoroughly disconnected from employer's service when he was injured" as he was no longer within the scope of his employment duties of protecting property and patrons of the bar and as he was acting voluntarily on behalf of the patron, not the employer. McNamara v. Mac's Pipe & Drum, 21 BRBS 111, 114 (1988). The Board, after re-stating the "Zone of Special Danger doctrine," held as follows:

The United States Court of Appeals for the **District of Columbia Circuit**, relying upon O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), has stated that it is not necessary that the employee be engaged at the time of injury in activity of benefit to his employer. All that is required is that the obligations or conditions of employment create the Zone of Special Danger out of which the injury arose. See Durrah, supra. As the administrative law judge stated, the **Supreme Court** stated in O'Leary:

This is not to say that there are not cases 'where an employee . . . might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment. 340 U.S. at 507.

McNamara, 21 BRBS 111. Accord Gillespie v. General Elec. Co., 21 BRBS 56 (1988).

Benefits were awarded, however, to the widow of an employee in Nepal who suffered a fatal heart attack after he had played a round of golf and had experienced a coincidental gastrointestinal attack as a result of unsanitary living conditions there. According to the Board, "it matters little that

the rupture (of the abdominal aortic aneurysm) came as a result of a round of golf or a coincidental gastrointestinal attack." The Board cited the following language from O'Leary, 340 U.S. 504: "all that is required is that the 'obligations or conditions' of employment create 'the Zone of Special Danger' out of which the injury arose." Smith v. Board of Trustees, S. Ill. Univ., 8 BRBS 197, 199 (1978).

[ED. NOTE: There is no compensable injury that covers American civilians being laid off in foreign countries due to nationalization of jobs. The claimants are still able to perform their jobs just not in that locale. Najjar v. Vinnell Corp., BRB No. 96-0906 (Apr. 15, 1997) (unpublished) (Defense Base case - civilian working as a personal specialist was released due to a program of Saudization).]

2.2.13 Occupational Diseases: General Concepts

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955); Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232 (1986); Geisler v. Columbia Asbestos, 14 BRBS 794 (1981). Nor does the LHWCA require that the injury be traceable to a definite time. The fact that the claimant's injury occurred gradually over a period of time, as a result of continuing exposure to conditions of employment, is no bar to a finding of an injury within the meaning of the LHWCA. Bath Iron Works Corp. v. White, 584 F.2d 569 (**1st Cir.** 1978).

The concept of "no injury until manifestation" carries over to the issue of situs as well. The expanded situs requirement (after the 1972 Amendments) applies to employees and their survivors, even though the employee was exposed to the hazardous stimuli before the effective date of the Amendments, in an area that was not a covered situs before the 1972 Amendments. Insurance Co. of North America v. U.S. Dep't of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (**2d Cir.** 1992), cert. denied, 507 U.S. 909 (1993) (Date of manifestation of occupational disease with long latency period, rather than date of last exposure, determines whether LHWCA as amended, applies to employee or survivor seeking benefits.).

However, it is possible for an aggravation of an occupational injury to be considered a new injury. Bath Iron Works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (**1st Cir.** 1999) (Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury). In Jones, while the claimant continued to work at the same shipyard during the entire period in question, there were two separate periods of exposure with the claimant having been employed in at least three different positions (Positions one and three exposed him to asbestos.) With at least two different carriers.

In Gencarelle v. General Dynamics Corp., 22 BRBS 170, 173 (1989), the Board was presented with the issue of whether chronic synovitis of the knees is an occupational disease. Board case law has applied the occupational disease provisions of the LHWCA to work-related injuries that are potential hazards to the entire class of longshore employees in similar employment; thus, occupational disease claims generally have involved pulmonary conditions such as asbestosis and bronchial asthma, as well as hearing loss claims, all of which conditions result from work exposure to environmental hazards common to all employees in similar positions of employment. See, e.g., Barlow v. Western Asbestos Co., 20 BRBS 179 (1988); Horton v. General Dynamics Corp., 20 BRBS 99 (1987); Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232 (1986); Cox v. Brady-Hamilton Stevedore Co., 18 BRBS 10 (1985).

As discussed at length above, Section 2(2) of the LHWCA defines injury as including "accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. § 902(2). Professor Larson states that there are **two crucial characteristics of an occupational disease**:

- 1) an inherent hazard from continued exposure to conditions of a particular employment, and
- 2) gradual, rather than sudden, onset.

1B Larson, Workman's Compensation Law § 41.31 (1992). An occupational disease is in contrast to an accidental injury, which is generally unexpected and has a sudden onset.

[ED. NOTE: While hearing loss is technically classified as an "occupational disease," it is not the type of occupational disease that is commonly contemplated by the LHWCA, jurisprudence or workers compensation law commentators such as Larson, and should be treated similarly to traumatic injuries. Examples of what the jurisprudence contemplates as "true" occupational diseases are the asbestos related illnesses. (I.e., mesothelioma, asbestosis.) In distinguishing true occupational diseases from traumatic type injuries, the LHWCA itself references a true occupational disease as "an occupational disease which does not immediately result in a disability or death." See Section 12(a) and 13(b)(1). In Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), a unanimous Supreme Court followed the First Circuit and held that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA, ["the Schedule" for some traumatic injuries] not Section 8(c)(23) [the occupational disease retiree section]. Noting that hearing loss occurs simultaneously with the exposure to excessive noise, the Court found that hearing loss is not an occupational disease "which does not immediately result in ... disability," and therefore is not to be treated the same as, for example, asbestosis, where it takes years for the symptoms to manifest after the injurious exposure. This concept of a true occupational disease as requiring a gradual, rather than sudden, onset, is in line with most commentators. See, e.g., 1B A. Larson, Workman's Compensation Law § 41.31 (1992).]

Claimant's treating physician in Gencarelle, 22 BRBS 170, defined **chronic synovitis** as the reaction of the knee joint to debris cast off by a degenerating arthritic knee. There was no evidence of record that the claimant's employment caused his pre-existing arthritic condition. The pre-existing condition was unique to claimant, and there was no evidence that synovitis is an inherent hazard to those in employment similar to claimant. Thus, the first characteristic of an occupational disease as suggested by Professor Larson was not satisfied in Gencarelle. In addition, there was no evidence that synovitis naturally arose out of the claimant's employment. See 33 U.S.C. § 902(2).

In Gencarelle, the Board also noted that an injury may occur over a gradual period of employment and still be construed as accidental. See Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986); Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (**1st Cir.** 1981). The Board rejected claimant's contention that he is entitled to the two-year statute of limitations for occupational diseases and affirmed the judge's application of the one year statute of limitations of Section 13. Gencarelle, 22 BRBS at 173.

The Board's decision was affirmed in Gencarelle v. General Dynamics Corp., 892 F.2d 173, 23 BRBS 13 (CRT) (**2d Cir.** 1989), wherein the court held that the claimant's activities of repeated bending, stooping, and climbing were not "peculiar to" his employment as a maintenance worker but were common to many occupations and to life in general. These activities "are not the repetitive biomechanical stresses that lead to occupational diseases." In Gencarelle, the court discussed the parameters of occupational diseases and stated that "[a] panoply of definitions have sprouted from state courts and legislatures for state workers' compensation programs." Id. at 176, 23 BRBS at 18. See generally 1B Larson, The Law of Workmen's Compensation §§ 41.00-41.32, at 7-353--73 (1992).

The generally accepted **definition of an occupational disease** is:

any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally.

Larson, supra, § 41.00, at 7-353.

The **Second Circuit** then summarized the concept of occupational diseases as follows:

From this definition emerge at least **three elements that must be satisfied** before finding that an employee has an occupational disease. First, the employee must suffer from a "**disease**." The term "disease" has been expansively interpreted to include any "serious derangement of health" or "disordered state of an organism or organ." Larson, supra, § 41.42, at 7-408 (citation omitted)...

Second, "**hazardous conditions**" of employment must be the cause of the disease. Traditionally, these hazardous conditions have been of

an external, environmental nature such as asbestos, coal dust, or radiation...

The third element of an occupational disease is that the hazardous conditions must be "**peculiar to**" **one's employment** as opposed to other employment generally. Speaking for this court, Judge Learned Hand concluded:

It is indeed necessary not to extend the statute [LHWCA] so as to make it a general health insurance, and to avoid this, the coverage [for occupational disease] must be limited to diseases resulting from working conditions peculiar to the calling. In order to recover a workman must be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these.

Grain Handling Co. v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939) (citations omitted), cert. denied, 308 U.S. 570 (1939); see also Director, Office of Workers Compensation Programs v. General Dynamics Corp., 769 F.2d 66, 68 (2d Cir. 1985) (finding no evidence that claimant's disease resulted from 'a hazard peculiar to' his work).

The relevant comparison is between the hazardous conditions at the claimant's workplace and the corresponding conditions - or background risks - of employment generally. See Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 319, 12 N.E. 2d 311, 313 (N.Y. 1938) ("disease" on legs of theater ticket seller not hazard of her employment). The hazardous activity need not be exclusive to one's employment; it need only be sufficiently distinct from hazardous conditions associated with other types of employment. See Underwood, 329 Mich. at 276, 45 N.W. 2d at 287.

Gencarelle, 892 F.2d at 176-77, 23 BRBS at 18-20 (CRT) (emphasis added).

As noted above, the Board has held that an injury may occur over a gradual period of employment and still be construed as accidental. See generally Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986). In Pittman, the Board affirmed an award of benefits where the claimant's work as a tugboat steel fitter aggravated, accelerated and exacerbated his **hemorrhoids** resulting in surgery and a work absence of two months, the Board holding that the claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment, i.e., the constant lifting and straining required by his work, and that the employer failed to rebut the Section 20(a)

presumption by producing substantial evidence that claimant's hemorrhoids were not aggravated by his employment.

In Pittman, the employer had argued that an accidental injury within Section 2(2) is one which occurs suddenly or unexpectedly, and not over a long period of time. The Board had previously rejected similar arguments, holding that the LHWCA cannot be construed so as to limit compensable injuries to those which occur suddenly, as opposed to those which occur over a long period of time. Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). That the claimant's injury occurred gradually over a period of time, as a result of continuing exposure to conditions of employment, is no bar to a finding of an injury under Section 2(e). Pittman, 18 BRBS at 214.

2.2.14 Occupational Disease & Disability

In Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243 (1991), compensation benefits were not awarded because the record contained no permanent impairment rating on which an award could be based. The claimant, however, would be entitled to an award of medical benefits for his work-related silicosis. See also Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

2.2.15 Occupational Disease vs. Traumatic Injury

The **Ninth Circuit** held that where a claimant's injury, although due to a traumatic episode, was not evident until a few years later, the term "injury" under the LHWCA meant injury as of the time when the disability attributable to the injury became manifest and benefits to the claimant are based on the average weekly wage as of the time the claimant became disabled by her injury. Johnson v. Director, OWCP, 911 F.2d 247, 24 BRBS 3 (CRT) (9th Cir. 1990), cert. denied, 499 U.S. 959 (1991).

In Carlisle v. Bunge Corp., 33 BRBS 133 (1999), claimant worked as a river operator, operating joysticks for usually three to four hours per day, but sometimes would work as much as eight hours a day for several weeks at a time. Claimant's other job duties included carrying heavy loads, pulling cables through loaded barges, climbing ladders, lifting barge doors and scooping beans with a shovel. The ALJ held that the claimant had suffered an occupational disease for pain and weakness in his hands.

The Board noted that "claimant's employment requiring the operation of joysticks and bobcat levers, involved 'harmful' repetitive hand and arm movements, which are peculiar to his job as a river operator ... claimant's use of joysticks would require 'a marked amount of flexion/extension, ulnar and radial flexion in alternating movements,' and thus, those activities are significantly attributable to his condition." Accordingly, the Board affirmed the ALJ and found that claimant's occupational disease afforded him the benefit of the longer statute of limitations prescribed by Section 13(b)(2) and his claim for compensation was therefore timely.

ED. NOTE: While hearing loss is technically classified as an “occupational disease,” it is not the type of occupational disease that is commonly contemplated by the LHWCA, jurisprudence or workers compensation law commentators such as Larson, and should be treated similarly to traumatic injuries . Examples of what the jurisprudence contemplates as “true” occupational diseases are the asbestos related illnesses. (I.e., mesothelioma, asbestosis.) In distinguishing true occupational diseases from traumatic type injuries, the LHWCA itself references a true occupational disease as “an occupational disease which does not immediately result in a disability or death.” See Section 12(a) and 13(b)(1). In Bath Iron Works Corp. v. Director, OWCP, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), a **unanimous Supreme Court** followed the **First Circuit** and held that claims for hearing loss, whether filed by current workers or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13) of the LHWCA, [“the Schedule” for some traumatic injuries] **not** Section 8(c)(23) [the occupational disease retiree section]. Noting that hearing loss occurs simultaneously with the exposure to excessive noise, the **Court** found that hearing loss is **not** an occupational disease “which does not immediately result in ... disability,” and therefore is not to be treated the same as, for example, asbestosis, where it takes years for the symptoms to manifest after the injurious exposure. This concept of a true occupational disease as requiring a gradual, rather than sudden, onset, is in line with most commentators. See, e.g., 1B A. Larson, Workman’s Compensation Law § 41.31 (1992). For more on hearing loss, see Topic 8.13.]

2.2.16 Occupational Diseases and the Responsible Employer/Carrier

Responsible Employer

The responsible employer is the employer who last exposed the employee to injurious stimuli prior to the date upon which the claimant was aware or should have been aware, of the relationship between the disability, disease, and employment. See Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955); Ranks v. Bath Iron Works Corp., 22 BRBS 302 (1989), Ramey v. Stevedoring Services of America, 134 F.3d 954 (9th Cir. 1998). In occupational disease cases, the last covered employer is liable for the totality of the claimant’s disability from the occupational disease, regardless of whether it was aggravated by subsequent non-covered employment. Labbe v. Bath Iron Works Corp., 24 BRBS 159, 162 (1991); see also, Bath Iron Works v. Brown, 194 F.3d 1 (1st Cir. 1999). However, one must keep in mind that it is possible to have an occupation disease injury followed by an aggravation of an asbestos-related injury that, under certain factual circumstances, may be considered a new injury. Bath Iron works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (1st Cir. 1999)(Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a “new” injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

The Board has consistently held that the awareness component of the Cardillo standard is in essence identical to the awareness standard of Sections 912(a) and 13(b)(2). See, e.g., Vanover v. Foundation Constructors, 22 BRBS 453, 456 (1989).

Exposure to injurious stimuli in areas outside the LHWCA's coverage, which occurs subsequent to the covered exposure, does not alter the responsible employer's liability; the last employer covered under the LHWCA is responsible. Todd Shipyards Corp. v. Black, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), aff'g in pertinent part 13 BRBS 682 (1981), cert. denied, 466 U.S. 937 (1984); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Green v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 562 (1981), vacated on other grounds, 688 F.2d 833 (4th Cir. 1982) (per curiam), opinion following remand, 15 BRBS 465 (1983).

[ED. NOTE: For a discussion and criticism of the “last maritime employer rule” versus the “last employer rule, see Junius C. McElveen, Jr. & Lawrence P. Postol, “Compensating Occupational Disease Victims Under the Longshoremen’s and Harbor Workers’ Compensation Act,” 32 Am. U.L. Rev. 717, 761-62 (1983)(A last maritime or covered employer rule “undercut[s] the basic rationale of the last employer rule, that each employer will be the last employer a proportionate share of the time.”). While the article makes several points, the courts continue to note policy arguments supporting an extension of the last employer rule to the last maritime employer. See for example, Bath Iron Works v. Brown, 194 F.3d 1, (1st Cir. 1999)(Without the last maritime employer rule an employer could manipulate the system by transferring an exposed employee from a covered to a non-covered facility.); See Fulks v. Avondale Shipyards, Inc., 10 BRBS 340, at 345 (1979), aff’d, 637 F.2d 1008 (5th Cir. 1981); cf. Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1285 (9th Cir. 1983).]

The last employer rule is "a rule of liability assessment, not of jurisdiction." Fulks v. Avondale Shipyards, 10 BRBS 340, 345 (1979), aff'd, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), cert. denied, 454 U.S. 1080 (1981) (emphasis added).

The Cardillo rule applies only to occupational diseases, Melson v. United Brands Co., 6 BRBS 503 (1977), aff'd, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

The purpose of the last employer rule of Cardillo is to avoid the complexities of assigning joint liability where the claimant has worked for several maritime employers or where the employer has been represented by several carriers during the pertinent period.

Although there have been attempts to limit the application of the Cardillo rule in hearing loss cases, it is well to keep in mind that Cardillo involved three shipyard workers seeking disability for work-related hearing losses. See also, Ramey v. Stevedoring Services of America, 134 F.3d 954 (9th Cir. 1998) (Held: there was sufficient evidence in this hearing loss case to apply last employer rule; claimant’s benefits would be based on his average weekly wage as of last day of employment rather than date of first audiogram.).

Moreover, **Second Circuit** Judge Medina explained the genesis of the Cardillo rule in these prescient and extremely practical words:

It would be sheer folly to seek or expect to discover a formula devoid of any possibility of inequity or seeming injustice. Cardillo, supra,

225 F.2d at 144. His conclusion that the last carrier bear the sole responsibility was grounded on two major considerations. The first was the great difficulty, if not practical impossibility, in determining with any degree of medical certainty: a) the time within which occupational disease develop; b) the extent of damage at any particular date as the disease evolves; or c) the correlation of the progression of the disease with specific industrial experiences.... Secondly, [he] concluded that the answer to the question to be resolved was evident from the legislative history of the Act, which was fully discussed in his opinion.

General Dynamics Corp., Elec. Boat Div. v. Benefits Review Bd., 565 F.2d 208, 7 BRBS 831, 833 (2d Cir. 1977), aff'g Gray v. General Dynamics Corp., Elec. Boat Div., 5 BRBS 279 (1976).

In Susoeff v. San Francisco Stevedoring Co., 19 BRBS 149 (1986), the Board held that the burden is not on the claimant to establish the responsible employer, and an employer joined in the case can escape liability (1) by rebutting the presumption that exposure to the injurious stimuli did not cause the bodily harm or (2) by demonstrating that the employee was exposed to injurious stimuli while performing work covered under the LHWCA for a subsequent employer. Susoeff, 19 BRBS at 151. See also General Ship Serv. v. Director, OWCP (Barnes), 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991).

In a case involving a claim under Section 8(c)(23), a voluntary retiree may not be charged with such awareness until he knows that a permanent impairment exists. Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989); Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988).

Where there is no evidence of record which establishes that the claimant had any rateable permanent physical impairment prior to his September 23, 1981 hospitalization or that he was made aware of a permanent condition prior to that date, the claimant cannot be held to be aware of the relationship between his occupational disease, employment, and disability prior to the date he became disabled, Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1985); 20 C.F.R. §§ 702.212(b), 702.222(c), until such time as a physician issues a disability or impairment rating. Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246-47 (1991).

Moreover, the claimant cannot receive benefits under Section 8(c)(23) in addition to total disability benefits. Carver, 24 BRBS at 247. See also Hoey v. Owens-Corning Fiberglass Corp., 23 BRBS 71 (1989).

Apportionment of liability among competing employers or carriers **is not permitted** under the LHWCA. McCabe v. Sun Shipbuilding & Dry Dock Co., 1 BRBS 509 (1975), aff'd in part and rev'd in part, 593 F.2d 234, 10 BRBS 614 (3d Cir. 1979). However, consider Total Marine Services v. Director, OWCP, 87 F.3d 774, 777 (5th Cir. 1996), where the **Fifth Circuit** ordered one maritime

employer to reimburse another for compensation paid on behalf of an employee that had been borrowed by the subcontractor. For more see **Borrowed Employee Doctrine** below.

The **Ninth Circuit** also rejected apportionment in Todd Shipyards Corp. v. Black, 717 F.2d 1280, 16 BRBS 13 (CRT) (**9th Cir.** 1983), cert. denied, 466 U.S. 937 (1984), holding that "requiring a worker injured under such circumstances (i.e., occupational disease) to prove proportionate liability might be tantamount to denying him any recovery whatsoever." Id. at 1285, 16 BRBS at 18 (CRT).

The assignment of joint and several liability under the LHWCA generally has been limited to those situations where the employee worked for two employers at the same time. See Total Marine Services v. Director, OWCP, 87 F.3d 774, 777 (**5th Cir.** 1996) (indemnification of contractor by subcontractor); Oilfield Safety & Mach. Specialties v. Harman Unlimited, 625 F.2d 1248 (**5th Cir.** 1980), aff'g Hansen v. Oilfield Safety, 8 BRBS 835 (1978) and 9 BRBS 490 (1979).

The Board has consistently held that the last exposure rule of Cardillo does not require a showing of an actual medical causal relationship between the claimant's exposure and his occupational disease. Franklin v. Dillingham Ship Repair, 18 BRBS 198 (1986). In Franklin, the employer conceded that it may have been the last employer to expose the claimant to asbestos, but argued that such exposure was not injurious and did not cause any increase in such disability.

In Proffitt v. E. J. Bartells Co., 10 BRBS 435 (1979), the Board held that two days exposure to the harmful stimuli is sufficient to impose liability on that employer without demonstration of "distinct aggravation" from the stimuli.

In determining the responsible employer, the **Ninth Circuit** has held: "All that must be proved is that the covered employer exposed the worker to injurious stimuli in sufficient quantities to cause the disease." Black, 717 F.2d at 1285, 16 BRBS at 17 (CRT).

The **Ninth Circuit** was again faced with interpreting the Cardillo rule in Port of Portland v. Director, OWCP (Ronne), 932 F.2d 836, 24 BRBS 137 (CRT) (**9th Cir.** 1991), wherein the court held, as a matter of law, that it was "factually impossible for Ronne's employment with Port of Portland, which began four days after the audiogram was administered, to have contributed in any way to Ronne's hearing loss." Id. at 840, 24 BRBS at 143 (CRT).

Although the **Ninth Circuit** "agree(d) with the Board that Cordero v. Triple A Machine Shop, 580 F.2d 1331 (**9th Cir.** 1978), cert. denied, 440 U.S. 911 (1979), does not require a demonstrated medical causal relationship between the claimant's exposure and his occupational disease," the court held that "Cordero does require that liability rest on the employer covering the risk at the time of the most recent injurious exposure **related** to the disability." Moreover, "the fact that Ronne may have experienced subsequent exposure to industrial noise while working for the Port of Portland is irrelevant because no part of the claim is based on any such exposure." Id.

Thus, the court "reject(ed) any reading of Cardillo that would impose liability on an employer who **could not**, even theoretically, have contributed to the causation of the disability." Port of Portland, 932 F.2d at 840-41, 24 BRBS at 143-44 (CRT).

The Board followed the Cardillo-Cordero rule in Mauk v. Northwest Marine Iron Works, 25 BRBS 118 (1991), a claim arising within the jurisdiction of the **Ninth Circuit**, wherein the Board held that "liability falls on the last covered employer to expose the employee to injurious stimuli **prior** to the administration of the determinative audiometric examination establishing disability **irrespective** of claimant's receipt of the audiogram." Mauk, 25 BRBS at 124 (emphasis added).

"Minimal exposure" to asbestos and its place within the Cardillo rule was the issue in Todd Pacific Shipyards v. Director, OWCP (Picinich), 914 F.2d 1317, 24 BRBS 36 (CRT) (**9th Cir.** 1990), rev'g Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989).

In Picinich, the judge had found that the decedent was not exposed to "injurious stimuli," i.e., asbestos, while working for the most recent employer as any exposure during the pertinent period was "minimal." The Board reversed, holding that a marine chemist's tests indicated that asbestos fibers were present in the ambient air aboard the vessel subsequent to the asbestos removal procedures.

Moreover, the Board, after agreeing that "our review of the record shows that conclusion (i.e., minimal exposure to asbestos) is supported by the relevant evidence, imposed liability on the most recent employer and, citing a consistent line of cases, the Board "rejected the contention that an employee's exposure to the injurious stimuli must actually contribute to or aggravate his disability before an employer may be held liable for the payment of benefits under the LHWCA. Picinich, 22 BRBS at 292, and cases cited therein.

On appeal, the **Ninth Circuit** reversed the Board, holding that **"minimal exposure" to asbestos is not sufficient** and that decedent's employment must have "exposed [him] to **injurious stimuli in sufficient quantities** to cause the disease." Todd Pac. Shipyards, 914 F.2d at 1320, 24 BRBS at 40 (CRT). The court pointed out that the **correct test** is as follows:

All that must be proved is that the covered employer exposed the worker to injurious stimuli in sufficient quantities to cause the disease.

Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1286 (**9th Cir.** 1983).

Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988) involved an employee who became totally disabled as a result of lung cancer caused in part by asbestos exposure. Two carriers provided coverage under the LHWCA to the employer during the employee's employment as a pipe-fitter from 1961 to 1984. The employee died four months after he stopped working. The Board affirmed the holding of the judge imposing liability on the carrier on the risk when the employee was last exposed to the injurious stimuli prior to his awareness that he was suffering from an occupational disease.

The Board rejected the argument of Aetna, the later carrier, that while exposure to a harmful substance can produce an injury, unless such exposure actually causes or contributes to the disability for which the claimant is seeking compensation, the later carrier is not liable. The Board pointed out that the last exposure rule does not require a showing of an actual medical causal relationship between claimant's exposure and his occupational disease. Lustig, 20 BRBS at 213. See Perry v. Jacksonville Shipyards, 18 BRBS 219, 222 (1986); Whitlock v. Lockheed Shipbuilding & Constr. Co., 12 BRBS 91 (1980).

Lustig was appealed and the **Ninth Circuit** affirmed the Board's decision and rejected Aetna's argument that Todd Shipyards should not be held liable as the last maritime employer because it provided coverage under the LHWCA for the employer during the employee's last eight years of work with the employer and because there is a 10-year latency period between asbestos exposure and the manifestation of the asbestos-related lung cancer. Aetna, arguing that the first carrier which had insured the employer from 1961 to 1976 should be responsible for any benefits awarded, maintained that any asbestos exposure after 1971 "would not have had any effect on Mr. Lustig's disability." The court rejected that position as "an unwarranted change of the last employer rule set forth in Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955)...." Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 22 BRBS 159, 162 (**9th Cir.** 1989).

The **First Circuit** has held that, as between two insurers disputing which must pay claims under the LHWCA, the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by an occupational disease arising naturally out of his employment and exposure, is responsible for discharging the duties and obligations of the liable employer. Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 26 BRBS 85 (CRT) (**1st Cir.** 1992).

In a hearing loss case, Roberts v. Alabama Dry Dock and Shipbuilding Corporation, 30 BRBS 229 (1997), there was a single employer who was self-insured at the time of the first audiogram. The first audiogram was performed while the employer was self-insured and the second while the employer was insured by Travelers. The first showed a 3% hearing loss while the second recorded a .6% loss, an improvement of 2.4%. The Board held that if there are two audiograms, separated by a period of time, and the second audiogram does not show an increase over the first, then the employer at the time of the first audiogram which shows a hearing loss is liable. Therefore, the Board held that the liability fell upon the employer while self-insured, as this was the employer at the onset of the hearing loss. 30 BRBS at 234.

See Port of Portland v. Director, OWCP, 932 F.2d 836 (**9th Cir.** 1991) (date of disability governs employer liability); Argonaut Ins. Co. v. Patterson, 846 F.2d 715 (**11th Cir.** 1988) (the **Eleventh Circuit** noted that Cardillo linked awareness to suffering and concluded that mere awareness of a disease is not, in and of itself, tantamount to suffering from that disease, especially since the term "suffering" carries "very particular connotations which it can not be assumed the **Second Circuit** [Cardillo] meant to ignore.").

See also 4A Larson, The Law of Workmen's Compensation § 95.25(a) (1990) (stating that a date-of-disability rule is "frequently chosen" in the workers' compensation area); see, e.g., Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246-47 (1991) (holding that employer liability attaches at date of disablement); Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232, 235 (1986) (holding that carrier liability attaches as of the date that the employee's long-latency occupational disease "affected his ability to earn wages").

Significantly, the **First Circuit** in Liberty Mutual held that the date of disability is determined by the date of decreased earning capacity. Thus, the carrier that had assumed the risk after the diagnosis of asbestosis, but before the claimant suffered any decrease in wage-earning capacity is liable.

[ED. NOTE: Query the situation where a claimant, newly diagnosed as having mesothelioma, has been exposed to asbestos for 30 or more years at the workplace and the maritime employer(s) has had successive carriers. Since the latency period for mesothelioma can be more than 20 years, and since mesothelioma can theoretically be caused by one asbestos fiber, is the Cardillo rule reasonable ?]

Borrowed Employee Doctrine

In Total Marine Services v. Director, OWCP, the **Fifth Circuit** held that under the borrowed employee doctrine “[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third party, so that he becomes the servant of that person with all the legal consequences of the new relationship.” Total Marine Services v. Director, OWCP, 87 F.3d 774, 777 (**5th Cir.** 1996), citing Standard Oil Co. v. Anderson, 212 U.S. 215 (1909)(emphasis in original). This leads to the conclusion that the borrowing employer is liable for securing the injured claimant’s compensation benefits under the LHWCA. *Id.*; see also Champagne v. Penrod Drilling Co., 341 F.Supp. 1282, 1283 (**W.D.La.**1971), *aff’d*, 459 F.Supp. 1042 (**5th Cir.** 1971), *modified on other grounds*, 462 F.2d 1372 (1972), *cert denied* 409 U.S. 1113, (1973); West v. Kerr-McGee Corp., 765 F.2d 526 (**5th Cir.** 1985).

*[ED. NOTE: There is language in the holding of Total Marine Services that “ in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured worker’s formal employer for any compensation benefits it has paid to the injured worker.” 87 F.3d 774. This is a singular instance of the courts endorsing such a reimbursement. The LHWCA has no provisions for this and the **Fifth Circuit** did not give any explanation for its holding. The most plausible explanation is that the **Fifth Circuit** found that the subcontractor had breached its duty to provide for the compensation payments, thus equity says that they should not be allowed to profit from their dereliction of duty. This is an isolated case and should be narrowly limited to its facts.]*

In Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (**5th Cir.** 2001), the **Fifth Circuit** found that the ALJ did not have jurisdiction to determine the merits of

certain contractual rights and liabilities arising from an indemnification agreement between the borrowing employer and the loaning employer. Additionally the court found that the ALJ did not have jurisdiction to address a waiver of subrogation by the loaning employer's carrier. The jurisdiction issue turned on the interpretation of that part of Section 19(a) of the LHWCA stating that an ALJ has authority "to hear and determine all questions in respect of such claims." The **Fifth Circuit** concluded that the contract dispute was not integral to the longshore compensation claim and that the Board and the ALJ did not have the statutory authority to determine that issue.

In Weber v. S.C. Loveland Co. (WeberIII), ___ BRBS ___, (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30 2002), the Board distinguished Temporary Employment Services. The issue in Weber was which of two, if any insurers was on the risk for longshore benefits at the time of the claimant's injury and is liable for those benefits. In Weber, the claimant was injured in Jamaica and the Board found that the claimant was "covered under the LHWCA." There were two insurance policies in question.. One covered injuries within the United States and included Longshore coverage. The other covered injuries outside the U.S. and did not include Longshore coverage. The Board noted that in Temporary Employment Services, the **Fifth Circuit** held that contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board. However, the Board found that Weber "does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of employers' carriers is liable." Thus the Board found that the ALJ has the authority to address the issue.

In Fitzgerald v. Stevedoring Services of America, ___ BRBS ___, (BRB No. 00-0724) (Jan. 31, 2001), the Board held that a nominal employee of a government subdivision (port authority) is not exclude from the borrowed employee doctrine as a matter of law. The Board held that Section 3(b), concerning the immunity of government entities from liability under the LHWCA, did not prevent a nominal state employee from becoming a borrowed employee of a statutory employer. In reaching this conclusion, the Board noted the wording of Section 4(a) of the LHWCA. In pertinent part, Section 4(a) reads:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. ...

(Emphasis added by the Board.)

Thus the Board reasoned, under Section 4(a), all employers, including borrowing employers, are liable for compensation under the LHWCA. The Board used this case to reiterate its recommended use of the "Ruiz-Gaudet borrowed employer test" to determine if a claimant is a borrowed employee. See Ruiz v. Shell Oil Co., 413 F.2d 310 (**5th Cir.** 1969) and Gaudet v. Exxon Corp., 562 F.2d 351 (**5th Cir.** 1977), cert. denied, 436 U.S. 913 (1978) for the nine part test.

Responsible Carrier

In occupational disease cases, the method for determining the responsible carrier emanates from Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955). After establishing the "last employer" rule, the **Second Circuit** stated:

...the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the "liable" employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the "liable" employer.

225 F.2d at 145.

This rule has been consistently followed. General Dynamics Corp., Elec. Boat Div. v. Benefits Review Bd., 565 F.2d 208, 7 BRBS 831 (**2d Cir.** 1977). Although the carrier rule does not explicitly refer to last exposure prior to awareness, a majority of the Board held that the last carrier rule should be applied in the same manner as the last employer rule. Perry v. Jacksonville Shipyards, 18 BRBS 219 (1986). Thus, the Board remanded for a determination of the carrier insuring employer during the claimant's last exposure to injurious stimuli prior to awareness.

As with the responsible employer, it is irrelevant that a claimant's condition existed while a prior carrier was on the risk. Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). See also Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38 (1982); Brown v. General Dynamics Corp., 7 BRBS 561 (1978); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977).

The Board has affirmed a judge's finding of responsible carrier where the insurance policies were no longer in existence, and the only available evidence indicated the carrier was the last carrier. The burden was on the carrier to show it was not the insurer. Dolowich v. West Side Iron Works, 17 BRBS 197 (1985).

Where necessary to resolve a claim for compensation benefits, the judge may adjudicate insurance contract disputes. Rodman v. Bethlehem Steel Corp., 16 BRBS 123 (1984); Valdez v. Bethlehem Steel Corp., 16 BRBS 144 (1984); Droogsma v. Pensacola Stevedoring Co., 11 BRBS 1 (1979).

A carrier covering non-occupational injuries can intervene under the LHWCA and recover amounts mistakenly paid out for work-related injuries. Aetna Life Ins. Co. v. Harris, 578 F.2d 52 (**3d Cir.** 1978); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190 (1984); Brady v. Hall Bros. Marine Corp., 13 BRBS 854 (1984).

2.2.17 Occupational Diseases and Section 8(f)

In an occupational disease claim, the Director asserted that the employer was on notice at the time of the informal conference that the liability of the Special Fund (See Topic 8.7, *infra*) was at issue because a claim for death benefits was involved and because it possessed, at that time, medical records pertaining to decedent's pre-existing medical conditions.

Thus, the Director asserted that the employer should have "reasonably anticipated" that Section 8(f) would be an issue in the case, and should have protected its rights by filing a claim at that time. Bath Iron Works Corp. v. Director, OWCP (Bailey), 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), *aff'g* Bailey v. Bath Iron Works Corp., 24 BRBS 229, 234-35 (1991).

In Bailey, the Board affirmed the judge's denial of the employer's post-hearing request for Section 8(f) relief under Section 8(f)(3), because the employer's own hospital records reflected decedent's high blood pressure and annual chest x-rays had been taken since 1966. These x-rays eventually yielded a diagnosis of asbestosis. The judge concluded that at least by the time of the informal conference on April 4, 1987, the employer and both carriers had sufficient information so that the possible applicability of Section 8(f) could reasonably have been anticipated, yet it did not file a request for such relief. Thus, the request for Section 8(f) relief is barred by Section 8(f)(3).

Section 8(f) relief may be granted if it is established that the employee's death was due in part to a manifest pre-existing permanent partial disability. See 33 U.S.C. § 908(f)(1); see also White v. Bath Iron Works Corp., 812 F.2d 33, 19 BRBS 70 (CRT) (1st Cir. 1987). It is possible for an aggravation to be considered a new injury. Bath Iron Works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (1st Cir. 1999) (Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

Section 8(f)(3) provides that any request for Section 8(f) relief and a statement of the grounds for such relief shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. The regulations at 20 C.F.R. § 702.321(b) provide that the employer should file a claim for Section 8(f) relief as soon as possible after the date of death in a case involving death benefits.

The failure to present such a request prior to consideration by the deputy commissioner is an absolute defense to the Special Fund's liability, and such defense must be raised and pleaded by the Director. See 20 C.F.R. § 702.321(b)(3). The failure of an employer to present a timely and fully documented application for Section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order.

The Board has also addressed the Section 8(f)(3) issue in Brazeau v. Tacoma Boatbuilding Co., 24 BRBS 128 (1990). In Brazeau, the Board reversed the judge's application of Section 8(f)(3) because, based on the facts of that case, the employer had insufficient notice at the time of the informal conference to anticipate reasonably that the claimant's pre-existing condition was permanent. Id. at 131-32.

The Board held that the judge placed the *onus* of claiming a permanent disability on the employer as opposed to the claimant, which the Board stated was not required by either Section 8(f)(3) or its implementing regulations. Id. The Board also held that an employer is not required to monitor a claimant's condition in order to initiate consideration of the issue of permanency and thus preserve its right to relief under Section 8(f). Id. However, the Board noted that Section 8(f)(3), as enacted by the 1984 Amendments, was designed to force employers to file for Section 8(f) relief as soon as they become aware a claim for permanency is involved. See also Currie v. Cooper Stevedoring Co., 23 BRBS 420 (1990).

The **Fourth Circuit** has held that the manifestation requirement of Section 8(f) is inapplicable where a decedent suffered from asbestosis and it was a post-retirement disease. Newport News Shipbuilding & Dry Dock Co. v. Harris, 934 F.2d 548, 24 BRBS 190 (CRT) (**4th Cir.** 1991), criticized by Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (**9th Cir.** 1993) (unpublished). Where the employer showed that there was a pre-existing permanent partial disability which combined with the occupational disease to cause the decedent's death, the **Ninth Circuit** found that the employer was entitled to Section 8(f) relief. The **Fourth Circuit** held in Harris that:

We are convinced that Section 8(f) should be read literally in considering disability from post-retirement occupational diseases. Only in this way can Congress' intent in passing the 1984 amendments be carried out. To establish entitlement to relief from the special fund for a post-retirement occupational disease, therefore, the employer need only show that there is an existing permanent partial disability and that a pre-existing disability combined with the same and contributed to the resulting permanent total disability. In such cases the manifestation requirement will not be applied.

Harris, 934 F.2d at 553, 24 BRBS at 200 (CRT).

2.2.18 Representative Injuries/Diseases

Adhesive Capsulitis (Tendinitis)

In Carey v. Cargill, Inc., 13 BRBS 516 (1981), the Board affirmed an award of permanent and total disability benefits for claimant's bilateral shoulder adhesive capsulitis or tendinitis. The Board reversed the denial of Section 8(f) relief, however, as the employer had satisfied the LHWCA's tripartite requirements. See also Director, OWCP v. Cargill, Inc., 689 F.2d 819, 15 BRBS 30 (CRT)

(9th Cir. 1982), on reh'g, en banc, 709 F.2d 616 (9th Cir. 1983) (Section 8(f) relief was denied as the employer did not have knowledge of the pre-existing condition at the time of initial employment).

Upon review, however, the **Ninth Circuit** held that a pre-existing disability need not be manifest at the time of the initial hiring to entitle an employer to Section 8(f) relief, since to deny such relief **would encourage employers not to retain workers** who become handicapped during their tenure on the job. Director, OWCP v. Cargill, Inc., 709 F.2d 616, 16 BRBS 137 (CRT) (en banc), remanded to panel, 718 F.2d 886, 16 BRBS 85 (CRT) (9th Cir. 1983).

Allergy and Nerve Conditions

In Nardella v. Campbell Machine, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975), the court affirmed the award of benefits to a claimant whose pre-existing allergy and nerve conditions were **aggravated by exposure to noxious fumes and welding smoke** in the work environment.

Arthritis in Right Knee

The claimant's left knee injury and subsequent knee surgery caused the claimant thereafter to favor his left leg, thereby exacerbating asymptomatic pre-existing arthritis in his right knee. The Board affirmed the judge's conclusion that the claimant's right knee condition is the natural and unavoidable consequence of the injury to his left knee and, thus, constitutes a work-related injury. The judge had rejected the employer's argument that the claimant's right knee condition was not related to the left knee injury as it was the result of a pre-existing degenerative process. Uglesich v. Stevedoring Servs. of America, 24 BRBS 180 (1991).

Arthritis

Post-traumatic osteoarthritis of the knee, developing as a sequel of a meniscectomy, is the natural and unavoidable consequence of the work-related injury and subsequent surgery as there was no evidence that the osteoarthritis was an occupational disease peculiar to the nature of the claimant's work or that the claimant's work activities between 1970 and 1979 aggravated his pre-existing knee condition and the only medical evidence on record described the claimant's condition as the natural sequella of the meniscectomy. The court also held that any benefits payable are based upon the average weekly wage in 1970 and not in 1979, at which time claimant's increased disability became manifest. Director, OWCP v. General Dynamics Corp. (Morales), 769 F.2d 66, 17 BRBS 130 (CRT) (2d Cir. 1985), rev'g 16 BRBS 293 (1984).

In Owens v. Newport News Shipbuilding & Dry Dock Co., 11 BRBS 409, 412-13 (1979), the claimant sustained a work-related knee injury in March 1974, but the employer's physician diagnosed the condition as pre-existing arthritis. Two months later, however, a torn medical meniscus was suspected and this condition was confirmed by subsequent surgery. See also Fargo v. Campbell Indus., 9 BRBS 766 (1978) (the Board affirmed the award of permanent total disability benefits as the aggravation of a pre-existing arthritic condition by a work-related injury is completely

compensable under the LHWCA). Compare Carlson v. Bethlehem Steel Corp., 8 BRBS 486 (1978) (benefits were denied as the aggravation of claimant's arthritic condition by a work-related injury caused only a temporary recurrence of the symptoms rather than a worsening of the underlying condition).

Asbestosis

Benefits were paid to an employee who testified credibly that he was exposed to asbestos as a shipfitter and whose testimony was not contradicted by the employer and the employee's lung cancer, resulting from such asbestos exposure, constitutes a work-related occupational disease. Martin v. Kaiser Co., 24 BRBS 112, 118-19 (1990).

The claimant, who was exposed to asbestos at work and suffered from chest wall pain subsequent to his lung surgery and who was aided by the presumption that working conditions at the shipyard caused his asbestosis, was entitled to benefits as his doctors advised him to have surgery for removal of the lung nodule resulting from his asbestos exposure. Everett v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 316, 318 (1989). See also Laplante v. General Dynamics Corp., 15 BRBS 83 (1982), aff'g 11 BRBS 117 (ALJ) (1979) (claimant's permanent total disability resulted from the aggravation of his pre-existing heart condition by work-related asbestosis).

Asthma

In Champion v. S&M Traylor Brothers, 690 F.2d 285, 15 BRBS 33 (CRT) (**D.C. Cir.** 1982), rev'g 14 BRBS 251 (1981), the claimant's asymptomatic asthmatic condition was aggravated by exposure to dust and fumes at work and his asthma persisted following his removal from the aggravating conditions, even though medical evidence indicated it should have ceased. The Board affirmed an award of only temporary compensation benefits as the claimant was not entitled to permanent disability compensation for his persisting asthmatic condition because he failed to establish that his employment caused this disability.

The **District of Columbia Circuit**, however, found that the Board and the judge erred by failing to find that there was a presumption that the **emotional trauma which resulted as the sequel of claimant's initial disability** (i.e., the aggravation of his dormant asthma) was a continuing cause of claimant's persisting asthma. Accordingly, the court shifted the burden to employer to sever this potential connection. Champion, 690 F.2d at 295, 15 BRBS at 42 (CRT).

The evidence in Champion consisted of a doctor's testimony that emotional factors, among various other factors, were capable of causing claimant's asthma, but "acknowledged that he did not know specifically what was continuing Champion's asthma." Champion, 15 BRBS at 37 (CRT). Another doctor identified no cause for the persistence of claimant's condition and concluded that it was "coincidental" that the claimant developed his ongoing asthmatic problem at the same time that he experienced a precipitating incident at work. The doctor admitted, however, that emotional problems could trigger increased problems for asthmatics. Id. at 39 (CRT).

Thus, in Champion, the court concluded the Section 20(a) presumption was not rebutted and remanded the claim "for a calculation of the appropriate award in accordance with this opinion." Id. at 42 (CRT).

"Industrial asthma" was the work-related injury in Janusiewicz v. Sun Shipbuilding & Dry Dock Co., 13 BRBS 1052 (1981). Benefits were denied, however, as the claimant did not comply with Section 12(a) of the LHWCA and as he was receiving benefits through his employment sickness and accident insurance benefits policy conditional upon his certification that his absence from work was due to a non-occupational illness.

Breathing Problems

In Graham v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 387 (1979), the Board reversed the denial of benefits to a claimant who had developed pulmonary problems when **exposed to welding fumes** in the course of his work as a shipyard welder.

In Bennett v. Sun Shipbuilding & Dry Dock Co., 5 BRBS 609 (1977), the Board affirmed an award of benefits to claimants who were disabled by **pneumoconiosis** resulting from their work as sandblasters and their exposure to material and dusty conditions used in doing that work even though they lost no time from work and their post-injury wages are higher than their average weekly wages since it was **undisputed that the claimants are no longer able to work as sandblasters and cannot work in an atmosphere of dust or fumes**. The Board remanded the claims to the judge, however, to determine the extent of the claimants' permanent partial disabilities.

Carpal Tunnel Syndrome(CTS)

In Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144-45 (1990), the Board affirmed an award of benefits where the claimant, aided by the statutory presumption in Section 20, had established physical harm, i.e., **bilateral carpal tunnel syndrome** and left **ulnar neuropathy**, and working conditions which could have caused such harm. The employer did not rebut the presumption with substantial evidence which would sever the causal connection between the injury and the working conditions. Note that Reflex Sympathetic Dystrophy (RSD) has been misdiagnosed as CTS.

In Sinclair v. United Food & Commercial Workers, 23 BRBS 148, 155-56 (1989), the Board affirmed the judge's conclusion that the employer does not rebut the statutory presumption by introducing a physician's opinion that there is a hypothetical probability that the condition (carpal tunnel syndrome) is not work-related because it frequently occurs in women of the claimant's age without any known cause, as the record contained the opinions of two physicians that the claimant's condition might be attributable to the excessive use of her wrist joints as a commercial artist. Accord Alexander v. Ryan-Walsh Stevedoring Co., 23 BRBS 185 (1990).

Chemical Exposures

In Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191, 193-94 (1990), the claimant alleged that her husband's **exposure to paint additives** caused his Jakob-Creutzfeldt disease, a rare type of degenerative brain disease, resulting in his death the month following the exposure. The judge, while finding that the employer had rebutted the presumption, resolved the causation issue based on the entire record and concluded that decedent's exposure to toxic chemicals at work had contributed to the development of his disease.

On appeal, the Board rejected the employer's argument that the claimant did not demonstrate exposure to toxic chemicals **known** to have an impact on Jakob-Creutzfeldt disease or the human immune system, the Board holding that the employer's evidence was clearly insufficient to prove lack of causation because neither the neurologists nor the industrial hygienist could state with a reasonable degree of certainty whether decedent's exposure to the toxic chemicals had any effect on the development or progression of the disease which caused his death.

It should be further noted that even after substantial evidence is produced to rebut the presumption, the employer still bears the ultimate burden of persuasion, see Parsons Corp. v. Director, OWCP, 619 F.2d 38, 12 BRBS 234 (**9th Cir.** 1980), and all doubtful questions are to be resolved in favor of the injured employee. Avondale Shipyards v. Kennel, 914 F.2d 88 (**5th Cir.** 1990); Young & Co. v. Shea, 397 F.2d 185 (**5th Cir.** 1968), cert. denied, 395 U.S. 920 (1969). But Cf. Maher Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (**3d Cir.** 1993), cert. granted sub nom. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). (See also Topics 20 and 23.1.4, infra).

In Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988), the Board rejected the employer's argument that no causation was established. This argument hinged on the fact that the doctor on whom the judge relied to find causation was unable to identify the specific chemicals which produced the claimant's chemical hypersensitivity. Instead, the Board found that causation was established because the doctor had indicated that the claimant's symptoms were due to the cumulative effect of chemical exposures over many years and that any or all of the chemicals to which he was exposed could have played a part in his symptomology.

Chemical Hypersensitivity (Agent Orange)--Immunol. Dysfunction

The judge found that the overwhelming weight of the creditable medical evidence caused the conclusion that the claimant has not been exposed to agent orange nor did she have in the past or at the present time any of the objective physical symptomatology associated with herbicide or dioxin exposure. Further, the medical evidence refuted any connection of the claimant's medical, psychological, and psychiatric conditions with her employment in the Republic of Korea for the American National Red Cross. Wendler v. American Nat'l Red Cross, BRB No. 93-0423 (May 29, 1996) (unpublished).

Chest Pains at Work

Where a claimant established a physical harm, i.e., chest pains, and working conditions, i.e., moving large steel drums, **which could have caused the harm**, the claimant, aided by the Section 20(a) presumption, has established that his angina and subsequent heart attack constituted a work-related injury based on work-related aggravation of his underlying **pre-existing arteriosclerosis**. Obert v. John T. Clark & Son, 23 BRBS 157, 159-60 (1990).

Cyclothymic Personality

In Callnan v. Morale, Welfare & Recreation, Department of Navy, 32 BRBS 246 (1998), the Board noted that a cyclothymic personality condition was a “bipolar disorder of at least two years’ duration.” In Callnan, the ALJ held, and the Board affirmed, that this condition did not establish the existence of a “*serious, lasting* emotional problem”.

Depression Caused by Job Stress

In Barnard v. Zapata-Haynie Corp., 23 BRBS 267 (1990), the Board affirmed an award of benefits to the claimant, an airborne fish spotter, for his work-related depression due to stress induced by flying in congested air space over navigable waters where his psychiatric impairment resulted in his grounding by a Federal Aviation Administration medical examiner.

Dermatitis

In Schenk v. Raber-Kief, Inc., 1 BRBS 389, 392 (1975), rev'd sub nom. Director, OWCP v. Raber-Kief, 558 F.2d 1037 (9th Cir. 1977) (Table), the Board affirmed an award of benefits because there was substantial evidence in the record to support a finding that the claimant's dermatitis arose out of his employment.

Drug Toxicity and Disability

Drug toxicity, resulting from a claimant's excessive use of medication prescribed to treat his low back pain caused by a work-related injury, combined with the lumbar injury to prevent the claimant from safely performing his former work duties due to his physical and/or emotional condition, entitling claimant to benefits. Wilson v. Todd Shipyards Corp., 23 BRBS 24 (1989).

Dystonia

Dystonia is characterized by involuntary jerking and twisting motions of the upper extremity and torso to the right or left. Rochester v. George Washington University, 30 BRBS 233 (1997).

Electric Shock

In Ware v. Dresser Offshore Services, 9 BRBS 160 (1978), the Board affirmed an award of benefits where the claimant received an electrical shock of 480 volts when he attempted to connect a pump to an electrical outlet in 1971 and where his total disability began in 1976.

Epoxy Poisoning

The claimant, an industrial painter from 1977 to 1978, developed a sensitivity to epoxy paints that made it impossible for him to continue with his regular employment. The Board found that painting, not working in the dock crew, was his regular employment; thus the judge was reversed and the case remanded for consideration of a permanent disability award in light of the claimant having established his *prima facie* case. Flowers v. Norfolk Shipbuilding and Dry Dock Corporation, BRB No. 96-531 (Nov. 19, 1966) (unpublished).

Esophageal Cancer

Esophageal cancer, resulting from asbestos exposure as a maritime employee, is a work-related injury. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 51-52 (1990).

Gastrointestinal Condition

In Powell v. Fluor Daniel Corp., (BRB Nos. 97-0774 & 97-0774A)(March 3, 1998) (Unpublished), the Board held that a report by Claimant's physician affirmatively stating that Claimant's work-related diarrhea condition is directly responsible for his continuing physical and psychological problems established the 20(a) presumption.

Grand Mal Seizures

In Carolina Stevedoring Co. v. Homeport Insurance Co., 191 F.3d447 (Table) (Unpublished)(4th Cir. September 14, 1999), the claimant's disregard for his own safety by working and not taking his medication fell short of a willful intent to injure or kill.

Gulf War Syndrome

In Pieceynski v. Dyncorp., 31 BRBS 559 (ALJ) (1997), remanded at Pieceynski v. Dyncorp., (BRB No. 97-1451)(July 17, 1998)(Unpublished) and subsequently re-issued as a Decision and Order on Remand Awarding Benefits, at Pieceynski v. Dyncorp., (Case No. 94-LHC-2387)(Unpublished)(1999), the claimant's alleged health problems included the following: skin rashes over most of his body that leave permanent scars; bleeding gums and the loss of all his teeth; joint pain; dizziness and loss of balance; memory loss; poor concentration; chronic diarrhea and stomach problems; chronic headaches; redness of the eyes; ringing in the ears; chronic fatigue; sexual impotence; chronic cough at night and loss of sleep; chronic muscle soreness and muscle spasms at

night; and diabetes requiring medication. Initially the ALJ found that the claimant was unable to carry his burden of proving that his health problems were related to the use of anti-nerve gas pills, exposure to Scud missile explosions, or exposure to smoke from burning oil wells. Pieceynski, 31 BRBS 559 (ALJ) (1997). Unable to affirm the ALJ's denial of benefits on procedural grounds, the Board remanded the case for further action. Piceynski v. DynCorp, (BRB No. 97-1451)(July 17, 1998)(Unpublished). Subsequently, the ALJ issued a Decision and Order on Remand Awarding Benefits. (Case No. 94-LHC-2387)(1999)(Unpublished).

In Lane v. Bell Helicopter Co., (BRB Nos. 99-1007 and 99-1007A)(June 23, 2000)(Unpublished), the Board upheld the ALJ's finding that the claimant established that his neurocognitive deficits were caused by his exposure to pesticides, depleted uranium, and oil fire smoke during the Gulf War. Further, the Board held that a causal relationship between claimant's condition and his work exposure was established as a matter of law.

Halothane-induced Hepatitis

Halothane, an anesthetic widely used during the 80's and 90's, is generally safe. A small minority of people (1 out of 10,000) suffer an allergic-type reaction, which results in acute hepatitis, from breathing even small amounts of the drug. Chronic active/aggressive hepatitis is a disease characterized by an on-going injury to the cells of the liver. Generally, the affected person either dies within a month or achieves a full recovery. The chance for a fatal outcome ranges from 10%-80%. Casey v. Georgetown Medical Center, 31 BRBS 527 (ALJ) (1997) (Mapes, ALJ).

Hand-arm vibration Syndrome (HAVS)

The claimant did not establish a *prima facie* case for the disease; however the case is noteworthy for its definition of the syndrome. According to the National Institute for Occupational Safety and Health (NIOSH), HAVS is a "chronic, progressive disorder with a latency period that may vary from a few months to several years." Morgan v. Ingalls Shipbuilding, Inc., 29 BRBS 508 (ALJ) (1995). The symptoms include tingling, numbness, blanching of the fingers, loss of grip strength, reduction in finger dexterity, and sometimes the disturbance of sleep. It is known by the names "**vibration white finger**" disease, **cumulative trauma disorder**, and **Raynaud's phenomenon**. The case does a very thorough analysis of the symptoms and methods used to test for the disease.

Headaches and Dizziness as an Injury

The **Fifth Circuit** found that substantial evidence existed to support causation for the claim where the judge accepted the testimony of the claimant's witnesses concerning the relevance of post-traumatic pain, dizziness, and headaches in concluding that the claimant's pain, dizziness, and headaches were caused by his accident at work when a pressurized sandblasting hose struck him in the forward right temple, causing head lacerations and a depressed skull fracture, requiring emergency surgery. Avondale Shipyards v. Kennel, 914 F.2d 88, 24 BRBS 46 (CRT) (**5th Cir.** 1990). The judge's decision is reported at 21 BRBS 245 (ALJ) (1988).

In Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085 (**11th Cir.** 1988) the court found that the evidence suggested that the cause of the claimant's severe headaches, dizziness and memory lapses may have been caused by **substance abuse** and **dietary indiscretions** rather than by job related stress.

*[ED. NOTE: The **Eleventh Circuit** recognized that the Sanders decision was problematic jurisdictionally and has since abrogated its effect as to the status of the claimant -- not to the injury claimant suffered. See Atlantic Container Service, Inc. v. Coleman, 904 F.2d 611 (**11th Cir.** 1990).]*

Hearing Loss

(See generally Topic 8.13.)

Heart Attacks

There are numerous cases involving the work-relatedness of heart attacks. For instance, an employee who sustains a heart attack while performing his normal job duties is presumed to have sustained a work-related injury in the absence of rebuttal evidence by the employer. Wheatley v. Adler, 407 F.2d 307 (**D.C. Cir.** 1968); Glens Falls Indem. Co. v. Henderson, 212 F.2d 617 (**5th Cir.** 1954) (decedent suffered a heart attack while performing his normal job duty of loading grain).

In Salzano v. American Stevedores, 2 BRBS 178 (1975), aff'd, 538 F.2d 933, 4 BRBS 195 (**2d Cir.** 1976), the Board declared as permanently totally disabled a marine carpenter who suffered a heart attack in the course of his employment, as he could not return to work.

An interesting case is Baldwin v. General Dynamics Corp., 5 BRBS 579, aff'd on recon. 6 BRBS 396 (1977), wherein the employee's fatal heart attack was found to have occurred in the course of his employment within Section 2(2) as he ran slowly from a parking lot to the pier where he was to board a Navy launch for the ride out to the submarine tender, although the running was not necessary to his work. (Note: This claim was brought under the Defense Base Act.)

In Kilsby v. Diamond M Drilling Co., 6 BRBS 114 (1977), aff'd, 577 F.2d 1003, 8 BRBS 658 (**5th Cir.** 1978), the employee sustained a work-related heart attack while using a ten-pound sledge hammer to do his "work in a hot, crowded work space for 2 ½ hours." In Dohrmann v. Navy Resole System Office, 5 BRBS 260 (1976), the employee sustained a work-related fatal heart attack when he helped move a 1,000 pound vending machine.

In Schwartz v. American President Lines, 5 BRBS 352, 354 (1977), a fatal heart attack suffered in 1975 by an employee who had suffered a work-related heart attack in 1958 and was declared permanently disabled in 1965 is determined to be work-related, pursuant to the LHWCA's statutory presumption, as the employer did not rebut said presumption, the Board holding, "while rebuttal evidence may be hard to develop, the presumption reflects a strong legislative policy favoring awards in arguable cases."

An employee who sustained a heart attack on the day that he was scheduled to undergo another myelogram and possible spinal fusion to alleviate back pain caused by a work-related back injury was entitled to benefits. The Board affirmed the conclusion that the back injury caused claimant enormous pain, stress, and emotional trauma which resulted in the heart attack. Bruce v. Atlantic Marine, 12 BRBS 65 (1980), aff'd, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

In Bruce, the Board stated:

It is clear that although the role of stress in causing myocardial infarctions is controversial within the medical community, this does not relieve the administrative law judge of 'his responsibility to select the more reasonable inference in the light of the evidence as a whole and the common sense of the situation.' Todd Shipyards Corp. v. Donovan, 300 F.2d 741, 742 (5th Cir. 1962). Furthermore, where the medical testimony is not conclusive, lay testimony, and the surrounding factors and circumstances may be taken into consideration by the fact finder. Southern Stevedoring Co. v. Voris, 218 F.2d 250 (5th Cir. 1955).

Bruce, 12 BRBS at 67-68 (emphasis added).

Although an employer argued that angina attacks are often a natural consequence of a myocardial infarction, the Board held that such evidence is insufficient to rebut the LHWCA's presumption that angina attacks suffered by an employee in the course of his employment constituted a work-related injury although the myocardial infarction was unrelated to his employment. Duty v. Jet America, 4 BRBS 523, 526 (1976).

Moreover, work-related symptoms of chest pain and angina pectoris are compensable under the LHWCA when such symptoms cause disability, the Board holding that substantial evidence proved that the claimant suffered chest pains brought on by the stress of his work, regardless of whether the pains were caused by an underlying heart disease or a psychosomatic disorder. Crum v. General Adjustment Bureau, 12 BRBS 458, 461-62 (1980), aff'd in pertinent part and rev'd on other grounds (i.e., an award of temporary total was modified to permanent total benefits), 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984).

Benefits have been denied, however, where the judge did not find a relationship between the claimant's back injury and his heart attack sustained while he was absent from work and resting as a result of his back injury, Perelli v. Consolidated Fibers, 9 BRBS 179 (1978), and where the judge found no relationship between the claimant's cardiac problems and his maritime employment. Bielo v. Navy Resale Sys., 7 BRBS 1030 (1978).

A fatal heart attack occurring after playing a **round of golf in a foreign country** was found to be a work-related injury, pursuant to the **"zone of special danger"** doctrine in a claim brought

under the LHWCA as extended by the Defense Base Act. Smith v. Board of Trustees, S. Ill. Univ., 8 BRBS 197 (1978).

Hemorrhoids

In Pittman v. Jeffboat, Inc., 18 BRBS 212, 214 (1986), the Board affirmed an award of benefits where the claimant's maritime work aggravated his hemorrhoids resulting in surgery and a work absence of two months.

Hopeless/Helpless Syndrome

The claimant was unable to perform a secretarial job as she suffered from “hopeless/helpless syndrome” - an inability to work because of difficulty with concentration, anxiety and fatigue, and difficulty in handling stressful situations. Armfield v. Shell Offshore, Inc., 30 BRBS 122 (1996).

Kevlar

Here the claimant worked in the Kevlar shop of the shipyard, cutting sheets of kevlar, which in turn, created dust. The ALJ found that this dust exposure (along with inhalation of welding smoke, paint fumes and sandblasting dust) contributed to the claimant's COPD, diagnosed as emphysema. Terry v. Ingalls Shipbuilding, (J. DiNardi)(ALJ Case No. 1998-LHC-2760)(March 1, 2000). See also, Richmond v. Ingalls Shipbuilding, Inc., (ALJ Case No. 1999-LHC-1956)(March 1, 2000); Peterson v. Ingalls Shipbuilding, Inc., (ALJ Case No. 1999-LHC-1954)(March 1, 2000); Herring v. Ingalls Shipbuilding, (ALJ Case No. 1999-LHC-1898)(March 1, 2000); Clancy v. Ingalls Shipbuilding, Inc., (ALJ Case No. 1999-LHC-1955)(March 1, 2000).

Latent Pre-existing Porphyria

The exposure to metallic gases while working in the fish hold area of a marina as a painter and welder either aggravated or activated the claimant's latent pre-existing porphyria. Dusenbury v. Kevin Hill's Marine Services, BRB No. 96-0517 (Nov. 21, 1996) (unpublished). The symptoms included: difficulty focusing eyes, confusion, balance problems, loss of sexual desire, back pains, problems with depth perception, numbness in the hands and feet, a lump in the arms and throat, a stinging sensation on the nose, tingling in the throat, difficulty urinating, skin discoloration, seizures, and personality changes. These symptoms may not be determinative as the judge found the claimant to lack credibility. There is a blood enzyme test; however, it is not generally accepted as diagnostic in the medical community as its testing methods are not standardized or been subjected to peer review.

Lead Poisoning

The claimant's work as a lead bonder resulted in chronic lead poisoning with symptoms of headaches, nausea, and intestinal problems. These symptoms constituted a work-related injury entitling the claimant to benefits. Decosta v. General Dynamics Corp., 13 BRBS 469 (1981).

Leukemia, Chronic Granulocytic (Ionizing Radiation/Atomic Weapons Testing)

Employer successfully rebutted the Section 20(a) presumption that the claimant's chronic granulocytic leukemia was caused by his ionized radiation exposure which occurred while he was working for a Defense Base Act contractor involved in atomic weapons testing in the Pacific Proving Grounds in the 1950's. Kaneshiro v. Holmes & Narver, Inc., 31 BRBS 196 (ALJ) (1997), Decision and Order on Remand—Denying Benefits at 31 BRBS 196 (ALJ).

Leukemia Resulting From Benzene Exposure

An employee who had been regularly exposed to benzene when pumping gas and using industrial solvents for automobile repairs at a service station subsequently developed leukemia and died. The Board, in affirming an award of benefits on remand, held that the employer failed to produce substantial evidence to rebut the presumption of causation as the employer's physician based his report on incorrect assumptions and, even if the employee's benzene exposure was less than the average, such was **insufficient rebuttal** proof since the effect of benzene exposure varies from individual to individual. Compton v. Pennsylvania Ave. Gulf Serv. Center, 14 BRBS 472 (1981). See also 9 BRBS 625 (1979) (Board's prior Decision and Order).

Lepomis/Biotransformation

Noting that competent medical opinions and well-reasoned scientific opinions, such as the "scientific method," can be used to refute a claimant's theories of causal relationship, the judge held that there was no acceptable medical evidence to support a finding of relationship between lepomis (fatty tissue build up) and bulk phosphate fertilizers. Claimants were exposed to various chemical compounds and substances, including diamanium phosphate, grain-leaded triple super phosphate, diesel oil and fumes, motor oil, lube oil, grease, mineral spirits, ammonium phosphate, kerosene, petroleum distillate, and liquid insect mixer. Blue v. CF Indus., Case No. 89-LHC-2564 (May 1, 1992) (unpublished).

Lumbar Stenosis

The Board has held that the gradual work-related aggravation of the claimant's lumbar stenosis was an accidental injury, rather than an occupational disease, since walking and standing are not peculiar to the claimant's employment and since there was no evidence that others in employment develop lumbar stenosis. Steed v. Container Stevedoring Co., 25 BRBS 210, 214-15 (1991).

Lung Cancer

Where the decedent suffered from lung cancer and where the uncontradicted testimony established that the decedent was exposed to asbestos at work, the claimant was entitled to the Section 20(a) presumption, and to an award of benefits; since neither opinion from two physicians completely ruled out asbestos exposure as a contributing factor in decedent's cancer, decedent was entitled to benefits as the employer had not introduced specific and comprehensive medical evidence rebutting the presumption. Peterson v. General Dynamics Corp., 25 BRBS 71, 78 (1991).

Lyme Disease

Claimant, a Stars and Stripes journalist covered under the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. 8171 et seq., suffered early stage Lyme disease while on assignment camping in the Black Forrest. Zeigler v. Department of the Army, (BRB No. 99-0122)(Oct. 7, 1999)(Unpublished).

Malignant Pleural Mesothelioma

Malignant pleural mesothelioma, a cancerous tumor in the lining of the lung resulting from asbestos exposure at the shipyard, constitutes a work-related injury. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989); Harris v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 114 (1989); Green v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 562 (1981). As the tumor grows, there is an increasing chance for the production of fluid that will collect in the lungs, causing a marked decrease in the claimant's ability to draw a normal breath. One procedure that can be used to drain the fluid from the lung is known as thoracentesis.

In Schmulian v. Marinship Corporation, (BRB Nos. 96-1093 and 96-1093A)(April 28, 1997)(Unpublished), the claimant was suffering from an asbestos induced **mesothelioma**. BRB Nos. 96-1093 and 96-1093A (Apr. 28, 1997) (unpublished). The only treatment that could be employed was to drain the fluid from the lungs, which was done several times until it became impossible due to the tumor's encasement of the entire lung. At that point, the **claimant shot himself**, and was rushed to a hospital. **The claimant had previously initiated a "no code" order so no life-saving operations were performed.** The employer tried to argue that there was no diagnosed mental illness so Section 3(c) would bar the death benefits claim due to the claimant's willful intent to kill himself. The Board affirmed the judge's finding that the claim for death benefits was not barred under Section 3(c) as the claimant's willful intent to kill himself was not the sole cause of the death. The holding was based on two alternate grounds: 1) the **suicide would not have occurred but for the effects of the work injury**; and 2) that the effect of the almost daily emergency room procedures to drain the lung, combined with the immanent prospect of death produced an irresistible urge that the claimant could not resist. The result is that the claimant lacked the requisite willful intent to commit suicide within the meaning of Section 3(c).

Multiple Sclerosis

Benefits were denied where the judge, crediting the employer's physician, found that the claimant's work-related fall did not cause, aggravate, or exacerbate the claimant's underlying multiple sclerosis. Grimes v. George Hyman Constr. Co., 8 BRBS 483 (1978).

Obesity

Obesity has not been recognized as a pre-existing disability. See Brogden v. Newport News Shipbuilding & Dry Dock Co., 80-LHC-2098 (August 17, 1981). See also Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 80-LHC-564 (August 7, 1980) (held that claimant's breathing difficulties caused by obesity, and not the obesity in and of itself, was a permanent partial disability which satisfied the requirements of Section 8(f)). In C & P Telephone v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), the **District of Columbia Circuit** concentrated on the claimant's prior back injuries, not on the fact that they may have at least been partially due to her obesity.

[ED. NOTE: Being overweight is not necessarily recognized as a physical impairment under the Americans with Disabilities Act (hereinafter "ADA"), 42 U.S.C. 12101 et. seq. If the condition is within a "normal range," weight is simply regarded as a physical characteristic like eye color, left-handedness, or muscle tone. However, it is a case-by-case call. Obesity that is out of the normal range, and caused by a physical disorder might be considered an impairment. (These remarks were noted in the September 30, 1993 Washington Post, page 4A, and attributed to Peggy Mastroianni, director of the ADA policy division of the Equal Employment Opportunity Commission.)]

Opening a Sliding Door

The effort of a warehouse manager in opening a sliding door, which effort caused sudden pain and aggravated his pre-existing back condition, was a **new** injury within the meaning of Section 2(2), although that effort was the last of a series of aggravations which caused his permanent total disability. Moreover, the carrier which insured at the time of the effort is **solely** liable for the compensation and medical benefits awarded, even though it did not insure the employer during the entire series of aggravations. Morgan v. Marine Corps Exch., 10 BRBS 442, 445-46 (1979).

Pleural Plaques

Pleural plaques, resulting from asbestos exposure, constitute a work-related injury as this condition established that something had gone wrong within claimant's bodily frame. Such plaques, even in the absence of pulmonary impairment, entitle claimant to medical benefits under the LHWCA. Romeike v. Kaiser Shipyards, 22 BRBS 57, 59-60 (1989).

Pleural thickening and plaques, also resulting from asbestos exposure, may also constitute a work-related injury as establishing physical harm to the bodily frame. Crawford v. Director, OWCP, 932 F.2d 152, 24 BRBS 123, 128 (CRT) (2d Cir. 1991). The employee must establish exposure to

asbestos as the etiology of his physical harm and, in the absence of such exposure, benefits may be denied. Brown v. Pacific Dry Dock, 22 BRBS 284, 286 (1989).

Psychological Problems

A claimant who sustained a work-related back injury, requiring two surgical procedures, however without significant objective findings, and who then was unable to work because of the unrelenting complaints of pain was awarded total disability benefits for the resultant conversion hysteria and his inability to return to work as the judge concluded the claimant's disability was work-related although wholly psychological in nature. Dygert v. Manufacturer's Packaging Co., 10 BRBS 1036, 1043-44 (1979).

A crane operator's psychological impairment manifested by chest pains, resulting from the **stress of having to work overtime**, is an accidental injury within Section 2(2), **even though there was no physical or external cause**. Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428, 431 (1979). Accord Urban Land Inst. v. Garrell, 346 F. Supp. 699 (D.C. 1972) (even though the case involves a psychological injury, the court found no rational basis for distinguishing this type of injury from the physiological injuries of a heart attack in Wheatley v. Adler, 407 F.2d 302 (D.C. Cir. 1968), or a cerebral vascular accident with intracerebral hemorrhage in Mitchell v. Woodworth, 449 F.2d 1097 (D.C. Cir. 1971).

Recently there has been a growth in **stress-related claims**. Case law does not support the proposition that, in order to establish a *prima facie* case, a claimant must seek psychological treatment or manifest stress-related medical symptoms at the time that stressful employment events occurred. The compensability of a psychological injury caused or aggravated by work-related cumulative stress is premised on the occurrence over time of stressful work-related events, culminating in the manifestation of the symptomatology which represents the psychological injury. See generally Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base, 32 BRBS 127, at 129 (1998)(en banc)(McGrannery, J.dissenting), aff'd on recon. en banc at 32 BRBS 134 (1997)(Brown and McGranery, J.J., dissenting); Konno v. Young Brothers, Ltd., 28 BRBS 57, 61 (1994); Marino v. Navy Exchange, 20 BRBS 166, at 168, (BRB No. 88-1720(Dec. 12, 1990)(Unpublished). See also American Nat'l Red Cross v. Hagen, 327 F.2d 559 (7th Cir. 1967). One must ask whether the cumulative stress of a claimant's general working conditions could have caused or aggravated his psychological injury. The relevant inquiry involves not merely the work-related event, but claimant's perceptions of those events and experience of stress resulting from them. See Sewell; Konno; Furthermore, focus on whether employer's actions were justified is not germane to this inquiry. See Sewell, 32 BRBS at 136, 138 n.5.

A distinction must be drawn between legitimate personnel actions and work-related cumulative stress. Marino v. Navy Exchange, 20 BRBS 166 (1988). A legitimate personnel action, such as a reduction-in-force, is not a working condition that can form the basis for a compensable psychological injury. Marino at 168. However, psychological injury due to cumulative stress from supervising a number of locations, insufficient personnel to perform the job, working more than the

required hours, and performing the duties of subordinates, all can form the basis for a compensable injury. Id.

In cases involving allegations of the existence of stressful working conditions, irrespective of any legitimate personnel actions, the Board has held that a claimant's minimal burden in establishing a *prima facie* case requires simply that he demonstrate the existence of working conditions which could have caused or aggravated his psychological injury. See Sewell, 32 BRBS at 136; Konno, 28 BRBS at 61. A demonstration by a claimant of stress in his daily work environment, including day-to-day interactions with his supervisor, may satisfy the "working conditions" prong of the claimant's *prima facie* case. See Sewell, 32 BRBS at 136. A claimant is not required to show unusually stressful conditions in order to establish his *prima facie* case. See, e.g., Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Rather, even where the stress may seem relatively mild, the claimant may recover if an injury results. See Sewell, 32 BRBS at 137; Konno, 28 BRBS at 61.

Moreover, in determining whether a claimant's *prima facie* case is established, the relevant consideration involves claimant's own perceptions of the work events or interactions alleged to be stressful relationship with a supervisor, the analysis must focus on the occurrence of events resulting in stress to the claimant, not whether the supervisor's actions were justified. See Sewell, 32 BRBS at 136, 137 n. 5. A focus on whether a supervisor's actions were justified would require the supervisor to be at fault in order for the claim to be compensable, a requirement that would be inconsistent with the strict liability for work-related injuries on which workers' compensation rest. See Sewell, 32 BRBS at 137 n.5.

ED. NOTE: *In a recent non-LHWCA case, a federal judge, denying a motion for summary judgement, ruled that a hypertensive production supervisor at a Pennsylvania box-making factory who had to avoid stressful social situations "at all costs" can sue his employer for firing him in violation of the Americans with Disabilities Act and the state employment bias law. Garvey v. Jefferson Smurfit Corp., (Case No. 00-1527)(E.D. Pa. October 24, 2000)(Unpublished)(jury could decide if worker was limited in the major life activities of socializing and engaging in interpersonal relations).]*

A claimant's psychological disorder, superimposed upon a work-related knee injury, resulted in a permanent and total disability condition in Love v. W. M. Schlosser Co., 9 BRBS 749, 752-53 (1978); Kilson v. Sun Shipbuilding & Dry Dock Co., 2 BRBS 172, 175 (1975) (the fact that claimant's chronic back pain may have a psychological basis does not bar his entitlement to compensation under the LHWCA).

Benefits, however, were denied a claimant who had recovered from his work-related back and knee injuries but who had not returned to work apparently because of "a functional overlay developing in Claimant's attitude about March of 1971 for secondary gain factors." Wilkinson v. I.T.O. Corp. of Baltimore, 10 BRBS 414 (1979). Compare Sams v. D.C. Transit Sys., 9 BRBS 741 (1978).

The testimony of two physicians provided evidentiary support for a claimant's assertion that her continuing symptomatology was the result of a psychological reaction to the physical reaction she experienced due to her exposure to chemicals at work, and such symptomatology prevents her from returning to her usual job, thereby entitling her to an award of permanent partial disability. Sinclair v. United Food & Commercial Workers, 23 BRBS 148, 150-54 (1989).

A claimant's mental limitations (i.e., her borderline retardation) combined with her work-related knee injury to render her virtually unemployable, one vocational counselor opining that "a non-competitive sheltered workshop situation may be the best placement for her." Todd Pac. Shipyards Corp. v. Director, OWCP (Mayes), 913 F.2d 1426, 24 BRBS 25, 32 (CRT) (9th Cir. 1990).

The **Second Circuit** has noted that "severe depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it." Pietrunti v. Director, OWCP, 119 F.3d 1035, 1044, 31 BRBS 84, 91 (CRT) (2d Cir. 1997), citing Wilder v. Chater, 64 F.3d 335, 337 (7th Cir. 1995).

In Moncrief v. Sinclair Control Corp., BRB No. 97-1285 (June 12, 1998) (Unpublished), the Board held that a claimant who received an electrical shock while working aboard a vessel, and thereafter allegedly developed psychological problems including a phobia of electricity, was denied benefits when the employer provided the testimony of a neurologist who specialized in electrical injuries to opine that the lack of any exit or entry wounds and the variable results of the claimant's psychological tests convinced him that the claimant was probably malingering as to his electrical shock injury.

Pulmonary Conditions

If a claimant develops a pulmonary problem, or his working environment aggravates a preexisting condition, then he is entitled to disability. The fact that a claimant's symptoms may be alleviated by a departure from the workplace does not support a finding that the work-related aspect of his condition has resolved. Crum, 738 F.2d at 480, 16 BRBS at 125 (CRT) (1984). Temporary recurring symptoms may nonetheless be permanent within the meaning of the LHWCA if they continue and appear to be of a lasting or indefinite duration, as opposed to a condition which is subject to a very gradual healing period. Id., 738 F.2d at 480, 16 BRBS at 124 (CRT), citing Watson v. Gulf Stevedore Corp., 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969); Care v. Washington Metropolitan Area Transit Authority, 21 BRBS 248, 250 (1988). It should also be noted that the underlying condition need not have been caused or permanently worsened by claimant's workplace exposure. Crum, 738 F.2d at 480, 16 BRBS at 125 (CRT).

Recreational Activities

An employee who aggravated his work-related knee condition (i.e., a torn medical meniscus) while playing a round of golf, requiring knee surgery the following week sustained a compensable injury. Ward v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 353, 357 (1978).

In making its holding in Ward, the Board noted that a subsequent injury is compensable if it is the direct and natural result of a compensable primary injury and the employer is responsible for the entire disability resulting from the combination of the primary injury and the aggravation. Compare Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979) (claimant's fall from his roof while attempting to repair a television antenna constituted an intervening cause between his work-related knee injury and any disability resulting from his subsequent fall).

Reiter's Syndrome

Employer could not overcome the presumption that the claimant's illness was caused by exposure to bacteria at work. Smith v. Noncommissioned Officers' Open Mess, McConnell Air Force Base, Kansas, (ALJ Case No. 91-LHC-904)(Unpublished).

Sarcoidosis

Champion v. S&M Traylor Brothers, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982), involved a claim for benefits for sarcoidosis (i.e., a **chronic disease of unknown etiology** that is characterized by the formation of nodules resembling true tubercles, especially in the lymph nodes, lungs, bones, and skin). (See "Asthma" supra for a discussion of Champion).

Severe Depression

The **Second Circuit** has noted that "severed depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it." Pietrunti v. Director, OWCP, 119 F.3d 1035, 1044, 31 BRBS 84, 91 (CRT) (2d Cir. 1997), citing Wilder v. Chater, 64 F.3d 335, 337 (7th Cir. 1995).

Sexual Potency

In Ramirez v. Lane Construction Co., 9 BRBS 645 (1979), the Board held that a claimant who was awarded benefits for his work-related injury is not entitled to monetary damages "for his wife's loss of consortium" and "for (his) pain and suffering". It must be remembered that where an injury falls within the coverage of the LHWCA, the claimant's sole remedy against the employer is the compensation as provided for in the LHWCA.

Moreover, the LHWCA, unlike tort law, is a system which only compensates injuries that affect an employee's ability to earn wages. Since the claimant's sexual potency does not affect his

ability to earn wages, its loss cannot be compensated under the LHWCA. Similarly, a claimant's pain and suffering, no matter how severe, may be compensated only to the extent it interferes with his ability to earn wages. Pain and suffering without economic effect cannot, in and of itself, be the basis of an award under the LHWCA. Ramirez, 9 BRBS at 646.

Silicosis

In Carver v. Ingalls Shipbuilding, 24 BRBS 243 (1991), compensation benefits were not awarded because the record contained no permanent impairment rating on which an award could be based. The claimant would be entitled to an award of medical benefits, however, for his work-related silicosis. See also Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

Stress

[See “Psychological Problems,” infra, this subsection.]

Suicide

The employee's suicide was the result of **one continuing injury, i.e., depression** over his declining business, and thus he has sustained a work-related injury under the LHWCA as extended by the District of Columbia Workmen's Compensation Act. Director, OWCP v. Cooper Assocs., 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), aff'g in pertinent and rev'g on other grounds 7 BRBS 853 (1978) (the fact that the employee's death resulted from an **irresistible suicidal impulse wrought by intolerable employment stress** removes this claim from the ambit of Section 3(b) which bars claims based on injury resulting from willful intent to kill oneself).

The psychiatrist's opinion that decedent's work injury and its effects prevented him from forming a rational and willful intent to commit suicide, and the doctor's conclusion that decedent died as a direct consequence of his industrial work was not convincingly rebutted by the employer. Thus, the Board affirmed the judge's holding that the claim was **not barred by Section 3(c)**. Maddon v. Western Asbestos Co., 23 BRBS 55, 60-61 (1989).

An electrician's **mental derangement, resulting from an electrical shock** in 1962, and resulting in his suicide twelve years later constitutes a work-related injury. Brannon v. Potomac Elec. Power Co., 6 BRBS 527, 530 (1977).

For a case where the employer unsuccessfully attempted to argue the applicability of Section 3(b) (willful intent to kill oneself not covered) when the claimant suffered from fatal malignant mesothelioma, had initiated a “no code” order, and fatally shot himself, see “Malignant Pleural Mesothelioma,” supra this sub-topic.

Thrombophlebitis

The claimant "was **bitten by a brown recluse spider** during the course of his employment with the employer. The claimant suffered from thrombophlebitis of the right leg as a result of this injury" and he was paid temporary total disability benefits while he was out of work. Thereafter, upon his return to work, one year later, another work-related injury affected that condition and he was hospitalized for chest pains, right leg thrombophlebitis, and pulmonary embolism. The claimant was unable to return to work and he remained totally disabled until his death almost three years later. The Board affirmed an award of benefits but reversed the denial of Section 8(f) relief as the employer satisfied the requirements for such relief. Stephens v. I.T.O. Corp. of Baltimore, 8 BRBS 406 (1978).

Thoracic Outlet Syndrome (TOS) and related Reflex Sympathetic Dystrophy (RSD)

In Breese v. The Department of Army/NAF/CPO, (BRB No. 97-425)(Oct. 27, 1997) (Unpublished), the claimant developed TOS as a result of strained muscle contractions due to RSD. TOS is a pinching of the nerve in the collarbone. RSD is an abnormality of the sympathetic and parasympathetic nervous systems that may be mis-diagnosed as carpal tunnel.

Vascular Headaches

In Campbell v. Norfolk Shipbuilding & Dry Dock Co., 1995 WL 848036 (ALJ) (May 5, 1995), the ALJ accepted a physician's opinion that the claimant's vascular headaches were triggered by claimant's work injury and satisfy claimant's *prima facie* burden. The ALJ recognized that although the prevailing medical theory is that vascular headaches may have a genetic basis, the physician testified that individuals with a genetic predisposition to this condition can begin to experience the severe headaches only after an occurrence such as illness, medicine or trauma, particularly, trauma to the neck. Id. at 13.

Varicose Veins

The Board has held that work-related aggravation of a claimant's varicose veins constituted an accidental work-related injury, **notwithstanding that he knew** that his condition could be made worse by his continued employment, the Board holding that he had **no deliberate intention to harm himself** and that it was reasonable to presume that he would try to work because of financial necessity.

The claimant was not entitled to permanent benefits, however, since the symptoms subsided once the claimant received medical treatment therefor, having no lasting effect on the natural progression of his pre-existing disease. Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

2.3 2(3) EMPLOYEE

[ED. NOTE: For a definition of "employer-employee relationship" see Topic 75, infra.]

Section 2(3) of the LHWCA defines "employee" as follows:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under the Act;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3).

(For a complete discussion of "employee" see Topic 1, supra).

There is no specific threshold test for determining whether the work is too "episodic or momentary" for it to be considered as arising within the course and scope of his employment. Lewis v. Sunnen Crane Services, Inc., 31 BRBS 34 (Apr. 15, 1997). Work that is part of an employee's regular job assignments is not "episodic". McGoey v. Chiquita Brands Internat'l., 30 BRBS 237 (1997). The **First Circuit** has held that an activity must be "discretionary or extraordinary" to be considered "episodic." Levins v. Benefits Review Board, 724 F.2d 4,8 (1st Cir. 1984). In Lewis, the Board held that so long as "that claimant did spend at least some of his time performing

undisputedly maritime activities and these duties were a regular portion of the overall tasks to which claimant could be, and actually was, assigned, the administrative law judge” should find that the activity was not “episodic.” Lewis, 31 BRBS 34.

2.4 2(4) EMPLOYER

[ED. NOTE: For a definition of “employer-employee relationship” see Topic 75, infra]

Section 2(4) of the LHWCA defines "employer" as follows:

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters on the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4).

(See also Topic 1.9, supra.)

2.5 SECTION 2(5) CARRIER

The LHWCA defines "carrier" as follows:

The term "carrier" means any person or fund authorized under Section 32 to insure this Act and includes self-insurers.

33 U.S.C. § 902(5).

By providing compensation insurance under the LHWCA, an insurance carrier becomes bound for the full obligation of the employer. 33 U.S.C. § 935; 20 C.F.R. § 703.115. Crawford v. Equitable Shipyards, 11 BRBS 646 (1979), aff'd per curiam sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

The Board has consistently held that an insurer may intervene in a proceeding under the LHWCA to recover from the employer amounts mistakenly paid to a claimant. Januszewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286 (3d Cir. 1982); Aetna Life Ins. Co. v. Harris, 578 F.2d 52 (3d Cir. 1978); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259, 263 (1986); Pilkington v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 119 (1981). The employer is responsible for benefits awarded to the claimant even though the employer's insurance policy under the LHWCA has lapsed. Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991).

The carrier at the time of a traumatic injury is liable for the employer's obligations resulting from that injury. With multiple traumatic injuries, designation of the responsible carrier is based upon the same analysis used in determining the responsible employer. The judge must determine whether the claimant's disability resulted from the natural progression of his first injury or if the claimant's subsequent injury aggravated, accelerated or combined with the earlier injury to result in the claimant's disability. Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 (1981); Crawford, 11 BRBS 646. See Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Delaware River Stevedores, Inc., v. Director, OWCP, ___ F.3d ___ (No 01-1709) (3rd Cir. Jan. 30, 2002).

In Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997), the Board held that the ALJ "has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act." The Board concluded that the ALJ erred in finding two employers liable for the claimant's attorney's fees where "CPS has no longshore workers itself, but merely provides workers to longshore employers, [and Carrier] was on the risk not for CPS itself, but for ... other employers to whom CPS loaned employees." The Board held that "[b]y virtue of the contractual agreements, [Carrier] is solely liable to claimant as the insurance carrier, as its policy insures [the longshore employer] for injuries covered under the Longshore Act and as it waived its right to seek reimbursement from [the longshore employer]." But see, Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5th Cir. 2001) (ALJ did not have jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between

the borrowing employer and the loaning employer; did ALJ have jurisdiction to address a waiver of subrogation by the loaning employer's carrier.).

In Weber v. S.C. Loveland Co. (WeberIII), ___ BRBS ___ (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30 2002), the Board distinguished Temporary Employment Services. The issue in Weber was which of two, if any insurers was on the risk for longshore benefits at the time of the claimant's injury and is liable for those benefits. In Weber, the claimant was injured in Jamaica and the Board found that the claimant was "covered under the LHWCA." There were two insurance policies in question.. One covered injuries within the United States and included Longshore coverage. The other covered injuries outside the U.S. and did not include Longshore coverage. The Board noted that in Temporary Employment Services, the **Fifth Circuit** held that contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board. However, the Board found that Weber "does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of employers' carriers is liable." Thus the Board found that the ALJ has the authority to address the issue.

(See also Topic 70, infra).

2.6 SECTION 2(6) SECRETARY

The term "Secretary" means the Secretary of Labor.

33 U.S.C. § 902(6).

In Lopes v. New Bedford Stevedoring Corp., 12 BRBS 170, 172 (1979), the case was remanded to the deputy commissioner for issuance of an appropriate order in keeping with the Secretary's regulations and accepted procedures.

2.7 SECTION 2(7) DEPUTY COMMISSIONER

The term "Deputy Commissioner" means the Deputy Commissioner having jurisdiction in respect of an injury or death.

33 U.S.C. § 902(7).

20 C.F.R. § 702.105--entitled **Use of the title District Director in place of Deputy Commissioner**--provides:

Wherever the statute refers to **Deputy Commissioner**, these regulations have substituted the term **District Director**. The substitution is purely an administrative one and in no way effects (sic) the authority of or the powers granted and responsibilities imposed by the statute on that position.

[55 FR 28606, July 12, 1990]

[ED. NOTE: Within this text the terms "Deputy Commissioner" and "District Director" are used interchangeably. Generally, "Deputy Commissioner" has been used in dealing with cases arising prior to July 1990--when the Board and courts commonly used the term. "District Director" is used in reference to more recent jurisprudence and current tense. For a case confusing the terminology, see Staftex Staffing v. Director, OWCP, 217 F.3d 365 (5th Cir. July 18, 2000, re-issued at 237 F.3d 409 (5th Cir. July 25, 2000), subsequently re-issued at 237 F.3d 409 (5th Cir. March 26, 2001)]

*[ED. NOTE: In 1972 the LHWCA was amended to transfer all adjudicatory powers to OALJ. 33 U.S.C. 919(d). In Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 115 S.Ct. 1278 (1995)(eight person majority, one concurrence), the **Court** spoke in terms of the Director as having a "duty of uniform administration and enforcement" as opposed to the adjudicatory process that initially takes place at OALJ. See also, Barthelemy v. J. Ray McDermott, 537 F.2d 168 (5th Cir. 1976). Still more recently, in Ingalls Shipbuilding, Inc. v. Director, OWCP, (Yates), 519 U.S. 248, (1997), the **Court** again referred to OALJ as the beginning of the adjudicatory process.*

For discussions on the powers of the district director and the powers of ALJs, see Topics 19.3 "Adjudicatory Powers" and 19.4 "Formal Hearings Comply with APA."]

2.8 SECTION 2(8) STATE

Section 2(8) of the LHWCA provides as follows:

The term "State" includes a Territory and the District of Columbia.

33 U.S.C. § 902(8).

In Tyndzik v. University of Guam, 27 BRBS 57 (1993), the Board held that **Guam** is covered under Section 3(a) of the LHWCA. Due to the ambiguous usage of the word "**territory**" in legislation and judicial decisions, it was not readily clear whether Guam was a covered location under Section 3(a).

The Board distinguished the circuit courts opinions applying the term "territory." In Garcia v. Friesecke, 597 F.2d 284 (1st Cir.), cert. denied, 444 U.S. 940 (1979), the LHWCA was held not to apply to Puerto Rico as the LHWCA was displaced by the local Puerto Rican compensation scheme. This holding was due to the purpose of the 1927 LHWCA, which was to provide coverage to those injured on navigable waters where the states could not legislate. See Guerrido v. Alcoa Steamship Co., 234 F.2d 349 (1st Cir. 1956).

In Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (3d Cir. 1990), cert. denied, 498 U.S. 1067 (1991), the **Third Circuit** held that the Virgin Islands were seen in the same light as a state, that the Organic Act was meant to apply to territories, and that federal maritime law does not preempt application of any state workers' compensation laws and that the two may apply concurrently and therefore the LHWCA applied to the Virgin Islands.

The Board determined that Guam's situation was more similar to that of the Virgin Islands than to Puerto Rico. Both statutes allow for local legislation not inconsistent with United States law, while Puerto Rico was invested with the powers of self-government unlike the other territories.

The Board also dismissed the judge's reliance on the Report of the Commission on the Application of Federal Laws to Guam, H.R. Doc. No. 212, 82 Cong., 1st Sess. 1 (1951), that stated that the LHWCA does not apply to Guam. The Board reasoned that since the Report did not give a basis for this ruling, and since the circuits were split on the application of the Report, in addition to the fact that the 1972 Amendments allowed for concurrent state and federal jurisdiction to compensation acts, the Report was not applicable. Tyndzik, 27 BRBS at 64-65.

One judge has found that the LHWCA applied to an accident occurring on **Saipan, located in the Northern Mariana Islands**. Uddin v. Saipan Stevedore Co., 27 BRBS 76 (ALJ) (1993) (Order Denying Dismissal).

After World War II, governance of the Micronesian Islands was handed to the United States by the Trusteeship Agreement with the United Nations. On January 9, 1978, the Covenant to Establish a Commonwealth of the Northern Mariana Islands became effective and the Islands became self-governing and in 1986, the Trusteeship Agreement was formally dissolved. The Commonwealth of the Northern Mariana Islands (CNMI), however, maintained close relations with the United States. As a result of this history, CNMI is a *sui generis* political entity where some portions of the U.S. Constitution and federal statutes apply, but not all.

Section 502(a)(2) of 90 STAT. 268 (Public Law 94-241-Mar. 24, 1976) states:

[T]he following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant...(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the Several States.

The judge in Uddin noted that the statute does not mention the LHWCA as not applying to the CNMI, and the LHWCA was in existence as of the effective date of Section 502.

The LHWCA provides for workers' compensation to be paid for injury or death of an employee resulting from an injury occurring upon the navigable waters of the United States. 33 U.S.C. § 903(a). The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof. 33 U.S.C. § 902(10).

In applying Section 502(a)(2), the determination of whether an act applies to the CNMI is done by ascertaining whether the LHWCA applies to Guam. The Northern Mariana Islands Commission on Federal Laws to the Congress of the United States of America determined that the LHWCA applied to Guam and therefore, under Section 502(a)(2) of the Covenant, was applicable to CNMI. The Second Interim Report of the Northern Mariana Islands Commission on Federal Laws to the Congress of the United State, p.52 (August 1985) (Documentary Supplement).

2.9 SECTION 2(9) UNITED STATES

Section 2(9) of the LHWCA provides as follows:

The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

33 U.S.C. § 902(9).

Although Congress may have intended to confine the LHWCA to the territorial waters of the United States, the jurisprudence, to some degree, has extended coverage beyond the geographical boundaries of the states, territories, District of Columbia, and the navigable waters of the United States. (See Topics 1.5.2 and 2.8.0, *supra*).

In fact, in its recent pronouncement, the Board has included Jamaica within the “navigable waters of the United States.” Weber v. S.C.Loveland Co. (Weber I), 28 BRBS 321 (1994), *reheard at Weber v. S.C.Loveland Co. (Weber II)*, 35 BRBS 75 (2001) (Board adheres to its holding that claimant’s injury occurred on a covered situs, as being the law of the case.); Weber v. S.C. Loveland Co. (Weber III), ___ BRBS ___ (2002) (Board leaves prior jurisdiction determination unchanged.). In Weber, the claimant, working for employer as a field superintendent, injured his back in the port of Kingston, Jamaica, when he was walking on the catwalk on employer’s barge, and slipped and fell.

In its initial decision, the Board discussed cases which extend the LHWCA’s coverage to include injuries occurring on the high seas. See Cove Tankers Corp. v. United Ship Repair, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982), and Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc., 788 F.2d 264, 19 BRBS 10 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986). It specifically addressed the decision in Kollias v. D & G Marine Maintenance, 29 F.3d 67, 28 BRBS 70 (CRT)(2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995), wherein the United States Court of Appeals for the **Second Circuit** held that the term “navigable waters” includes the high seas without qualification.

The Board, also in its initial decision, looked to other federal admiralty statutes “for guidance,” such as the Jones Act and the Death on the High Seas Act (DOSHA). The Board opined that cases decided under those statutes established a trend in admiralty law toward extending coverage to persons injured on foreign territorial waters, as the term “high seas” as used in DOSHA was not meant to exclude foreign territorial waters, see Howard v. Crystal Cruises, Inc., 1992 AMC 1645, 1648 (1992), *aff’d* 41 F.3d 527 (9th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995); Mancuso v. Kimex, Inc., 484 F.Supp. 453, 455 (S.D. Fla. 1980). The Board noted that the Jones Act is applicable to a seaman injured or killed in foreign territorial waters or in a foreign port, see Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 528 (5th Cir. 1979)(*en banc*), *cert.denied*, 446 U.S. 956, *reh’g denied*, 448 U.S. 912 (1980); McClure v. United States Lines Co., 386 F.2d 197 (4th Cir. 1966).

The Board, in the initial decision, held that in view of developing case law, as well as the policy concern for providing uniform coverage and protection for American workers working in foreign waters when all contacts except the site of injury are within the United States.

On its second hearing in this matter, the Board found that its review of intervening law corroborates its previous conclusion. Referencing In re Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200 (2d Cir. 2000), the Board noted a “recognized trend” in federal court decisions towards extending coverage of DOSHA to individuals injured on foreign territorial waters. In this second decision the Board addressed the defenses reliance on several federal decisions. It noted that in its initial decision, it stated that the courts in Christianson v. Western Pacific Packing Co., 24 F.Supp. 437 (W.D. Wash. 1938)(the court held that the LHWCA did not apply to an employee injured while servicing canning machinery on a barge in British Columbia waters in Canada), and Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940)(the LHWCA did not apply to a longshore employee injured while loading a steamship in the Panama Canal Zone), summarily found no coverage without providing “any reason” for their ruling, and therefore, these cases were not definitive of the coverage issue.

The Board further recalled that it had noted that Maharamas v. American Export Isbrandtsen Lines, Inc., 475 F. 2d 165 (2d Cir. 1973) (coverage denied to a claimant injured while working as a hairdresser on a Mediterranean cruise), was inapposite as the claimant was not doing longshore work, and in Garcia v. Friesecke, 597 F.2d 284 (1st Cir. 1979), cert. denied, 444 U.S. 940 (1979), the denial of coverage related to an injury occurring in Puerto Rican territorial waters which gave rise to a conflict of law issue and dealt with special circumstances of Puerto Rico’s status as a territory of the United States.

[ED. NOTE: It is submitted, that the Board’s holding that the port of Kingston, Jamaica is within the “navigable waters of the United States,” would not pass a statutory strict construction test as applied by the United States Supreme Court. It should further be noted that the Jones Act (a seaman’s death and survival negligence action), unlike the LHWCA, did not specify a geographical jurisdiction. DOSHA, (solely a death action, but covering the death of any person caused by “wrongful act, neglect, or default occurring on the high seas.”) contained a geographical jurisdictional requirement limiting its coverage to the high seas beyond a marine league. In fact, In re Air Crash Off Long Island, New York, On July 17, 1996, 209 F.3d 200 (2d Cir. 2000), which the Board has cited, states, “We take no position on what courts should do when faced with the difficult question of whether to apply DOSHA in foreign territorial waters, where plaintiffs might otherwise be left with only foreign remedies in foreign courts.” Air Crash Off Long Island, 209 F.3d at 212.]

In their revered “hornbook,” “The Law of Admiralty,” authors Gilmore and Black have noted that in originally enacting the LHWCA, “Congress aimed not at the broadest possible coverage (up to the full limits of its own constitutional powers) but at the narrowest possible coverage (to provide a federal compensation system only for those maritime workers who according to the Supreme Court, could not be covered by state compensation systems. The draftsmen of the 1927 LHWCA therefore

wrote into the statute limitations on its territorial coverage designed to achieve that end.” Section 6-48, Gilmore and Black, “The Law of Admiralty,” (2nd Ed. 1975). Least one not become confused, the references Gilmore and Black have made to American law being applied to harbor workers, repairman “and the like” on board ships wherever they may be, (see Section 6-63, pp. 476-477; Nye v. A/SD/S Svendborg, 358 F.Supp.145 (D.C.N.Y., 1973)(shipowner negligent for not better assisting obese pump repairman in boarding vessel)) are made in the context of third party claims by these workers against the ships themselves, i.e., Section 905(b) type actions. One must also note that state workers compensation laws do provide for American workers in foreign locales.

[ED NOTE: Query: If the LHWCA “may” be applied in foreign territorial waters, when the foreign territory has an applicable law, one would need to develop a “choice of law” standard somewhat akin to that used by federal courts in dealings with maritime personal injury matters in the non-workers compensation context. It is submitted that in enacting and amending the LHWCA, Congress never contemplated such a path.]

2.10 SECTION 2(10) "DISABILITY"

Section 2(10) of the LHWCA defines "disability" as follows:

"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; 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).

33 U.S.C. § 902(10).

The definition of "disability" given in Section 2(10) has been given a considerable gloss following the **Supreme Court's** holding in Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121 (1997). The **Court** expanded the traditional understanding of "disability" to include both current economic harm **and potential economic harm as a potential result of a present injury and market opportunities in the future.** Id.

2.10.1 Claimant's Vocational Background vs. Legal Qualification to Work

The 1984 Amendments to the LHWCA specifically overruled Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984), and Redick v. Bethlehem Steel Corp., 16 BRBS 155 (1984), in which cases the Board held that benefits under the LHWCA cannot be paid to those who retire from the work force as they have no loss of wage-earning capacity.

Through the enactment of the post-retirement injury provisions of the 1984 Amendments to the LHWCA, Congress intended to expand the category of eligible claimants to include persons suffering from an occupational disease who have voluntarily retired from the work force. This result was necessary due to the Board's holding in Aduddell v. Owens-Corning Fiberglass, 16 BRBS 131 (1984), that a claimant who had voluntarily retired for reasons "wholly unrelated to his asbestosis" and who had no intention of returning to the work force prior to the manifestation of his asbestosis, was not entitled to benefits because he had no wage loss as a result of his injury.

Congress explicitly stated its intent to overrule Aduddell through enactment of the amendments. H.R. REP. NO. 1027, 98th Cong. 2d Sess. 30, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 2771, 2780. Thus, Congress enacted the amendments to provide benefits to a class of claimants excluded by the Board's decision in Aduddell, i.e., those who retired for reasons unrelated to their work injury.

Consistent with this purpose, a claimant's retirement is termed "**voluntary**" based on whether his disability due to his disease caused the termination of his employment, rather than on economic or other considerations of claimant or employer. Harmon v. Sea-Land Services, Inc., 31 BRBS 45 (1997); Morin v. Bath Iron Works Corp., 28 BRBS 205, 208 (1994); Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988).

Moreover, a claimant may be compensated under the voluntary retiree provisions when a non-work-related disability causes cessation of employment. See Woods v. Bethlehem Steel Corp., 17 BRBS 243 (1985). As a person who has left his employment due to his work-related injury, an involuntary retiree is simply disabled and is entitled to receive compensation for his disability from the date he left his employment. Id.; MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986). Under Section 8(c)(23), retirees may receive an ongoing award based on a percentage of their rating of permanent medical impairment. See also 33 U.S.C. § 902(10).

When "a claimant's retirement is due, at least in part, to his occupational disease, the claimant is not a voluntary retiree and the post-injury provisions at Sections 2(10), 8(c)(23), and 10(d)(2) do not apply." Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997).

Thus, the 1984 Amendments apply a new set of rules in occupational disease cases where the "injury" occurs after claimant voluntarily retires, i.e., voluntarily leaves the work force for reasons unrelated to his occupational disability. 33 U.S.C. §§ 902(1); 908(c)(23); 910(D)(2) (Supp. V 1987).

In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the American Medical Association Guides to the Evaluation of Permanent Impairment, and the claimant is limited to a permanent partial disability award pursuant to Section 8(c)(23), based solely upon the degree of his physical impairment. See Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

In Hoey v. Owens-Corning Fiberglas Corp., 23 BRBS 71, 74-75 (1989), the Board noted that "claimant would be classified as a 'voluntary retiree' because he left the workforce for reasons unrelated to the injury of which he now claims benefits, his stomach cancer, an occupational disease which became manifest only after his retirement. See MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986)."

These post-retirement injury provisions, therefore, were enacted to provide relief for those claimants who otherwise would not be entitled to receive any compensation because their occupational disease became manifest after retirement. They were not intended to provide additional relief to claimants who have already received compensation under the LHWCA for permanent total disability.

The Board has consistently held that a claimant who is already receiving permanent total disability cannot seek additional benefits, under Section 8(c)(23), based on medical impairment after

he has become totally disabled due to another cause and has been compensated for this permanent total disability under the LHWCA.

Thus, the Board affirmed the judge's conclusion that the claimant is not entitled to benefits on the stomach cancer claim because he had previously settled a prior claim for asbestosis for \$50,000.00, according to the terms of which the parties acknowledged that he was permanently and totally disabled. The Board held, however, that the claimant was entitled to an award of medical benefits for his stomach cancer. Hoey, 23 BRBS at 75.

A claimant was properly found to be a voluntary retiree where, prior to leaving the employer, the claimant, alleging no disability, filed for Social Security Retirement Benefits and his employee's severance papers indicated he was voluntarily retiring. Johnson v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 160, 162 (1989).

Moreover, the claimant sought no other employment and the medical evidence demonstrated no pre-retirement breathing impairment. Johnson, 22 BRBS 160; Smith v. Ingalls Shipbuilding Div., Litton Sys., 22 BRBS 46, 49 (1989) (claimant was a voluntary retiree because he was in good health in 1970 when he requested a layoff, he was able to perform his job until that time, he had a good attendance record, he had no serious health problems between 1970 and 1981, at which time asbestosis was suspected, he did not look for other work and made no attempt to regain his former job at the shipyard).

In an early case interpreting the 1984 Amendments as affecting retirees and occupational diseases, the Board held that decedent, a retiree whose occupational disease (i.e., lung cancer resulting from exposure to asbestos), was a voluntary retiree as her occupational disease became manifest more than one year after her retirement and benefits are payable to her surviving husband based upon the national average weekly wage as of the time of her injury (i.e., the date of manifestation), pursuant to Section 10(d)(2). Arganbright v. Marinship Corp., 18 BRBS 281, 283 (1986). See Dunn v. Todd Shipyards Corp., 18 BRBS 125 (1986).

Pursuant to the 1984 Amendments, the **date of last exposure to the injurious stimuli is no longer relevant to the average weekly wage**. The judge must determine the date of manifestation of the claimant's disease, pursuant to Section 10(i) and the date of retirement, pursuant to Section 10(d)(2). Coughlin v. Bethlehem Steel Corp., 20 BRBS 193 (1988).

Note that if pulmonary disability preceded the date of manifestation and caused the retirement, onset of disability is, in effect, considered the date of injury and the average weekly wage should reflect earnings prior to the onset of disability, rather than the date of manifestation. Dunn, 18 BRBS at 128.

Where the claimant retired in order to receive Social Security Benefits and his union pension, the Board affirmed the judge's finding that the claimant left the work force for reasons unrelated to

his asbestosis and that he was thus a voluntary retiree, pursuant to Section 8(c)(23). Frawley v. Savannah Shipyard Co., 22 BRBS 328, 330 (1989).

Moreover, compensation benefits were properly denied since there was no medical opinion evaluating the extent of the claimant's impairment due to asbestosis. As the claimant established a work-related injury, however, the claimant is entitled to an award of medical benefits and the attorney entitled to a fee. Frawley, 22 BRBS at 331.

Where a claimant left his full-time job and thereupon took a part-time job, as a warehouseman for his son's company, as a means to supplement his retirement benefits without affecting his entitlement to those benefits, the Board held that such a claimant is a voluntary retiree and, pursuant to Sections 8(c)(23), 10(d)(2)(B), and 10(i), benefits for his work-related asbestosis are based upon the National Average Weekly Wage at the time of his injury. Jones v. U.S. Steel Corp., 22 BRBS 229, 232 (1989).

Where a claimant is a voluntary retiree and where his occupational disease becomes manifest within one year of retirement, the claimant's average weekly wage is based on his average annual earnings during the 52-week period preceding retirement, pursuant to Section 10(d)(2)(A). Coughlin, 20 BRBS at 197.

A claimant's retirement was termed "involuntary" based on a determination that he left the work force because of work-related pulmonary problems and the fact that neither the claimant nor the employer caused the termination of employment. MacDonald v. Bethlehem Steel Corp., 18 BRBS 181 (1986). See also 20 C.F.R. § 702.601(c) (retirement is a "voluntary" withdrawal from the work force with "no realistic expectation that such person will return to the work force").

The LHWCA's definition of the word "**disability**"-- incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment -- clearly **requires a causal connection** between the worker's physical injury and his inability to find suitable employment.

The judge, in determining whether the worker is disabled and whether suitable alternate employment is available, may look beyond the worker's injury and inquire whether someone having **both** the injury and a similar background -- the worker's age, education, and work experience, for example -- would be unable to find work in the relevant geographical area. Crum v. General Adjustment Bureau, 738 F.2d 474, 479, 16 BRBS 115 (CRT) (**D.C. Cir.** 1984), aff'g and rev'g in part 16 BRBS 101 (1983).

The Board, however, has declined to treat a worker's undocumented alien status as one of the elements of an employee's background that must be taken into account when determining whether the claimant is disabled because of his injury, holding that while "his status as an undocumented worker might bar him from obtaining a job on the open market, this consideration, unlike age, education and

work history, has no bearing on claimant's **ability** to work." Rivera v. United Masonry, 24 BRBS 78, 82 (1990), aff'd, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991) (emphasis added).

In contrast, while a pre-injury criminal record may be relevant in determining if jobs are realistically available to a claimant, Piunti v. ITO Corp. of Baltimore, 23 BRBS 367, 370 (1990), the claimant's status as an undocumented worker will prevent him from obtaining any job legally. Rivera, 24 BRBS at 82. The Board reasoned that if the undocumented claimant's thesis is accepted, it would enable him to obtain a benefit unavailable to other injured workers who are of the same age with the same educational and vocational backgrounds, and who have similar work restrictions. Id.

Under the LHWCA, as amended in 1984, when an employee retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based on the extent of his medical impairment as measured pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, and is not based on economic factors. See 33 U.S.C. §§ 920(10), 908(c)(23), and 910(d)(1) and (2) (Supp. V 1987); Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990). See generally Bath Iron Works Corp. v. Director, OWCP (Brown), 942 F.2d 811, 25 BRBS 30 (CRT) (1st Cir. 1991), aff'd, 506 U.S. 153 (1993). The judge must rely on medical evidence in determining the extent of the impairment. See, e.g., Donnell v. Bath Iron Works Corp., 22 BRBS 136 (1989).

In Larrabee v. Bath Iron Works Corp., 25 BRBS 185 (1991), the employer argued that the judge erred in making a finding on the extent of the claimant's respiratory impairment, in that this finding was not supported by the medical evidence of record and that the judge impermissibly substituted his judgment for the statutory criteria in determining the extent of the claimant's respiratory impairment.

The Board, in affirming the judge's conclusions, noted that the only medical evidence relevant to the degree of the claimant's medical impairment was the opinion of one physician that the claimant's degree of respiratory impairment would place him in Class 4, 50 to 100 percent severe impairment of the whole person, under the American Medical Association Guides to the Evaluation of Permanent Impairment (3d ed. 1988), based on a ventilatory test value below 40 percent of predicted normal.

The doctor stated he believed that the claimant's ventilatory capacity was 35 percent of normal, which meant that he lost 65 percent of his respiratory capabilities. The doctor explained that this loss was equivalent to losing more than one lung. In his opinion, the claimant was "down to his minimum," and a loss of a third of his residual ventilatory capacity, which would constitute a very small reduction, would place him in a life-threatening situation.

The judge, based upon the entire record and his analysis of the extent and effect of claimant's decreased pulmonary function, found claimant to be 90 percent permanently impaired, a rating permitted by Donnell.

The facts of Larrabee show that the physician was less than pleased with the numerical ratings promulgated by the American Medical Association for the various percentages and classes of pulmonary impairment and, despite prodding by the claimant's attorney, limited his rating to the class of impairment but would not specify a particular rating.

Thus, the Board held that the claimant's disability is a factual determination which is appropriately determined by the judge based on the medical evidence of record. See, e.g., Donnell, 22 BRBS 136. Thus, the judge relied on the full opinion of the doctor in determining the specific degree of impairment, 90 percent, a rating which was within the range identified by the doctor under the AMA Guides.

Unemployment Compensation Vis-A-Vis Disability

A claimant's application for unemployment benefits and receipt of them does not override substantial evidence that he is permanently totally disabled and is entitled to benefits under the LHWCA. Fargo v. Campbell Indus., 9 BRBS 766, 774 (1978).

2.10.2 Onset of Disability

Where the decedent was permanently partially disabled due to mesothelioma resulting from exposure to asbestos, and where a chest x-ray showed a pleural effusion in December 1982, the Board held that benefits should begin on December 6, 1982, and not five weeks later, the date selected by the judge as the date of manifestation, the claim having been filed in March 1983, and benefits for decedent should be based upon the National Average Weekly Wage as of December 1982, as the decedent had voluntarily retired in September 1981 in good health. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 82-84 (1989). Moreover, benefits to the surviving widow should be based upon the National Average Weekly Wage as of the decedent's death, May 10, 1984, as the claim for death benefits arises at that time. Id.

Compare Barlow v. Western Asbestos Co., 20 BRBS 179 (1988), where the Board affirmed an award of benefits commencing on the date on which the claimant's asbestosis was **diagnosed**, after two of the three physicians did not rate such disability and the other physician thereafter apparently rated such impairment at fifty (50) percent of the whole person, a rating the judge accepted, the Board noting, "there are no earlier diagnoses or findings of permanent pulmonary impairment to support an earlier onset date." See also Woods v. Bethlehem Steel Corp., 17 BRBS 243 (1985) (where claimant's asbestos-related disease was compounded by a pre-existing totally disabling heart condition).

X-ray evidence of a pleural thickening alone is **not** a basis for a permanent impairment rating under the AMA Guides. Thus, benefits for permanent partial disability, pursuant to Section 8(c)(23), begin at the time the physician issues an impairment rating for the claimant's disability of his lungs. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 51 (1990).

Where the claimant's disability was due to a combination of asbestos-related lung disease and esophageal cancer and where the AMA Guides provide a means for assessing the combined impairment of the whole person when the patient has more than one impairment, the Board held that overlapping and concurrent awards are not permitted and that the decedent was entitled to **only** one award representing his overall disability from his conditions. Ponder, 24 BRBS at 53.

See also Barlow v. Western Asbestos Co., 20 BRBS 179 (1988) (where three physicians agreed that claimant had a severe respiratory impairment but only one proposed a specific degree of impairment, the judge properly accepted the doctor's rating and awarded benefits for a fifty (50) percent pulmonary impairment for his asbestosis).

2.11 SECTION 2(11) DEATH

Section 2(11) of the LHWCA provides:

"Death" as a basis for a right to compensation means only a death resulting from an injury.

33 U.S.C. § 902(11).

In Bailey v. Bath Iron Works Corp., 24 BRBS 229 (1991), aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991), the judge awarded death benefits to the claimant as the surviving widow of a maritime employee who was exposed to asbestos at the employer's shipyard until approximately January 1984, at which time he took an early retirement.

The decedent's date of injury was August 9, 1985 and benefits for the decedent, a voluntary retiree, were based on the national average weekly wage as of that date. As the decedent died on August 9, 1986, in part due to work-related asbestosis, the widow's death benefits were based on the national average weekly wage as of the date of death. Bailey, 24 BRBS at 232-33. Accord Griffin v. Bath Iron Works Corp., 25 BRBS 26 (1991) (the decedent died of work-related asbestosis on October 28, 1986, and the principal issue was claimant's status as surviving widow).

[ED. NOTE: For more on death claims, see Topic 9, "Compensation for Death."]

2.12 SECTION 2(12) COMPENSATION

Section 2(12) of the LHWCA provides:

"Compensation" means the money allowance payable to an employee or to his dependents as provided for in this LHWCA, and includes funeral benefits provided therein.

33 U.S.C. § 902(12).

The Board has held that **payments made to the claimant under the employees' benefit plan** were not advance compensation payments, within the meaning of Section 14(j) of the LHWCA, since these payments were based on the length of the employee's service, were paid whenever the employee was absent from work for a work-related or non-work-related sickness or accident, and were not in lieu of worker's compensation. Jones v. Chesapeake & Potomac Tel. Co., 11 BRBS 7, 9 (1979), aff'd mem., 615 F.2d 1368 (D.C. Cir. 1980).

[ED. NOTE: Section 14 (j) [Pre-1984 Amendment section 14(k)] allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. The purpose of Section 14(j) is to reimburse an employer for the amount of its advance payments, where these payments were too generous, for however long it takes, out of unpaid compensation found to be due. For more on Section 14(j), see Topic 14.5.]

Moreover, payments which are **sick leave benefits** earned by the employee on the basis of seniority and good continuous service are not compensation. Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388, 396 (1978); Luker v. Ingalls Shipbuilding, Inc., 3 BRBS 321 (1976).

In Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992), however, the Board held that an employee who was prevented from earning a bonus by a work-related injury could not have that bonus considered "compensation" and included in her average weekly wage "because a contingent right to a bonus to be paid in the future is, like a fringe benefit, too speculative to be considered as part of the money rate at which the employee is being compensated as of the time of the injury under Section 2(13)." Id. at 343-44.

In Lazarus v. Chevron USA, Inc., 958 F.2d 1297, 25 BRBS 145 (CRT) (5th Cir. 1992), the **Fifth Circuit** held that medical benefits are included in the term "compensation" for the purposes of enforcement proceedings under Section 18(a). As medical benefits constitute monies payable to an employee or his dependents, the court noted, "We must construe this definition (of compensation) liberally in favor of injured workers," Holcomb v. Robert W. Kirk & Associates, 655 F.2d 589, 592 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), and the LHWCA "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Director, OWCP v. Perini N. River Assocs. (Churchill), 459 U.S. 297, 15 BRBS 62 (CRT) (1983). (The Board,

however, has held that interest is not added to the award of medical expenses. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988). But cf. Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993).

(See Topic 33, infra, for a discussion as to whether or not medical benefits are compensation for purposes of Section 33.)

Maximum Compensation and Section 6

In Puccetti v. Ceres Gulf, 24 BRBS 25, 29-31 (1990), the Board rejected as contrary to the language of Section 6(c), the Director's thesis that claimants receiving temporary total disability at the maximum level, pursuant to Section 6(b)(1), are entitled to the new maximum each year, up to 66 2/3 percent of their actual average weekly wage. Compare Marko v. Morris Boney Co., 23 BRBS 353, 360-62 (1990) (the plain language of the LHWCA provides that a claimant receiving permanent total disability benefits at the maximum rate during a period is to receive the benefits of recalculation of the maximum rate for that period--thus, the claimant is entitled to the benefit of the new maximum each year).

2.13 SECTION 2(13) WAGES

Section 2(13) of the LHWCA provides that:

The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any 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 employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13).

The term "wages" does not include fringe benefits, such as employer contributions to union, retraining, retirement, pension, health and welfare, or other benefit plans because they are not similar to board, rent, lodging, or housing. Lopez v. Southern Stevedores, 23 BRBS 295 (1990); Newport News Shipbuilding and Dry Dock Company v. Justice, 127 F.3d 1099 (4th Cir. 1997) (wages do not include fringe benefits such as training or educational stipends).

In Wausau Insurance Co. v. Director, OWCP, 114 F.3d 120 (9th Cir. 1997) the **Ninth Circuit** overruled the Board's determination that housing and meals would be included in a claimant's wages provided that they were not found to be fringe benefits. This overruled the Board's holding in Guthrie v. Holmes & Narver, 30 BRBS 48, 50 (1996), that housing and food will be considered to be part of the claimant's wages if they are deemed to be given in part, or in place, of wages. The **Ninth Circuit** found that the LHWCA "defers to the IRS criteria for deciding whether non-monetary compensation counts as wages. If it is not money, or an 'advantage' subject to withholding, it is not included." Wausau Ins. Co., 114 F.3d at 122; Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998). The Board interpreted the language in Wausau as requiring that: "the phrase 'including the reasonable value of any advantage' becomes a mandatory limitation on the inclusion of non-monetary compensation in the definition of wages." Quinones, 32 BRBS at 9-10. The Board was clear in Quinones that it is not going to follow the Wausau holding **outside the Ninth Circuit**, as the holding construes the term "including" too narrowly. Thus, the holding in Guthrie is affirmed outside of the **Ninth Circuit** based on the rationale of the holding in Quinones. *Id.* (the Board used the same rationale and came to the same result in both cases without stating that it was based on the holding in Guthrie).

Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), was codified by Congress in the 1984 Amendments to the LHWCA.

The loss of available **overtime** pay is included in average weekly wage determinations if the claimant can establish that overtime pay was lost because of the injury. Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 113 (1989). See also, Sears v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 235 (1987) (where employer presents evidence of unavailability or claimant's lack of utilization of overtime).

Wage guarantee payments are readily calculable, made directly to the employee, subject to tax withholding, and paid for services rendered in employment; they are therefore wages within the applicable statutory definition. McMennamy v. Young & Co., 21 BRBS 351, 353 (1988). Tax loss benefits from a farm operation are not wages. Newby v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 155, 157 (1988).

Container royalty payments, like wage guarantee payments, are part of a claimant's income to be included in average weekly wage calculations. Container royalty payments are made directly to the employee on the basis of seniority and career hours worked. See generally Lopez v. Southern Stevedores, 23 BRBS 295, 300-01 (1990); McMennamy v. Young & Co., 21 BRBS 351 (1988); Denton v Northrop Corp., 21 BRBS 37 (1988). Container royalties **do not** count as wages when they are received based on the time disabled rather than the time worked. Branch v. Ceres Corp., 29 BRBS 53 (1995), aff'd mem. sub nom. Ceres Corp. v. Branch, 96 F.3d 1438, 30 BRBS 74, 78 (CRT) (**4th Cir.** 1996); Eagle Marine Services v. Director, OWCP, 115 F.3d 735, 737 (**9th Cir.** 1997). The **Fourth Circuit** has held that container royalty payments, and holiday/vacation pay are wages under Section 2(13) if they are earned through actual work. Universal Maritime Corp. v. Wright, 155 F.3d 311, 33 BRBS 15 (CRT) (**4th Cir.** 1998); Story v. Navy Exchange Service Center, 33 BRBS 111 (1999). During periods of disability the claimant, in Branch, received 20 hours/week credit towards the total needed to receive the container royalties. Thus, the royalties came to the claimant as a result of disability and not hours actually worked.

The disabled employee's receipt of container royalties and holiday/vacation pay do not reflect post-injury wage-earning capacity under Section 8(h), because under the ILA employment contract, the employee's entitlement to the payments "was based principally upon his working a certain number of hours in the previous year." Eagle Marine Services, 115 F.3d at 737.

The situation in Branch is distinguished from that in Aiken v. Stevens Shipping & Terminal, 32 BRBS 1 (ALJ) (1997). In Aiken, the claimant suffered a crush injury to his hand while helping to unload a container. Unlike in Branch, where the claimant became eligible for a royalty payment after the inclusion of the disability credit hours, the claimant in Stevens had worked a sufficient number of hours prior to his injury to establish his eligibility to receive a container royalty payment. **The key is whether the claimant satisfies the container royalty hours requirement with actually worked hours or a combination of worked and disability credit hours.** Where the royalty is paid for purely hours worked then the royalty is another form of compensation of work performed and falls into the category of wages. As a result, it should be taken into account when calculating the claimant's average weekly wage.

In accordance with the holding in Branch, “if the payments from the Funds post-injury are ‘wages’, then the claimant has a ‘wage-earning capacity’ and the claimant’s ‘disability’ is less than ‘total in character’” 30 BRBS 74, 78(CRT) (4th Cir. 1996). Thus, Section 8(e) applies, and the employer is entitled to a credit.

In Seaco v. Richardson, 136 F.3d 1290 (11th Cir. 1998), the **Eleventh Circuit** denied the employer’s request for a credit under Section 8(e). The court found that the container royalty payments and holiday/vacation payments did not constitute “advance payments of compensation” under 33 U.S.C. § 914(j) and did not represent post-injury wage-earning capacity under Section 8(h). The fact that Richardson, and other longshoremen are able to “earn” these payments, regardless of whether they are disabled “belies a finding that these payments were intended as advance payments of compensation.” Id.; Trice v. Virginia Terminals, Inc., 30 BRBS 165, 168 (1996).

Where an employee authorizes the employer to deduct a portion or percentage of his annual remuneration for investment in a **tax deferred annuity**, to which the employer contributes nothing, the value of the annuity must be included in wage calculations. Cretan v. Bethlehem Steel Corp., 24 BRBS 35 (1990). That such amount is not considered income by the IRS in the year received is immaterial as the amount is included in the salary agreed to under the employment contract. Id. at 43.

Vacation and holiday pay are included in wage determinations and were considered **earnings in the year paid** even though they were received after the date of the injury. Sproull v. Stevedoring Servs. of America, 28 BRBS 271 (1994) (Smith and Dolder, JJ., dissenting in part), aff’d and modified in part on recon. en banc, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), aff’d in part rev’d in part, 86 F.3d 895, 899 (9th Cir. 1996), cert denied 520 U.S. 1155 (1997); see also Anthony v. I.T.O. Corp. of Baltimore, (ALJ 94-LHC-2089)(1994)(Unpublished) (refusing to include vacation and holiday pay because of clause in union contract); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133 (1990). Vacation and holiday pay are not necessarily earned in the same year that they are paid. The **Ninth Circuit**, in Sproull, agreeing with the *dicta* of the Board’s holding that **under other circumstances** either or both payments might be credited in the year earned, if that was a different year, and if such allocation was preferable for good reason; converted it into a significant element of the holding. The rationale for inclusion of holiday and vacation pay in the year earned is the same as the rationale for holding that holiday and vacation pay are not a fair and reasonable representation of the claimant’s post-injury wage-earning capacity under Section 8(h). Eagle Marine Services v. Director, OWCP, 115 F.3d 735 (9th Cir. 1997); Branch v. Ceres Corp., 29 BRBS 53 (1995), aff’d mem., 96 F.3d 1438 (table), 30 BRBS 74 (CRT) (4th Cir. 1996).

An employer’s payments for, or contribution to, a retirement, pension, health, welfare, life insurance, training, social security, or other benefit plan are **fringe benefits** not included in wages.

But, the reasonable value of any advantage received from the employer and subject to withholding, including an **overseas allowance, incentive compensation, completion award, foreign**

housing allowance, and cost of living adjustment are properly included in wage computations. Denton v. Northrop Corp., 21 BRBS 37, 46-47 (1988).

In McNutt v. Benefits Review Board, 140 F.3d 1247 (9th Cir. 1998), the **Ninth Circuit** held that, although a \$100 per diem amount paid to Claimant while working in Scotland was an “advantage” under Section 2(13) of the LHWCA, it was not a “wage” under the LHWCA because it was not subject to withholding under the Internal Revenue Code.

A **contingent right to a bonus to be paid in the future** is, like a fringe benefit, too speculative to be considered as part of the employee's prior monetary compensation as of the time of injury. The payment of the bonus in the following case was contingent upon events that might never have occurred. Johnston v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340, 344 (1992) (§ 10(a) determination). Cf. Jesse v. Tri-State Terminals, 7 BRBS 156 (1977), aff'd, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979) (where **subsequent** earnings of four similarly situated employees, in the year **subsequent** to claimant's injury, were utilized for purposes of a § 10(c) determination of average weekly wage.)

Where a claimant was more like an employee than a store-owner and where he earned post-injury \$200 per week and was also entitled to \$5,000 of the store's profits, the Board held that it was improper to include this latter amount in determining the claimant's wage-earning capacity, pursuant to Section 8(h), as the receipt of such amount is “merely speculative.” Seidel v. General Dynamics Corp., 22 BRBS 403 (1989); Denton, 21 BRBS 37.

Thus, the Board limited the Section 8(h) determination to the \$200 per week the claimant actually received. The Board noted that “if claimant does receive a portion of the 'profits' employer can file a motion for modification based on a change in economic condition.” Seidel, 22 BRBS at 406 n.3.

Unemployment insurance is not included in wage calculations. Although readily determinable, taxable, and paid directly to the employee, unemployment benefits are not paid by the employer pursuant to a contract for hire or for services rendered in employment. Blakney v. Delaware Operating Co., 25 BRBS 273, 276 (1992). See also Strand v. Hansen Seaway Serv., 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980).

The Board has held, in a claim under the LHWCA as extended by the Defense Base Act, that **overseas allowances and wage additives** were properly included in the determination of the employee's wages because these amounts were (1) easily ascertainable, similar to board, rent or lodging, and (2) were included for purposes of tax withholding and could not be considered fringe benefits. Denton v. Northrop Corp., 21 BRBS 37, 46-47 (1988). See generally Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 43-44 (1990); Lopez v. Southern Stevedores, 23 BRBS 295, 301 (1990); Thompson v. McDonnell Douglas Corp., 17 BRBS 6, 8 (1985).

2.14 SECTION 2(14) CHILD

Section 2(14) of the LHWCA provides that:

The term "child" shall include 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 step child or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on the employee. "Grandchild" means a child as above defined. The terms "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers or married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) of this section.

33 U.S.C. § 902(14).

[ED. NOTE: In addition to "child," Section 2(14) defines "grandchild," "brother," and "sister."]

The purpose of the definition in Section 2(14) is to delineate who, in conjunction with Section 9 of the LHWCA, are the legal beneficiaries of an award of death benefits. Smith v. Shell Offshore, 33 BRBS 161 (1999). Thus the Board reasoned that defining "minor" differently than "child" is not an inherent contradiction. "A person's status as a "minor" merely affects how and when a person might undertake actions on her own behalf while the status as a "child" affects the person's entitlement to support from others." Id. A legitimate child under 18 is entitled to benefits merely by virtue of the child's minority without regard to whether the employee contributed to the child's support. Doe v. Jarka Corp., 16 BRBS 318 (1984); Ingalls Shipbuilding Corp. v. Neuman, 322 F. Supp. 1229 (S.D. Miss. 1970), aff'd, 448 F.2d 773 (5th Cir. 1971).

An employee's thirty-four-year-old son, a child polio victim who uses a brace and crutches, has lived with his parents his entire life and was wholly dependent upon the employee for his support, despite his monthly \$97.33 in Social Security benefits, was a child, pursuant to Section 2(14), as such benefits were inconsequential and insubstantial. Mikell v. Savannah Shipyard Co., 24 BRBS 100, 108-09 (1990).

A totally disabled quadriplegic over 18 is not *per se* dependent upon the employee and must prove either dependency or status as a student. Doe, 16 BRBS 318. 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).

The judge must make a determination of dependency based on all of the circumstances of a particular case. See generally Lucero v. Kaiser Aluminum & Chem. Corp., 23 BRBS 261 (1990); Bonds v. Smith & Kelly Co., 21 BRBS 240 (1988). Moreover, all questions of dependency shall be determined as of the time of the injury. Doe, 16 BRBS 318.

The Board has held that a 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 ALJ's conclusion that decedent did not stand *in loco parentis* to his nephews). See Ingalls Shipbuilding Corp. v. Neuman, 448 F.2d 773 (5th Cir. 1971); Trainer v. Ryan-Walsh Stevedoring Co., 8 BRBS 59 (1978), aff'd in pertinent part, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979) (reversing ALJ and holding decedent stood *in loco parentis* to the claimant child).

In Trainer, noted above, the Board held that "federal common law" applied to define the terms "widow" and "widower." More recently, the Board has **overruled** the decision in Trainer, 8 BRBS at 59, regarding the **existence of "federal common law," and held that state law controls in defining the terms "husband" and "wife."** Jordan v. Virginia Int'l Terminals, 32 BRBS 32 (1998), at 35 (Resort to state law is appropriate for an undefined term if that term does not have a clear and common meaning and reasonable doubt exists as to the proper meaning); see also Smith v. Shell Offshore, 33 BRBS 161, (1999) ("As there is no 'federal common law,' and as the term 'minor' is neither defined by the [LHWCA] nor has a clear common meaning, we hold that use of state law is appropriate to determine when an individual is entitled to file a claim under the [LHWCA] in her own right.").

While the term "*in loco parentis*," is not defined by the LHWCA and must be defined by using the appropriate state law, it is not necessary to cite pertinent state law in defining the phrase in order to assess legal status, provided the ALJ notes the primary elements conforming to the state definition. In this particular case, the ALJ noted that the phrase "in loco parentis" contains an element of intent and that it is the intent of the adult, as revealed by his actions, which defines whether an adult stands in loco parentis to a child. Brooks v. General Dynamics Corp., 32 BRBS 114, (1998).

If, at the time of the decedent's injury, the child was wholly dependent on the money received from the decedent, he is a "child," pursuant to Section 2(14), and such "wholly dependent" status would be unaffected by any promise to repay the money at a later date. Lucero, 23 BRBS at 265-66.

The **Fifth Circuit** and the Board have consistently held that the judge must make the determination of dependency based on all the circumstances of a particular case. See Jones v. St. John Stevedoring Co., 18 BRBS 68 (1986), aff'd in part sub nom. St. John Stevedoring Co. v. Wilfred, 818 F.2d 397 (5th Cir.), cert. denied, 484 U.S. 976 (1987).

In Jones, the Board reversed denial of benefits to a child, holding that "the evidence overwhelmingly supports a finding of acknowledgment and dependency" as a matter of law. See also Texas Employers' Ins. Ass'n v. Shea, 410 F.2d 56 (5th Cir. 1969); Texas Employers' Ins. Ass'n v. Sheppard, 62 F.2d 122 (5th Cir. 1932); Bonds, 17 BRBS at 173.

The term "dependency" means not self-sustaining, relying on for support, or relying on for contributions to meet the reasonably necessary expenses of living. See Shea, 410 F.2d at 62; Standard Dredging Corp. v. Henderson, 150 F.2d 78, 80-81 (5th Cir. 1945); Sheppard, 62 F.2d at 124; Bonds, 17 BRBS at 172.

Further, the **Fifth Circuit** has affirmed a finding of dependency when the monetary payments for the individual's support were regular even if the amount of each payment was small. See Shea, 410 F.2d at 62.

The Board affirmed a finding of dependency where the testimony of the child's mother and other witnesses that the decedent gave the child money, bought her gifts, and assisted in paying for clothes and food, established that the decedent provided the child with sufficient financial support so that she could be properly found to be dependent, pursuant to Section 2(14) of the LHWCA. Bonds v. Smith & Kelly Co., 21 BRBS 240, 243 (1988).

Benefits were denied, however, to the employee's illegitimate daughter where she was neither acknowledged by nor dependent upon the employee. Hicks v. Southern Ill. Univ., 19 BRBS 222, 225-26 (1987).

It is not necessary to look to state law to define terms when a definition in the federal statute is complete, since it controls. In Jones, 18 BRBS 68, the Board held that as the term "**acknowledged**" can be given a clear meaning, the judge erred in looking to state law for a definition. Since the overwhelming evidence supported a finding of acknowledgment the claimant was held acknowledged as a matter of law. See Weyerhaeuser Timber Co. v. Marshall, 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).

An illegitimate child born after the employee's death was held entitled to be classified as dependent because substantial evidence supported a finding that she was acknowledged and dependent prior to the employee's death. Texas Employers' Ins. Ass'n v. Shea, 410 F.2d 56 (5th Cir. 1969).

Where a 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. Henderson v. Avondale Marine Ways, 204 F.2d 178 (5th Cir. 1953), cert. denied, 346 U.S. 875 (1953).

Benefits are payable to a dependent child until he or she reaches the age of eighteen, unless the child qualifies as a "student" within Section 2(18). Smith v. Sealand Terminal, 14 BRBS 844, 852 (1982). (See Section 2(18), infra).

2.15 SECTION 2(15) PARENT

Section 2(15) of the LHWCA provides:

The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

33 U.S.C. § 902(15).

The parent of an employee killed in the course of his employment is entitled to death benefits, pursuant to Section 9(d) of the LHWCA, if the parent was at least partly dependent on such employee for his accustomed standard of living. The Board and at least two circuits have rejected an employer's argument that the parent must qualify as a dependent under 26 U.S.C. § 152 as without merit. Myers v. Bethlehem Steel Co., 250 F.2d 615 (4th Cir. 1957); Vinnell Corp. v. Pillsbury, 199 F.2d 885 (9th Cir. 1952); Fino v. Bethlehem Steel Corp., 5 BRBS 223, 226-27 (1976).

2.16 SECTION 2(16) WIDOW OR WIDOWER

Section 2(16) of the LHWCA provides:

The term "widow or widower" includes only the 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 for justifiable cause or by reason of his or her desertion at such time.

33 U.S.C. § 902(16).

The LHWCA does not define "wife" or "husband." It is the claimant's burden to establish status as a widow or widower; Section 20(a) does not apply. Meister v. Ranch Restaurant, 8 BRBS 185 (1978), aff'd, 600 F.2d 280 (D.C. Cir. 1979).

The **Supreme Court** has established the **test** for determining whether a widow was living apart from her spouse for "**justifiable cause**" or by reason of "**desertion**" at the time of the spouse's death. In Thompson v. Lawson, 347 U.S. 334 (1954), the decedent deserted the claimant, and both parties thereafter entered into purported marriages. The **Court** indicated that since the claimant was not, at the time of her husband's death, living apart from him "by reason of his desertion," she was not a "widow" under the LHWCA.

In this regard, the **Court** provided, "[T]he essential requirement is a **conjugal nexus** between the claimant and the 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." 347 U.S. at 336-37. The **Court** held that the claimant must make a "conscious choice to terminate her prior conjugal relationship," which in Thompson she did by "embarking upon another permanent relationship." Id. at 337.

Although the **Supreme Court** did not expressly address "**justifiable cause**" in Thompson, a case which involved desertion, the **Court** provided in a footnote that:

It was not contended before us that in the circumstances of this case the phrase "for justifiable cause" had a different reach than the phrase "by reason of his desertion."

347 U.S. at 336 n.*.

In General Dynamics Corp., Quincy Shipbuilding Div. v. Director, OWCP, 585 F.2d 1168, 9 BRBS 188 (1st Cir. 1978), aff'g Murphy v. General 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 the claimant lived as a deserted wife until the decedent's death.

The Board has held, as a matter of law, that a claimant was the decedent's surviving spouse as the record demonstrated the existence of "living apart for justifiable cause," pursuant to Section 2(16), because (1) the claimant and the decedent separated because they could not live together amicably; (2) the claimant did not intend to sever the "conjugal nexus" between her husband and herself when she moved out; and (3) any long-term weakening of the marriage was caused by the decedent rather than the claimant. Kennedy v. Container Stevedoring Co., 23 BRBS 33 (1989).

The proper application of Section 2(16) depends upon the relationship between the claimant and the decedent, see Leete v. Director, OWCP, 790 F.2d 418, 18 BRBS 93 (CRT) (5th Cir. 1986), and, in particular, whether there was a conscious choice by the claimant to terminate her prior conjugal relationship. Thompson, 347 U.S. 334.

The Board has held that before reaching the issue of whether a conjugal nexus existed, a claimant must establish that he or she and the decedent were living apart for a justifiable cause. Meister v. Ranch Restaurant, 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 ALJ's finding that the claimant had not established a justifiable cause for living apart from the decedent.

The Board concluded, on the facts of the case, that the claimant's drinking was not cause for their separation, but rather that the claimant voluntarily deserted or abandoned his wife. 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, the claimant will not be considered the widow/widower. Henderson v. Avondale Marine Ways, 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 the nexus).

In Leete, 790 F.2d 418, 18 BRBS 93 (CRT), the Board affirmed the judge's decision that the conjugal nexus had been terminated at the time of death where the claimant had engaged in a relationship with another man during that time.

In Griffin v. Bath Iron Works Corp., 25 BRBS 26 (1991), the judge concluded that the claimant was not a "widow" who qualified for death benefits under the pertinent provisions of the LHWCA because the LHWCA required that the claimant be both (1) the decedent's spouse at the time of his initial injury, and (2) living with or dependent on the decedent at the time of his death to qualify for death benefits.

The judge reasoned that since the claimant in this case was not married to the decedent at the time of the decedent's initial injury, i.e., when the decedent's lung condition was first diagnosed, Section 9(f) of the LHWCA, which provides that "all questions of dependency shall be determined

as of the time of injury," is applicable. The ALJ concluded that since the claimant was not dependent upon the decedent at the time of the initial injury, she was not entitled to death benefits.

On appeal, the claimant argued that the ALJ erred in determining that Section 9(f) is applicable to this case. She posited that the fact that she was married to and dependent upon decedent at the time of his death entitles her to death benefits, regardless of her status as of her husband's time of injury. The claimant further contended that denying her death benefits would work a result which is inconsistent with the humanitarian purpose of the LHWCA, in that she lived with decedent for more than twenty years, was married to him for sixteen years, and cared for him throughout his illness.

The Board, in reversing the denial of death benefits, held, as a matter of law, that "the plain language of Section 2(16) indicates that its **clauses are to be read in the disjunctive**; that is, **a widow or widower is a wife or husband who, at the time of the employee's death, is living with the employee, or is dependent for support upon the employee, or is living apart from the employee for justifiable cause, or is living apart by reason of desertion.** See 33 U.S.C. § 902(16)." Griffin, 25 BRBS at 28.

In Griffin, the Board pointed out that the **Ninth Circuit** and the Board have interpreted Section 2(16) as providing for **alternative bases for recovery**. See Turnbull v. Cyr, 188 F.2d 455 (9th Cir. 1951); Denton v. Northrop Corp., 21 BRBS 37 (1988). In Turnbull, the **Ninth Circuit** affirmed a district court's finding that a claimant was entitled to death benefits as the widow of the decedent.

The case turned on the issue of whether the widow, who was living with but not dependent for support on the decedent at the time of his death, could claim death benefits. The court held that since the conditions of Section 2(16), that the widow must be living with or dependent for support on the decedent at the time of his death, or stated in the alternative, "it is clear" that fulfillment of either one of the conditions qualified the claimant as a widow. In so doing, the court specifically noted that Section 9(f) of the LHWCA did not militate against this construction of Section 2(16), since the question of dependency was not applicable. Turnbull, 188 F.2d at 457.

Moreover, according to the Board, the provisions of Section 2(16) have been consistently interpreted as affording claimants alternative bases of recovery in that the surviving widow need not have been decedent's spouse at the time of injury because Section 2(16) looks to the relationship at the time of death, by its plain language.

Thus, in Griffin, the Board held that the claimant in the instant case -- who was undisputedly married to and living with decedent at the time of decedent's work-related death -- need not establish dependency at any time, including the time of decedent's initial injury, to be entitled to death benefits. Therefore, because the question of dependency is not at issue in this case, Section 9(f) is inapplicable. Griffin, 25 BRBS at 28-29.

In Denton, 21 BRBS 37, a case where the employee died after suffering a traumatic injury, the Board affirmed the ALJ's determinations that the decedent and his wife lived apart for justifiable cause and that the ALJ need not determine whether the claimant was dependent upon the decedent "since the clauses of Section 2(16) are mutually exclusive." 21 BRBS at 44.

In Denton, the parties were married at the time of decedent's death as the interlocutory judgment of dissolution stated on its face that it did not constitute a final dissolution of the marriage. See generally Kennedy, 23 BRBS 33; Hicks v. Southern Ill. Univ., 19 BRBS 222 (1987).

There are several noteworthy decisions regarding a determination as to whether or not a husband and wife were living apart **for justifiable cause** or by **reason of desertion**. See, e.g., Lynch v. Washington Metro. Area Transit Auth., 22 BRBS 351, 355 (1989) (Board affirmed the judge's conclusion that claimant and decedent were living apart for justifiable cause and that a conjugal nexus existed between them at the time of death where decedent, who had severe mental problems, forced claimant to sign the separation agreement at gunpoint; decedent physically abused claimant while they lived together; claimant cared for decedent immediately after his mother died; claimant and decedent never divorced; they maintained frequent contact and a friendly relationship; and claimant had not remarried since decedent's death).

In Trainer v. Ryan-Walsh Stevedoring Co., 8 BRBS 59, 65 (1978), the Board established a uniform federal standard for determining "**widow**"/"**widower**" status under the LHWCA, i.e., a claimant applying for death benefits is **conclusively** a widow or widower if at the time of the employee's death the employee and the claimant had lived together for at least **10 years** in the same household and held themselves out to their relatives, friends, neighbors and tradespeople as husband and wife.

On appeal, however, the **Fifth Circuit** held that the Board's establishment of a federal standard for determining the status of a "widow" was improper and that such a determination must be based upon the **applicable state law of domestic relations**. Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306, 10 BRBS 852 (**5th Cir.** 1979).

[ED. NOTE: The Board has overruled its holding in Trainer. Jordan v. Virginia International Terminals, 32 BRBS 32 (1998).]

In Trainer, the **Fifth Circuit** held that the "conjugal nexus" test of Thompson, 347 U.S. 334, did not authorize the creation of a federal common law of marriage to determine whether the claimant, in the first instance, was married to the deceased employee. Trainer, 10 BRBS at 859.

See also Seaboard Air Line Ry. v. Kenney, 240 U.S. 489 (1916) (terms relating to familial relationships are defined by reference to state law); Marcus v. Director, OWCP, 548 F.2d 1044, 1047 (**D.C. Cir.** 1976) (since the statute does not further define "husband" for purposes of determining coverage, the local law of domestic relations must supply its meaning); Powell v. Rogers, 496 F.2d 1248, 1251 (**9th Cir.**), cert. denied, 419 U.S. 1032 (1974); Albina Engine & Mach. Works v. O'Leary,

328 F.2d 877, 878 (**9th Cir.**), cert. denied, 379 **U.S.** 817 (1964) (although meaning of the LHWCA is a question of federal law, local law gives meaning to the term surviving "wife" when undefined by the LHWCA).

The Board has 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 Circuits's** reversal of Trainer, and therefore based its holding on state law.

The Board, however, stated its disagreement with the **Fifth Circuit'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).

In Jordan v. Virginia International Terminals, 32 BRBS 32 (1998), the Board held that the LHWCA defers to state law when determining whether a couple was married at the time of the claimant's death. The Board officially overruled its prior position in Trainer.

2.17 2(17) ADOPTION

Section 2(17) of the LHWCA provides:

The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

33 U.S.C. § 902(17).

Benefits were denied to the adopted child of the deceased who, although a minor at the time of the decedent's death, was not adopted by decedent until eight years **after** the date of the injury. Section 9(f) requires that all questions of dependency shall be determined as of the date of the injury. Estate of Curtis Scott v. Ingalls Shipbuilding, Inc., 15 BRBS 290, 293 (ALJ) (1983).

2.18 SECTION 2(18) STUDENT

Section 2(18) of the LHWCA provides:

The term "student" means a person regularly pursuing a full-time course of study or training at an institute which is--

(A) A school or college or university operated or directly supported by the United States; or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary, but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

33 U.S.C. § 902(18).

In Denton v. Northrop Corp., 21 BRBS 37 (1988), the employer contended that the judge erred in finding that the claimant's son was entitled to benefits after his eighteenth birthday, December 3,

1982, because the son took no classes from February 26, 1983, until August 1, 1983, and, therefore, was not a student as defined by Section 2(18) because of the five-month cessation in his studies.

The judge accepted employer's argument that the son was not a **college** student from February 26, 1983, until August 1, 1983, but found that he was finishing his **high school** education, and received his high school diploma on June 10, 1983. The judge further found that the son began his college education in August 1983. The judge found, and the Board agreed, that claimant established that he was a full-time student from the age of 18 as there was no five-month cessation of studies between his graduation from high school and beginning of college. Denton, 21 BRBS at 44-45.

The employer also contended that mere enrollment in an educational institution is not sufficient to establish student status, citing Smith v. Sealand Terminal, 14 BRBS 844 (1982). In Smith, the Board remanded the case for the judge to determine whether the child retained student status between high school and vocational school where he enrolled, but never attended, due to lack of funds. The Board stated in Smith that under Section 2(18), **one is not deemed to cease to be a student if prevented from attending school due to factors beyond his/her control.**

In Hawkins v. Harbert Int'l, Inc., 33 BRBS 198, (1999), the Board held that the plain meaning of Section 2(18)(B) indicated that Congress did not intend to define the term "school" as being synonymous with "college or university", but rather, meant to expand the definition of "student" to include those older than eighteen and attending schools other than colleges or universities. This would include vocational schools as well as high schools. Had Congress meant for the term "school" to be synonymous with "college or university," it would have left this term out of Section 2(18)(B) entirely. However, the institution must be accredited by a State or by a State-recognized or nationally recognized accrediting agency or body. In Hawkins, the private high school attended by decedent's son was not an accredited high school. The private high school had applied for accreditation, but two months after the decedent's son had graduated. The Board, therefore, held that the decedent's son was not a student under the LHWCA.

2.19 SECTION 2(19) AVERAGE WEEKLY WAGE

Section 2(19) of the LHWCA provides:

The term "National Average Weekly Wage" means the National Average Weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

33 U.S.C. § 902(19). See generally Bailey v. Bath Iron Works Corp., 24 BRBS 229, 233, aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991); Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989). An award of death benefits to the widow of a voluntary retiree is based upon the National Average Weekly Wage as of the date of the retiree's death, pursuant to Section 10(i) of the LHWCA. Bailey, 24 BRBS at 233.

The LHWCA calculates the claimant's average weekly wage differently based on the type of injury sustained. The general rule, in a **trauma case**, is that the employee's average weekly wage "at the time of the injury" is used to compute the claimant's compensation. LeBlanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157 (5th Cir. 1997). However in the case of **occupational diseases** the LHWCA treats the time of injury, and thus the average weekly wage, as being that time when the claimant became aware of, "or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Id.

[Editor's Note: For factors governing the calculation of an individual's average weekly wage see Topic 2.13, supra.]

[ED NOTE: Recently the Board rejected a claimant's contention that, in determining her average weekly wage, the ALJ was required to exclude the entire time her family physician certified that she was disabled due to the deaths in her family. Scudder v. Maersk Pacific, Ltd., (BRB No. 00-1063)(July 24, 2001)(Unpublished), citing generally Preziosi v. Controlled Industries, Inc., 22 BRBS 468, 473 (1989); Greene v. J.O. Hartman Meats, 21 BRBS 214, 217 (1988). In Scudder, the Board noted that it was taking this position absent any indication from Congress that the LHWCA should be interpreted consistently with the Family and Medical Leave Act, 29 U.S.C. §2611 et. seq. (1993).]

2.20 2(20) BOARD

Section 2(20) of the LHWCA provides:

The term "Board" shall mean the Benefits Review Board.

33 U.S.C. § 902(20).

It is well-settled that the Board's scope of review is limited and that the Board must affirm the findings and conclusions of the administrative law judge if they are supported by substantial evidence, rational, and in accordance with law. See 33 U.S.C. § 921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Assocs., 380 U.S. 359 (1965).

It is also well-settled that the Board does not have the authority to engage in a *de novo* review of the evidence or to substitute its views for those of the administrative law judge. Presley v. Tinsley Maintenance Serv., 529 F.2d 433, 436, 3 BRBS 398 (5th Cir. 1976). The findings of the judge must be accepted unless they are not supported by substantial evidence in the record **considered as a whole** or unless they are irrational. Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1195 (9th Cir. 1988). The Board's interpretation of the LHWCA is not entitled to any special deference from the appellate court reviewing the Board's actions. Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 278 n.18 (1980).

In Mijangos v. Avondale Shipyards, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), rev'g 19 BRBS 15 (1986), the **Fifth Circuit**, in reversing the Board, held that "(a)ll of the ALJ's determinations are amply supported by the record. The only conclusion that can be drawn is that the Board disagreed with the credibility determinations made by the ALJ." Moreover, according to the **Fifth Circuit**:

The Board exceeded its statutorily defined powers of review. The Board impermissibly reweighed the evidence and made its own credibility determinations. The ALJ was free to disregard parts of some witnesses' testimony while crediting other parts of that testimony. All of the ALJ's credibility determinations and findings were both rational and supported by substantial evidence. The original order of the ALJ should have been affirmed.

Mijangos, 25 BRBS at 81 (CRT). Accordingly, the **Fifth Circuit** reversed the Board's decision and reinstated the administrative law judge's original order finding the claimant permanently and totally disabled. Id.

The **Second Circuit** also found that the Board had engaged in impermissible fact-finding in La Faille v. Benefits Review Bd., 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989), rev'g and rem'g 18 BRBS 88 (1986).

In General Dynamics Corp. v. Horrigan, 848 F.2d 321, 21 BRBS 73 (CRT) (1st Cir. 1988), cert. denied, 488 U.S. 992 (1988), the **First Circuit** stated:

these determinations (i.e., fact-finding as to an attorney fee) are best left to the trial judge, in this case the administrative law judge. The **Supreme Court** emphasized that, because of the equitable nature of this determination, the fact finder's discretion should be broad. Hensley v. Eckerhart, 461 U.S. at 437. "This is appropriate in view of the fact finder's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* See also Garrity v. Sununu, 752 F.2d at 735. [Moreover,] the determination of the ALJ must be accorded a broad degree of deference. "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole," 33 U.S.C. § 921(b)(3). The Board "may not engage in **de novo** review and substitute its findings for the ALJ's." Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 35 (1st Cir. 1980).

Horrigan, 21 BRBS at 81-83 (CRT) (emphasis added).

2.21 SECTION 2(21) VESSEL
(For a complete discussion of "vessel" see Topic 1.4.3.)

Section 2(21) of the LHWCA provides:

Unless the context requires otherwise, the term "vessel" means 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).

The LHWCA, unlike the Jones Act, 46 U.S.C. § 688, does not expressly incorporate the definition of vessel set forth in 1 U.S.C. § 3 ("Every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"). The **Fifth Circuit**, however, has adopted the definition of vessel provided in 1 U.S.C. § 3 for use in longshore cases. See Burks v. American River Transp. Co., 679 F.2d 69 (**5th Cir.** 1982). In Burks, the **Fifth Circuit**, in a case involving a negligence action against a vessel under Section 5(b) of the LHWCA, 33 U.S.C. § 905(b), held that a non-propelled barge equipped with a crane used for the unloading of ships was a vessel. (See Topic 1, supra).

The **Fifth Circuit** specifically noted that "[s]pecial purpose structures whose primary function is not transportation, such as a drilling barge with retractable legs that raise the barge out of the water" or "a barge submerged and in use as a drilling platform" are vessels. Offshore Co. v. Robison, 266 F.2d 769, 779 (**5th Cir.** 1959); Producers Drilling Co. v. Gray, 361 F.2d 432, 437 (**5th Cir.** 1966); Burks, 679 F.2d at 75.

In McCullough v. Marathon Letourneau Co., 22 BRBS 359, 363 (1989), the Board affirmed the finding that a jack-up rig, which was capable of floating and of being used as a means of transportation, was a vessel. The fact that the jack-up rig under construction is not yet a vessel does not preclude a finding of coverage just as a tanker or battleship will be a ship upon completion. Id. at 364.

Moreover, floating oil rigs have been treated as vessels by the courts and workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships, either under the Jones Act or LHWCA. Herb's Welding v. Gray, 470 U.S. 414 n.2, 17 BRBS 78, 79 n.2 (CRT) (1985). Compare Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969) (claimant was not a shipbuilder because the structure he was building was tantamount to an "artificial island" and was therefore not a vessel).

The **Fifth Circuit** has recently held that a spar, a nautical structure designed to float with the bulk of its hull below the waves like a "giant buoy," was not a vessel for purposes of the Jones Act. The court found that the spar was more like an offshore work platform. Fields v. Pool Company, 182 F.3d 353 (**5th Cir.** 1999).

In McCarthy v. The Bark Peking, 716 F.2d 130, 15 BRBS 182, 190 (CRT) (**2d Cir.** 1983), a worker was injured while painting the upper main mast and spars of a museum vessel, during the course of his employment, on actual navigable waters, at the South Street Seaport Museum in New York City. The **Second Circuit**, upon remand of the claim from the **Supreme Court**, held (1) that the claimant was a maritime employee who was "injured on the actual navigable waters in the course of his employment on those waters" and (2) that THE BARK PEKING was a vessel, within the meaning and intent of Section 5(b) and its provision dealing with "the negligence of a vessel," so that his statutory remedies are not limited by Section 5(a), the exclusivity provision of the LHWCA.

The court, pointing out that the LHWCA contains "only a circular definition of the term 'vessel'" in Section 2(21), noted various types of "seafaring entities" which have been held to be "vessels," such as non-propelled river barges in use as transports, Burks v. American River Transportation Co., 679 F.2d 69 (**5th Cir.** 1982), a 97 percent completed destroyer, Lundy v. Litton Systems, 624 F.2d 590 (**5th Cir.** 1980), cert. denied, 450 U.S. 913 (1981), a yard derrick barge, Richardson v. Norfolk Shipbuilding & Dry Dock Corp., 479 F. Supp. 259 (**E.D. Va.** 1979), aff'd on other grounds, 621 F.2d 633 (**4th Cir.** 1980), and a floating crane, Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee", 458 F. Supp. 602 (**S.D.N.Y.** 1978).

Thus, the **Second Circuit** held that THE BARK PEKING still remained a "vessel" for purposes of Section 5(b) since the ship rested in navigable waters and was capable of returning to the sea, even if only in tow. McCarthy, 15 BRBS at 187, 190 (CRT). However, the 1984 Amendments specifically exclude workers employed by a museum at Section 2(3)(B).

Moreover, the hull of a ship, floating on navigable waters during shipbuilding construction, is a vessel for purposes of a tort action authorized by Section 5(b) of the LHWCA. Hall v. Hvide Hull No. 3, 746 F.2d 294, 17 BRBS 1 (CRT) (**5th Cir.** 1984). See also Lundy v. Litton Sys., 624 F.2d 590 (**5th Cir.** 1980), cert. denied, 450 U.S. 913 (1981).

In Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 12 BRBS 969, 971-72, modified and reh'g denied, 657 F.2d 665 (**5th Cir.** 1981), the **Fifth Circuit** held that a recreational boat builder and a small pleasure craft marina came within the coverage of the LHWCA, even where the work performed was solely upon vessels under the eighteen tons net. The fact that the claimant's duties bore similarities to those of a land-based carpenter was not determinative because there is no activity more fundamental to maritime employment than the building and repairing of navigable vessels.

2.22 SECTION 2(22)

Section 2(22) of the LHWCA provides:

The singular includes the plural and the masculine includes the feminine and neuter.

33 U.S.C. § 902(22).