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***RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 154***
***July 2001 - August 2001***

*A.A. Simpson, Jr.*
*Associate Chief Judge for Longshore*

*Thomas M. Burke*
*Associate Chief Judge for Black Lung*

## I. Longshore

### A. Circuit Courts of Appeals

*Temporary Employment Services, v. Trinity Marine Group, Inc.*, ___ F.3d ___ (5th Cir. 2001).

In this "borrowed employer" case, the ALJ determined that Trinity Marine (Trinity) to whom Claimant was "loaned" by Temporary Employment Services, Inc. (TESI) is the employer for purposes of the Act. That determination, affirmed by the Board, was not an issue before the Circuit.

Rather, the only issue is whether the Board and the ALJ had jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between Trinity and TESI and a waiver of subrogation by Maryland Casualty Co. (TESI's carrier) in favor of Trinity. This jurisdictional issue turns on the interpretation of that part of Section 19(a) of the Act stating that an ALJ has authority "to hear and determine all questions in respect of such claims." The Court found that the Maryland-TESI/Trinity contract dispute was not integral to the longshore compensation claim and that the Board and the ALJ did not have statutory authority to determine that issue.

**[Topics** 19.3.6.1 Procedure–Issues at Hearing; 5.2.2 Third Party Liability--Indemnification**]**

### B. Benefits Review Board

*Bazor v Boomtown Belle Casino*, ___ BRBS ___ (BRB No.00-0928B)(July 11, 2001).

Decedent was facilities manager for a casino boat under construction at Avondale Shipyard which is located on a navigable waterway. His duties included overseeing cleaning of the vessel and installation of wiring for the gambling machines, computers, and security system.

In July of 1994, decedent suffered a stroke from which he never regained consciousness. He died in October of 1997. His medical bills (hospital, nursing home and home health care) were paid

by a health insurance policy underwritten by intervenor Great - West Life and Annuity Insurance Company. The Board approved the ALJ's award of benefits and attorneys fee:

Status and Situs

The Board rejected Employer's contention that decedent was excluded from coverage as an employee of a recreational operation under Section 2(3)(B) of the Act because decedent was involved soley in the vessel construction phase, i.e. a shipbuilding operator at all times when working in the vessel. The Board observe that it is the nature of the work which controls coverage, not the fact that employer is a casino operation, citing *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998) and *Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999).

The Board also upheld the ALJ's finding of situs, noting that decedent worked at Avondale's shipyard and dock facility, a covered situs under the Act.

**[Topics** 1.4.3.1 Vessel; 1.11.8 Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet.**]**

Causation

The Board affirmed the ALJ's finding that the evidence is sufficient to invoke the Section 20(a) presumption (stressful working conditions contributed to stroke).

**[Topic** 20.2.2 Presumptions--Injury**]**

Medical Benefits

The Board affirmed the right of intervenor to seek reimbursement for medical care and expenses, as the ALJ had found that employer declined to cover medical expenses and directed claimant to seek coverage from Intervenor.

**[Topic** 7.3.6 Medical Insurance**]**

Attorney Fees

In addition to offering the ALJ's award of attorney fees to claimant's counsel, the Board also rejected Employer's contention that certain expenses should be disallowed, as not being necessary (or utilized) at the hearing. The Board indicated the test for compensability is whether the claimant's attorney, at the time the work was performed, could reasonably regard it as necessary, citing, *Kelly v. Department of Army*, 34 BRBS 39 (2000).

The Board did not address Employer's objection to an award to intervenor's attorney, finding

that Employer had not objected to this item before the ALJ.

**[Topic** 28.6.2 Attorney Fees–Compensable Services**]**

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*Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, (BRB 00-1133)(Aug. 22, 2001).

Here the Board upheld the ALJ's denial of total disability for Claimant during a three-year period when claimant was assigned light duty work, finding that said employment constituted suitable alternate employment.

Thereafter, Claimant accepted an early retirement package pursuant to an agreement entered into between the union and employer pertaining to all workers of a certain age. One year later, following a knee replacement, Claimant's physician opined that he was unable to return to work.

The Board found that the ALJ rationally concluded that Claimant's retirement was voluntary, and not due to his injury. Accordingly, employer was not required to show the continued availability of suitable alternate employment as any loss of wage earning capacity is not due to injury.

**[Topic** 8.2.4 Partial Disability/Suitable Alternate Employment**]**

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*Steevens v. Umpqua River Navigation*, ___ BRBS ___, (BRB Nos. 00-1027 and 00-1027A)(July 17, 2001).

In this hearing loss case, the Board affirmed the ALJ's reliance on audiograms conducted 23 years after Claimant's retirement (the ALJ averaged the results), citing Labbe v. Bath Iron Works, 24 BRBS 159 (1991). Claimant asserts that he is entitled to benefits based on the minimum compensation rate of Section 6(b)(2) of the Act, arguing that the latter should apply to scheduled awards or permanent partial disability because they requested total disability benefits for a limited time. The Board's decision contains a good discussion of the four types of disability set out in Section 8 of the Act and the methods for calculating compensation for injuries resulting in each of the four forms of disability. The Board held that a scheduled award of permanent partial disability is not, for purposes of Section 6(b)(2) to an award of total disability for a limited time and affirmed the manner in which the ALJ calculated Claimant's compensation for his hearing loss (2/3 of the average weekly wage at the time of his retirement for 105.62 weeks).

**[Topics** 6.2.2 Minimum Compensation for Total Disability; 8.1 Nature of Disability (Permanent v.

Temporary); 8.2 Extent of Disability; 8.13.1 Hearing Loss–Introduction and General Concepts**]**

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*Liuzza v. Cooper/T.Smith Stevedoring Co.*, ___ BRBS ___, (BRB No. 00-0081)(June 29, 2001).

In a case of first impression, the Board held that an employer is not entitled to an offset or Section 14(j) credit of any overpayment of benefits it made on behalf of decedent against benefits it owes decedent's widow. The Board looked to the separate nature of disability and death benefits discussed in the Act's other credit provisions for the proposition that overpayments of disability compensation can be offset only against disability compensation due and overpayments of compensation for death can be offset only against death benefits due.

**[Topic** 14.5 Employer Credit For Prior Payments**]**

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Situs/Status

In five additional situs/status cases the Board ruled as follows:

*Riggio v. Maher Terminals*, ___ BRBS ___, (BRB No. 00-960)(June 28, 2000).

The Board held that Claimant's duties as a checker require him to spend part of his time in covered employment and that the injury need not have been performing maritime work on the "same day of injury." The common theme of cases cited by the Board is whether Claimant performs maritime duties as a regular portion of his overall duties. Accordingly, Claimant did not fall within the clerical exclusion of Section 2(3)(A).

**[Topics** 1.7.1 Jurisdiction--Status–"Maritime Worker;" 1.11.1 Exclusions to Coverage–Clerical**]**

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*Bianco v. Georgia Pacific Corp.*, ___ BRBS ___, (BRB Nos. 00-00953 and 00-0953A)(June 20, 2001).

The Board upheld ALJ's finding that situs test of Section 3(a) had not been met where injuries occurred within a separate manufacturing facility and not part of the Brunswick Port. The buildings where injuries occurred were used solely in the manufacturing process rather than as a step in the chain of unloading raw materials, citing *Jones v. Aluminum Co. of America [Jones II]*, ___ BRBS ___, (BRBS Nos. 00-696/A)(April 9, 2001).

**[Topic** 1.6.2 Jurisdiction–Situs–"Over land"**]**

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*Loyd v. Ram Industries, Inc.*, ___ BRBS ___, (BRB No. 00-1089)(Aug. 7, 2001).

The Board upheld ALJ's reliance on *Nelson v. American Dredging Co,*.143 F.3d 789)(3rd Cir. 1998), in finding situs and status for pipeline worker engaged in dredging operations in a ship channel. Decedent inspected and maintained the land portion of the pipeline and removed debris from the pipeline and at the dumpsite.

The injury occurred in an area adjoining navigable water which was customarily used by employer to unload dredged material (satisfying situs test); and decedent's duties were an integral part of the unloading process (satisfying the status test). In a footnote, the Board also observed that decedent's job was similar to a harbor worker.

**[Topics** 1.6.2 Jurisdiction–Situs–"Over land;" 1.7.1 Jurisdiction–Status–"Maritime Worker;" 1.7.2 Jurisdiction–Status–"Harbor-worker"]

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*Schilhab v. Intercontinental Terminals, Inc.*, ___ BRBS ___, (BRB No. 00-0999)(June 29, 2001).

Here, the Board upheld ALJ's finding that a railcar suprvisor at Employer's ships, barge, rail and truck terminal adjoining the Houston Ship Channel met the status requirement under Section 2(3) of the Act. Specifically, Claimant's duties required him to spend a portion of his time in covered maritime duties, viz., the loading and unloading of railcars for the direct transfer of liquid product either to or from marine vessels.

**[Topic** 1.7.1 Jurisdiction–Status–"Maritime Worker"**]**

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*Moon v. Tidewater Const. Co.*, ___ BRBS ___, (BRB No. 00-1138)(Aug. 22, 2001).

Claimant contends that he was a "harbor worker" within the meaning of Section 2(3) of the Act. His employer was a contractor who was hired by the Navy to build a warehouse at the Norfolk Navy Base. The ALJ found the latter to be a covered situs under the Act, but rejected the contention of status.

The Board upheld the ALJ's denial of benefits, citing *Weyher/Livsey Constructors Inc. v. Prevetire*, 27 F.3d 985 (4th Cir. 1994), observing that Claimant had only a temporary connection to the base which would terminate when he completed his portion of construction of the warehouse, which was not uniquely maritime in nature.

**[Topic** 1.7.1 Jurisdiction–Status–"Maritime worker"**]**

## II. Black Lung Benefits Act

### A. Circuit Courts of Appeals

In *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, ___ F.3d ___, Case No. 00-3316 (6th Cir. Sept. 6, 2001), the Sixth Circuit held that, under proper circumstances, the three year statute of limitations for filing a black lung claim at 20 C.F.R. § 725.308(c) would apply to the filing of a subsequent claim under 20 C.F.R. § 725.309. Under the facts before it, the court determined that the miner had not received a reasoned medical opinion finding him totally disabled due to pneumoconiosis which would have commenced the running of the limitation period. The court stated the following:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.[1] Three

[1] The court referenced a footnote at this juncture which reads as follows:

> This distinction deters finding 'compliant physicians' willing to give the miner an overly-favorable diagnosis that cannot be supported by the weight of the medical evidence. A miner who develops total disability due to pneumoconiosis three years after such a premature determination will find that the 'friendly doctor' has done him no favor. Indeed, the chief danger with this rule,

> years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Slip op. at 5 (italics in original).

Turning to the issue of whether a "material change in condition" under § 725.309 was established in the miner's claim, the court held that, under *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), it is insufficient for the ALJ to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. Rather, the court stated that the ALJ must also compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence "is substantially more supportive of claimant." Although the ALJ did not conduct a comparison of the old and new evidence to determine whether the new evidence was "substantially more supportive," the court nevertheless affirmed the finding of "material change" as supported by the record as a whole.

Finally, the court interpreted the amended provisions at 20 C.F.R. § 718.204(c) (2000) which provide that pneumoconiosis is a "substantially contributing cause" to the miner's total disability if it:

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c) (2000). Under the facts presented to the court, Employer argued that the miner's chronic obstructive pulmonary disease "was primarily, if not entirely, a consequence of the estimated quarter-of-a-million cigarettes he had smoked." Said differently, Employer maintained that "there is no substantial evidence that Kirk's total disability, which was not caused by pneumoconiosis in 1988, had suddenly become caused by this disease in 1992." The court found that, under the amended regulatory provisions, the mere fact that Claimant's non-coal dust related respiratory disease would have left him totally disabled even without exposure to coal dust, this would not preclude entitlement to benefits. The court held that Claimant "may nonetheless possess a compensable injury if his pneumoconiosis 'materially worsens' this condition."

[ **statute of limitations and subsequent claims under § 725.309; establishing a "material change in condition"; total disability and causation** ]

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> even given the constraint of communication to the miner, could be that '[u]nscrupulous employers could conveniently avoid all liability' by purposely making premature determinations. (Gov't. Br. at 37 n. 12). We have no occasion in this case to address the risk-benefit ratio of such an illegal tactic (or the Director's extraordinary cynicism regarding America's coal industry).

By unpublished decision in *Sewell Coal Co. v. O'Dell*, Case No. 00-2253 (4th Cir. July 26, 2001), the circuit court held that it was improper to accord two non-examining physicians' opinions greater weight in establishing rebuttal under 20 C.F.R. § 727.203(b)(4) over the opinions of four examining physicians, "all of whom diagnosed clinical pneumoconiosis." The court concluded that the non-examining physicians' opinions were insufficient "as a matter of law" to establish (b)(4) rebuttal of the (a)(2) presumption.

[ **non-examining physicians' opinions insufficient to establish (b)(4) rebuttal** ]

### B. U.S. District Court

In *Nat'l. Mining Ass'n. et al. v. Chao*, Civil Action No. 00-3086 (D. D.C. 2001), District Judge Emmet Sullivan dissolved his *Preliminary Injunction Order* which required a stay of all black lung cases wherein the amended regulations could affect the outcome. The court concluded that the amended regulations were valid and upheld their application. A copy of the *Memorandum Opinion and Order* may be found on our website at www:oalj.dol.gov.

[ **amended regulations** ]

### C. Benefits Review Board

In *Chester v. Hi-Top Coal Co.*, 22 B.L.R. 1-___, BRB No. 00-1000 BLA (2001), the Board cited to *Milburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) to hold that an ALJ may not discredit a medical opinion solely because the physician did not examine the claimant. Moreover, the Board held that it was error for the ALJ to discredit a medical opinion on grounds that it was "hostile-to-the-Act." In particular, the ALJ discredited a physician's opinion because he stated that "'it would be highly unusual for simple coal workers' pneumoconiosis of major category I to cause a measurable ventilatory impairment.'" The Board concluded that this was error because the physician did not "foreclose all possibility that simple pneumoconiosis can be totally disabling." Finally, the Board held that it was proper for the ALJ to accord no weight to a physician's opinion based on the physician's "failure to fully identify the evidence he relied upon in reaching his conclusions regarding the validity of (the) pulmonary function study."

[ **weighing physicians' opinions; "hostile-to-the-Act"; non-examining physician** ]

In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-___, BRB No. 00-0336 BLA (2001), the Board affirmed the ALJ's finding of pneumoconiosis based on biopsy evidence wherein the prosector stated the following:

> Biopsy of the right middle lobe of the lung showing subpleural fibrosis with anthracosis, perivascular anthracosis and chronic pulmonary emphysema.

The Board stated that the "diagnosis of anthracosis, with related disease process, which the administrative law judge determined to be credible, fall within the definition of 'pneumoconiosis' as defined by the Act and implementing regulations." The Board cited to 30 U.S.C. § 902(b) and the amended regulations at 20 C.F.R. §§ 718.201(a)(1) and 718.202(a)(2) (2000). Because Claimant established more than ten years of coal mine employment, the Board then held that Employer had the burden under § 718.203 to establish that the pneumoconiosis did not arise out of the miner's coal dust exposure. The ALJ's finding of coal workers' pneumoconiosis was vacated because he did not consider Employer's evidence to the contrary.

[ **biopsy findings of anthracosis with related disease process constitutes pneumoconiosis; must still establish causation of disease** ]