TOPIC 24 WITNESSES

24.1 GENERALLY

Section 24 of the LHWCA provides:

> **No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the United States District Court for the District of Columbia if the case is pending in the District).**

33 U.S.C. § 924.

Witnesses are required to give their testimony under oath or affirmation. The judge **may** examine the witnesses, but the parties or their representative **must** be allowed to do so. 20 C.F.R. § 702.340. Subpoenas may be issued by the Chief Administrative Law Judge or the presiding administrative law judge, as appropriate. Service can be accomplished personally or by certified mail. 29 C.F.R. § 18.24. Information on the subpoena process can be found at the OALJ web site, www.oalj.dol.gov.

Section 24 of the LHWCA and 20 C.F.R. § 702.340(b) provide that no person shall be required to attend as a witness at a place more than 100 miles from his residence unless mileage and fees have been tendered in advance. Section 24 also makes the same provision for a witness who resides outside the state where the hearing is to be conducted. 29 C.F.R. § 18.24 provides that no witness, except a witness for the government, may be required to attend unless there has been advance payment of the applicable fees. See 28 U.S.C. § 1821. Failure to make advance payment of the fees has been held to make the subpoena invalid. CF & I Steel Corp. v. Mitsui & Co. (USA), Inc., 713 F.2d 494 (**9th Cir.** 1983). If a witness fails to comply, the party adversely affected may apply to the U.S. District Court for enforcement. 29 C.F.R. § 18.24(d).

Most sections of the U.S. Department of Labor Rules of Evidence are not mandatory in proceedings under the LHWCA. 29 C.F.R. §§ 18.601-15, pertaining to witnesses, however, follow the Federal Rules of Evidence and may be instructive when resolving disputed matters.

24.2 EXPERT WITNESSES

If scientific, technical, or other specialized knowledge will assist the judge, a witnesses qualified as an expert may testify and render an opinion. 29 C.F.R. § 18.702. The specialized knowledge provision allows a skilled expert such as a banker, plumber, carpenter, etc., to be qualified as an expert witness. It is the burden of the proponent to establish the expertise of the witness. Whether the witness is sufficiently qualified as an expert is decided by the judge. 29 C.F.R. § 18.104.

In 1993, the **United States Supreme Court** adopted new criteria for the admissibility of expert testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 **U.S.** 579 (1993). The Court of Appeals for the **Ninth Circuit** recently clarified Daubert on remand. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (**9th Cir.** 1995), cert. denied, 516 **U.S.** 869. Daubert was a toxic tort case which addressed the impact of the Federal Rules of Evidence on the admissibility of scientific evidence and the admissibility of expert scientific opinion addressing the issue of causation.

In Daubert, the **Supreme Court** held, *inter alia*, that Rule 702 of the Federal Rules of Evidence superseded the Frye Rule (Frye v. United States, 293 F. 1013, 1014 (**D.C. Cir.** 1923)), which had been the dominant standard for determining admissibility of "scientific evidence" in federal court before the adoption of the Federal Rules of Evidence (FRE). Frye Rule held scientific evidence was admissible if it was based on scientific technique generally accepted as reliable within the scientific community. **Under FRE 702, which governs expert testimony in federal court cases, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."** Fed.R.Evid. 702 [Testimony by Experts].

The Daubert Court made clear that federal trial judges are to act as gatekeepers responsible for insuring that **"any and all scientific testimony or evidence admitted [at trial] is not only relevant, but reliable."** Id. at 2795 (emphasis added). The Court emphasized the district court's responsibility for protecting the judicial process from junk science. Id. According to the Court, "**[p]roposed testimony must be supported by appropriate validation** — i.e., 'good grounds,' based on what is known." Id.

The Court in Daubert also directed trial judges to determine that the proposed evidence "fits." 509 **U.S.** at 591. In other words, the evidence or testimony must "assist the trier of fact to understand the evidence, or to determine a **fact in issue**." Fed.R.Evid. 702 (emphasis added). Noting that "'fit'...is not always obvious," Justice Blackmun explained the concept with the following example:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge: about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact.

> However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

509 **U.S.** at 591.

Once the district court establishes that the proposed evidence is supported by appropriate validation and determines that the testimony would assist in determining facts in dispute, it is expected to apply a flexible five-part test to establish admissibility. The elements of the test are:

1. Whether the theory or technique in question can be (and has been) tested;
2. Whether it has been subjected to peer review and publication;
3. The theory or technique's known or potential error rate;
4. The existence and maintenance of standards controlling the theory or technique's operation; and
5. Whether the theory of technique has attracted widespread acceptance within a relevant scientific community.

Id. at 579-580. See Ellison v. Bath Iron Works Corp., 35 BRBS 240 (ALJ) (2001). Following the Daubert Test, in General Electric Co. v. Jointer, 522 **U.S.** 136 (1997), the **Supreme** Court gave trial judges broad discretion when applying Daubert, declaring that decisions of admissibility would be subject to review only under the lenient "abuse of discretion" standard. In Kumho Tire Co., Ltd., v. Carmichael, ___ **U.S.** ___, 119 S.Ct. 1167 (1999), the **Supreme Court** said that because the rules of evidence grant expert witnesses of all kinds great testimonial latitude. The four factors recited in Daubert are not a definitive check list of a trial court's considerations, and the court's analysis of an expert's reliability must depend upon the particular circumstances of the case. The essential determination, according to Kumho, is whether the expert employs in the courtroom "the same level of intellectual rigor that characterizes the practice of an expert in the relative field."

[ED. NOTE:** Whether one heralds Daubert as a welcomed clarification of the law on expert evidence, or criticizes the decision as a confusing extension of Frye, it is now the controlling precedent applied in federal courts to resolve questions concerning the admissibility of expert evidence.**]

On January 4, 1995, the **Ninth Circuit** issued its decision on remand and provided clarification of the **Supreme Court's** Daubert decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (**9th Cir.** 1995), cert. denied, 516 **U.S.** 869. The **Ninth Circuit** noted that it was required to deal with an evidentiary question: whether certain expert testimony was admissible to prove that the drug, Benedictine, caused the plaintiff's birth defects. The court additionally noted that its responsibility was to ensure that expert testimony rest on a reliable foundation. Id. The

appellate court ultimately upheld the lower court's summary judgment, **and** rejected the plaintiff's expert testimony because: (1) the experts' research had been prepared solely for purposes of the Benedictine litigation; (2) it had not been subjected to peer review, nor had it been deemed wholly worthy of comment by the scientific community; (3) the experts had not explained their methodology or verified it by reference to objective sources; and (4) the "fit" requirement was lacking, as the expert testimony did not establish — under a more-likely-than-not standard — that Benedictine **caused** the plaintiffs' limb reduction. Id. at 1317-21 (emphasis added).

Applying Daubert to Longshore Proceedings

In longshore cases, the parties often submit reports and testimony of purported medical experts on various issues, including causation, which simply recite the experts' qualifications, conclusions, and general assurances of reliability. Daubert could significantly affect longshore proceedings and procedure by imposing on longshore parties an even greater burden of proof than Greenwich Collieries. (See supra, Topic 23.7.1).

Under the **Supreme Court's** Daubert decision, as clarified in 1995 by the **Ninth Circuit**, submitting the conclusory opinions of medical experts, which simply consist of their subject belief without showing that their opinion was derived by the scientific method, may no longer be sufficient. For longshore claimants, submitting the bald conclusions of medical experts, absent a showing that their opinion is founded on scientific method, may be insufficient as a matter of law to meet their burden of proof by a preponderance of the evidence, as now required by Greenwich Collieries. (See supra, Topic 23.7.1). Respondents would not fare much better on issues such as Section 8(f) and suitable alternate employment where they bare the burden of proof.

In Hodgkenson v. Electric Boat Corp., 35 BRBS 459 (ALJ) (2001), the ALJ found that the LHWCA did not require ALJs to use the AMA Guidelines to Evaluation of Permanent Impairment because the Guides were not scientific, did not meet the test of Daubert, and should not be relied on by the ALJ when the claimant's treating physician disagreed with the Guides. In noting that the Guides are the result of a highly politicized process involving compromises by all interested parties, the ALJ stated, "At best, the AMA Guides are a consensus document whose ratings are also within the realm of reasonable medical certainty. At worst, these Guides are an arbitrary system designed so that two practitioners in different states will provide a consistent rather than a scientifically derived number when rating an impairment.

***[ED. NOTE:** It might be argued that Daubert is not relevant to longshore proceeding because of Section 23(a) of the LHWCA. Section 23(a), as interpreted, provides in part that in proceedings under the LHWCA, the Benefits Review Board and the ALJ are not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided for by…[the LHWCA]." 33 U.S.C. § 923(a). (ALJs are, however, bound by the ALJ Rules of Practice and Procedure. 29 C.F.R. 18.1 et seq.) Rather, longshore proceedings are governed by the APA pursuant to section 19(d), which provides for more relaxed and liberal rules for the admission of evidence and adjudicatory procedure. 33 U.S.C. § 919(d); See Darnell v. Bell Helicopters Int'l, Inc.,*

*16 BRBS 98 (1984), aff'd sub nom. Bell Helicopters Int'l, Inc. v. Jacobs, 117 BRBS 13 (CRT) (**9th Cir.** 1984); Casey v. Georgetown University Medical Center, 31 BRBS 147 (1997) (As to Daubert, Federal Rules of Evidence are not binding upon an ALJ and it is within the judge's discretion to determine the credibility of witnesses.). Nevertheless, both the courts and the Benefits Review Board have applied the federal rules in longshore cases on policy grounds when **not** inconsistent with the LHWCA. See, e.g., Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11, 21, n.16 (CRT) (**1st Cir.** 1982), aff'g 13 BRBS 1093 (1981); Lindsay v. Bethlehem Steel Corp., 18 BRBS 20, 23 (1986); Niazy v. Capital Hilton Hotel, 19 BRBS 266, 270 (1987); Taylor v. B. Frank Joy Company, 22 BRBS 408, 411 (1989). In O'Kelley v. Dept. of the Army/NAF, 35 BRBS 203 (ALJ) (2001), the ALJ noted that while the Daubert ruling was based on the Federal Rules of Evidence which do not necessarily apply to administrative cases, the Supreme Court's reasoning was based on the reliability of the proffered evidence, and the APA and due process require that even administrative decisions be based on reliable evidence: "Put another way, unreliable non-scientific evidence is not substantial evidence." Accord, Kumho Tire Co., Ltd. v. Carmichael, ___ **U.S.** ___, 119 S.Ct. 1167 (1999).**]***

The Federal Rules of Evidence should provide guidance to ALJs in longshore proceedings. See Camarillo v. National Steel and Shipbuilding Company, 10 BRBS 54, 59, n.2 (1979) (holding that a vocational rehabilitation expert may be permitted to state his/her understanding of the medical restrictions placed on a claimant by physicians as a basis for an opinion regarding current wage-earning capacity).

In Duran v. Tampa Ship Repair & Dry Dock Co., 2 BRBS 299 (1975), aff'd sub nom. Tampa Ship Repair & Dry Co. v. Director, OWCP, 535 F.2d 936, 4 BRBS 243 (**5th Cir.** 1976), the Board affirmed the decision of the ALJ to allow a clinical psychologist to testify as an expert. The Board referred to Rule 702 of the Federal Rules of Evidence, and stated "(a) clinical psychologist will qualify as an expert witness if his knowledge, skill, experience, training and education merit recognition of his opinion as authoritative."

[ED. NOTE:** Under the Federal Code of Regulations, the Board and/or the ALJ may prescribe the Daubert rules to longshore proceedings based on the legal precedents noted, namely Sprague and Camarillo. See 20 C.F.R. § 18.402 ("[A]ll relevant evidence is admissible, except as otherwise provided by the United States, by Act of Congress, pursuant to executive order, by those rules, or by other rules or regulations prescribed by the administrative agency pursuant to statutory authority"). However, application of Daubert rules may not be based specifically on DOL regulations, as DOL regulations governing formal adversarial adjudications conducted by the DOL are made inapplicable to the LHWCA.**]

An expert may render an opinion on an ultimate issue to be decided by the judge. 33. C.F.R. §18.704.

***[ED. NOTE:** Nonetheless, it may be argued that applying Daubert rules regarding scientific evidence in longshore proceedings would place improper limitations upon the well-established discretion of the ALJ as the trier of fact to weigh the medical evidence and draw his own inferences*

*from that evidence. See Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (**5th Cir.** 1962). It is well established that the ALJ is not bound to accept the opinion or theory of any particular medical examiner. Id.**]***

24.3 DEPOSITION EVIDENCE

The use of deposition evidence is governed by 29 C.F.R. § 18.22-23 which is similar to Rule 32 of the Federal Rules of Civil Procedure. At the hearing all or any part of a deposition, if admissible under the rules of evidence, may be used against any party who was present or duly notified under the following provisions:

(1) To impeach the deponent as a witness at the trial.

(2) The deposition of an expert, especially a physician, may be used by any party for any purpose, unless the administrative law judge finds that its use would be unfair or a violation of due process.

(3) The deposition of a party may be used by any other party for any purpose.

(4) The deposition of a witness may be used by any party for any purpose within the discretion of the administrative law judge providing certain findings are made:

(a) The witness is deceased, or

(b) The witness is more than 100 miles from the hearing location or out of the United States, or

(c) The witness is physically unable to attend, or

(d) The party offering the deposition has been unable to subpoena the witness, or

(e) Other exceptional circumstances.

Most objections can be made at the time of the hearing. A party may rebut any relevant evidence contained in a deposition irrespective of who sponsored its introduction. Cf. 29 C.F.R. § 18.607, which allows the credibility of a witness to be attacked by any party.