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TOPICS 1 - 21

Prepared by the U.S. Department of Labor
Office of Administrative Law Judges
Washington, DC

EDITOR'S NOTE:

This supplement to the January 2002 edition of the Longshore Benchbook is a compilation of Digests and Errata, plus several re-workings of portions of original Benchbook subsections. It is current through January 3, 2005. (For the most recent case law that has developed since January 3, 2005, *see* the Significant Case Digests beginning with January--February 2005.) Periodically information contained in new Significant Case Digests will be added and citations will be updated as publishers provide volume and page numbers.

Topics 1 through 21 are contained in Supplement Volume 1. Topics 22 through 90 can be found within Volume 2.

TOPIC 1

Topic 1.1 Jurisdiction/Coverage—Generally

***[ED. NOTE:** The following case is included for informational value only.]*

Amerault v. Intelcom Support Services, Inc, (S. Ct. of Guam Case No. CVA03-007)(2004 Guam LEXIS 27 (Supreme Court of Guam Dec, 20, 2004).

In this worker's compensation case the court noted that it would consider as persuasive case law interpreting provisions of the LHWCA that are similar to provisions of Guam's worker's compensation law. It's rationale was that the LHWCA was modeled after the New York State statutory scheme regarding workers' compensation. *Spencer-Kellogg &Ssons, Inc. v. Willard*, 190 F.2d 830, 832 n.1 (**3rd Cir.** 1951). Thus, it looked to LHWCA case law to interpret "compensation" and "medical benefits."

Topics 1.1 Jurisdiction—Generally

Hernandez v. Todd Shipyards Corp. (Unreported)(No. Civ. A. 04-1629)(E.D. La. July 8, 2004).

At issue here was whether an action should be remanded to state court because of a lack of federal question. Originally the widow filed an action in Orleans Parish Civil District Court alleging only state court claims against her husband's former employers and other defendants arising from her husband's on-the-job exposure to asbestos and his death from malignant mesothelioma. The Defendants removed the action asserting that the plaintiff's state law claims were preempted by the LHWCA. The defendants asserted that the LHWCA was the plaintiff's sole and exclusive remedy and that the district court had original federal question jurisdiction pursuant to 28 U.S.C. § 1331 and, therefore, that the action was removable pursuant to 28 U.S.C. § 1441.

Notwithstanding circuit precedent holding that the LHWCA "does not create federal subject matter jurisdiction supporting removal," *Garcia v. Amfels, Inc*, 254 F.3d 585, 588 (**5th Cir.** 2001); *see also Aaron v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.2d 1157 (**5th Cir.** 1989), defendants argue that the analysis used in those cases was "expressly overruled" by the **United States Supreme Court** in *Beneficial Nat'l Bank v. Anderson*, 539 **U.S.** 1 (2003), and "abandoned" by the **Fifth Circuit** in *Hoskins v. Bekins Van Lines*, 343 F.3d 769 (**5th Cir.** 2003).

Here, the court stated that "In *Hoskins*, the **Fifth Circuit** explained the effect of the *Beneficial* decision as follows: (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) *there is a clear Congressional intent that claims brought under the federal law be removable*." (Emphasis supplied by the **Fifth Circuit**.) The district court noted

that the circuit court concluded, "We view *Beneficial* as evidencing a shift in focus from Congress's intent that the claim be removable, to Congress's intent that the federal action be *exclusive*." (Emphasis supplied by the **Fifth Circuit**.) The district court concluded, "Accordingly, because the LHWCA has been raised as a defense to plaintiff's state law causes of action and because defendants cannot demonstrate that the LHWCA satisfies the **Fifth Circuit's** three-prong complete preemption analysis as modified in *Hoskins*, this Court does not have subject matter jurisdiction over this action."

Topics 1.1 Jurisdiction—Generally

Hernandez v. Todd Shipyards Corp., ___ F. Supp 2d ___ (Civil Action No. 04-1629 Section: I/1)(E.D. La. July 8, 2004).

The LHWCA does not completely preempt state law claims. The district court noted that the **Fifth Circuit** has held that the LHWCA does not contain a civil enforcement provision that creates a federal cause of action, and that the LHWCA does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA. *Garcia v. Amfels, Inc.*, 254 F.3d 585 (**5th Cir.** 2001); *see also Aaron v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.2d 1157 (**5th Cir.** 1989). In the case at hand where exclusive remedial provisons of the LHWCA were raised by the defendant in response to the plaintiff's purely state law claims, the LHWCA was nothing more than a statutory defense to a state court cause of action, and thus the matter could not be removed.

Topic 1.1.1 Standing to File a Claim

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Here, the court stated that "In *Hoskins*, the **Fifth Circuit** explained the effect of the *Beneficial* decision as follows: (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) *there is a clear Congressional intent that claims brought under the federal law be removable*." (Emphasis supplied by the **Fifth Circuit**.) The district court noted that the circuit court concluded, "We view *Beneficial* as evidencing a shift in focus from Congress's intent that the claim be removable, to Congress's intent that the federal action be *exclusive*." (Emphasis supplied by the **Fifth Circuit**.) The district court concluded, "Accordingly, because the LHWCA has been raised as a defense to plaintiff's state law causes of action and because defendants cannot demonstrate that the LHWCA satisfies the **Fifth Circuit's** three-prong complete preemption analysis as modified in *Hoskins*, this Court does not have subject matter jurisdiction over this action."

Topic 1.1.1 Jurisdiction/Coverage--Standing to File a Claim

Hymel v. McDermott, Inc., 37 BRBS 160)(2003).

Here the claimant sued his employer under the LHWCA as well as in state court against his employer and others, for negligence and intentional exposure to toxic substances in the work place. Executive officers of the employer during the claimant's employment (who were named as defendants in the state court suit) moved to intervene in the LHWCA claim. The ALJ denied the motion to intervene, finding that the issue raised by the interveners was not "in respect of "a compensation claim pursuant to Section 19(a) of the LHWCA. In a subsequent Decision and Order, the ALJ granted the claimant's motion to dismiss the claimant's claim with prejudice, pursuant to Section 33(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval. The interveners filed an appeal with the Board. The Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the interveners were not adversely or aggrieved by the denial of their motion to intervene. Interveners then filed a motion for reconsideration of the Board's dismissal.

The Board granted the motion for reconsideration, finding that the interveners are adversely affected or aggrieved by the ALJ's denial of their petition. The Board noted that Section 21(b)(3) of the LHWCA states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the LHWCA. However, turning to the merits of the appeal, the Board found that the ALJ's decision was legally correct. The Board noted **Fifth Circuit** case law to support the ALJ's determination that he was without jurisdiction to rule on interveners' entitlement to tort immunity in a state court suit, as that issue was not essential to resolving issues related to the claimant's claim for compensation under the LHWCA. The Board went on to note that even if the claimant's

claim had still been pending, the interveners' claim, while based on Section 33(i) of the LHWCA, is independent of any issue concerning the claimant's entitlement to compensation and/or medical benefits and the party liable for such. Section 33(i) does not provide the right of intervention.

Topic 1.1.1 Jurisdiction/Coverage--Standing to File a Claim

Hernandez v. todd Shipyards Corp., ___ F. Supp 2d ___ (Civil Action No. 04-1629 Section: I/1)(E.D. La. July 8, 2004).

The LHWCA does not completely preempt state law claims. The district court noted that the **Fifth Circuit** has held that the LHWCA does not contain a civil enforcement provision that creates a federal cause of action, and that the LHWCA does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA. *Garcia v. Amfels, Inc.*, 254 F.3d 585 (**5th Cir.** 2001); *see also Aaron v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 876 F.2d 1157 (**5th Cir.** 1989 In the case at hand where exclusive remedial provisons of the LHWCA were raised by the defendant in response to the plaintiff's purely state law claims, the LHWCA was nothing more than a statutory defense to a state court cause of action, and thus the matter could not be removed.

Topic 1.3 No Section 20(a) Presumption of Coverage

Watkins v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the

Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

Topic 1.4 Jurisdiction/Coverage—LHWCA v. Jones Act

Baker v. Mason Construction Co., (Unpublished)(BRB No. 04-0220)(Nov. 18, 2004).

The Board vacated the ALJ's finding that the claimant was a member of a crew and therefore not entitled to coverage under the LHWCA. The Board noted that the ALJ had found that the claimant performed deckhand duties and was subject to perils of the sea and the wind and the waves in his employment as a journeyman pile driver working on a mooring dolphin (free-standing set of pilings driven into the harbor bottom to support a mooring bollard.) The parties had stipulated that the claimant was employed and ultimately injured upon actual navigable waters. The Board observed that "While the [ALJ] appropriately noted the deckhand duties claimant performed, he did not discuss the nature of the project on which claimant worked, which was a pile driving project to salvage and rebuild a wharf's downstream 'mooring dolphin.' **Ninth Circuit** precedent interpreting *Chandris* [, *Inc. v. Latsis*, 515 **U.S.** 347 (1995)] requires an injury into whether claimant's work in support of this project was 'inherently vessel-related' or 'primarily sea-based.'" The Board further noted that the ALJ did not discuss whether the moored nature of the work barge affected the inquiry into crew member status.

Topic 1.4 LHWCA v. Jones Act—Generally

Lacy v. Southern California Ship Services, 38 BRBS 12 (2004).

Here the Board upheld the ALJ's determination that there was substantial evidence to support a finding that the claimant was a longshoreman, rather than a seaman. The claimant's duties incorporated stereotypical tasks of both longshoremen and seamen. He worked as a rigger and deckhand for the employer and was in the process of loading cargo from one of employer's boats onto a ship anchored outside the breakwaters of the Los Angeles/Long Beach Harbor when a swinging pallet hit him and caused injury to his back. The employer's primary business is to provide water taxi and supply service to vessels at anchor in the harbor.

While the claimant was called a "deckhand" he performed duties both on land and aboard vessels. Claimant worked 35 percent of his work time on vessels and 65 percent on land. The land time included time preparing cargo and vessels to be launched as well as disposal and clean up after docking. When the claimant was assigned to a vessel, he and another deckhand would prepare the cargo nets and pallets for loading, including getting them from the storage area, using forklifts to load them onto the nets, and using a crane to load them onto the vessels. The claimant would handle the dock lines upon leaving and returning to the dock, and he would ride in the vessel to deliver the supplies or passengers to the ship. His main duty in transport was to be sure the supplies were

secure, and he typically would have time to drink coffee during the ride. Once the vessel arrived at the ship, he would assist in loading the supplies onto the ship, or help transfer passengers to/from the ship.

The Board noted that the ALJ had correctly found that while the claimant met the first prong of the *Chandris* test (contributing to the function of the vessel and the accomplishment of its mission) he could not meet the second prong (a substantial connection to a vessel or fleet of vessels). While recognizing that the claimant's 35 percent of time spent on boats exceeded the 30 percent rule of thumb set forth by the **Fifth Circuit**, the ALJ had stated that time alone does not satisfy the inquiry. Rather, the ALJ found that the connection must also be substantial in nature, and he found that the claimant's on-board work was not "primarily sea-based" work. The ALJ determined that the claimant's "vessel-related" duties were "secondary and minor compared to his regular occupation as a loader and unloader" and that these longshore duties were "neither primarily sea-based nor inherently vessel related."

While upholding the ALJ, the Board however pointed out that a claimant's duties should not be segregated into steering/maintenance duties and loading/unloading duties. The Board stated that it needed only to address whether the ALJ rationally relied upon the **Ninth Circuit's** language to ascertain whether the claimant's connection to the employer's fleet was substantial. In assessing whether the claimant's duties were "sea-based" or "vessel-related," the ALJ determined that the bulk of the claimant's job required him to perform land-based loading, unloading, storing and disposing of items transported by the employer's vessels. The Board stated, "As this work is performed on land, the [ALJ] rationally concluded it was not 'sea-based.' Moreover, the [ALJ] found that claimant did not sleep on the vessels, was more often assigned to land jobs because of his skills, and did not get paid per vessel trip but was a regular hourly employee. Thus, in ascertaining whether claimant's connection to employer's fleet was substantial in nature, it was rational for the [ALJ] to rely on **Ninth Circuit** language and to conclude that the connection was not substantial in nature."

Topic 1.4 Jurisdiction--LHWCA v. Jones Act

Nunez v. B & B Dredging, Inc., 288 F.3d 271 (**5th Cir.** 2002)(*rehearing denied* May 21, 2002).

Worker was not a "seaman" under the Jones Act, even though he was permanently assigned to a dredge, since he spent only approximately 10 percent of his work time aboard the dredge. The circuit court noted the **Supreme Court's** analysis in *Chandris v. Latsis* resolved this issue and quoted the **Supreme Court** :

> "The Court stated a maritime worker who spends only a small fraction of his working time onboard a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.' The Court stated further that generally, the **Fifth Circuit** seems to have identified an appropriate

rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."

The circuit court also said, "The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."

Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act—Generally

Radut v.State Street Bank & Trust Co., ___ F.Supp 2d ___ (03 Civ. 7663 (SAS))(S. D. N.Y. Nov. 4, 2004).

Here the court found, as a matter of law, that a marine corrosion and coatings specialist retained as an independent contractor to perform a "steel and coating survey" on a vessel and who worked while the ship was at sea, was a "Sieracki seaman." This case has a good historical discussion of "Sieracki seaman" doctrine.

Topic 1.4.1 LHWCA v. Jones Act—Generally

Harkins v. Riverboat Services, Inc., ___ F.3d ___ (No. 03-3624)(**7th Cir.** October 6, 2004).

In a Fair Labor Standards Act (FLSA) case, the **Seventh Circuit** affirmed the dismissal of a suit for overtime/retaliatory discharge where the plaintiffs were not protected by the FLSA because they were considered seamen within the seaman's exemption to the FLSA.

The workers were part of the riverboat casino's "marine crew" and were responsible for the operation of the ship and the ship's passengers. However, most of the plaintiffs were not directly involved in navigation or engine-room work and spent much of their time doing the kind of housekeeping chores that they would have done in a casino that was on land. The riverboat in question spent at least 90 percent of its time moored to a pier and when it did cruise, only cruised for a maximum of four hours at a time. Realistically, the lives of the workers differed only slightly from that of ordinary casino workers.

The FLSA exempts from its overtime provisions persons employed as seamen. 29 U.S.C. § 213(b)(6). The plaintiffs argued that they were not seamen because they do not perform the distinctive work of seamen and "do not work on a real ship but on a kind of glorified houseboat." However, after examining the jurisprudential definition of

"seaman" and noting the terse language of the statute ("any employee employed as a seaman") under the FLSA, the court found that only two points emerged with any clarity from the cases: the employee must perform maritime-type work on a ship that is within the admiralty jurisdiction; and decisions interpreting the term "seaman" in other statutes do not necessarily control meaning in the FLSA.

The court stated that "when persons employed on a ship, even so a typical a one as an Indiana gambling boat, are classified as seamen for purposes of entitlement to the special employment benefits to which seamen, including therefore these plaintiffs, are entitled, a presumption arises that they are seamen under the FLSA as well." ***[ED. NOTE:*** *However, had the plaintiffs filed seamen claims, they would not necessarily be entitled to seamen's special benefits in some circuit courts.****]***

Topic 1.4.1 LHWCA v. Jones Act--Generally

Songui v. City of New York, 2003 N.Y. App. Div. LEXIS 13890 (Index No. 10780/99)(Dec. 22, 2003).

This is a summary judgment order wherein the private contractor, Reynolds Shipyard Corporation, successfully argued that a Jones Act claim should be dismissed since the barge repairman was a land-based worker with only a transitory connection to a vessel in navigation and was hired on a temporary basis to weld a metal plate onto a garbage barge owned by the City of New York. The court found that the worker was more properly covered under the LHWCA. The City of New York also moved for summary judgment claiming that federal maritime law should preempt state labor law. In denying the city's motion, the court noted that the New York Court of Appeals has previously held that the LHWCA does not preempt New York labor law and that an action may proceed to determine if there is any fault on the part of the city.

Topic 1.4.1 LHWCA v. Jones Act--Generally

[ED. NOTE: *This case is included for informational purposes only.****]***

Gros v. Settoon, Inc., 865 So. 3rd 143 (La. App. 3 Cir Dec. 23, 2003), 2003 La. App. LEXIS 3602), *cert denied to La. Supreme Court at* 871 So. 3rd 352 (March 26, 2004).

In this jurisdictional (Jones Act versus LHWCA) case, the Third Circuit Court of Appeals for the State of Louisiana made the extraordinary finding that, despite **Fifth Circuit** jurisprudence to the contrary; it would follow the **Ninth Circuit** and hold that a formal award of LHWCA benefits would not preclude the filing of a Jones Act claim. It found that Congress envisioned pursuing both LHWCA and Jones Act claims, despite the real possibility that an employer may be forced to engage in repetitious litigation.

While this matter was before an ALJ, the employer argued that the worker was a shore based worker only entitled to Louisiana state workers compensation. The ALJ found that the worker's injury upon navigable waters was sufficient to qualify him for LHWCA benefits. The worker then alleged his status as a seaman making claims for negligence, unseaworthiness and maintenance and cure under the Jones Act and also filing a claim for vessel negligence under 905(b). ***[ED. NOTE:*** *Using the Saving to Suitors clause of the U.S. Constitution, this matter was filed in state court rather than in federal district court where most similar cases are normally filed.**]***

The Louisiana Third Circuit noted the competing federal circuit positions as well as the **Fifth Circuit's** limitation on *Southwest Marine Inc. v. Gizoni*, 502 **U.S.** 81 (1991) wherein a worker sought and received voluntarily paid benefits. However, the state circuit court stated, "We are satisfied, during the administrative hearing to determine [the worker's] entitlement to LHWCA benefits, seaman status was not at issue. The Louisiana Third Circuit also states that, "The Administrative Law Judge found [the worker's] injury upon navigable waters was sufficient to qualify him for benefits under the LHWCA."

However, a reading of the ALJ's Decision and Order indicates that the issue of coverage was not glossed over. *Gros v. Fred Settoon, Inc*. (Unpublished) (Case No. 2000-LHC-2179)(April 9, 2001). The ALJ not only specifically listed "jurisdiction" as an issue, he specifically addressed both situs as well as status and found coverage under the LHWCA.

Topic 1.4.1 LHWCA v. Jones Act--Generally

Southcombe v. A Mark, B Mark, C Mark Corp., 37 BRBS 169 (2003).

In this status issue case, the Board upheld the ALJ's determination that the claimant was not engaged in maritime employment pursuant to Section 2(3) of the LHWCA. The claimant had been employed by a subcontractor as an ironworker. The general contractor was constructing a marina on a river. The marina was to include an 80-foot high "mega yacht" service facility. At the time of the claimant's injury he was unloading steel beams from a flat-bed trailer which were intended for use as the frame of the yacht service facility. The Board first noted that the seminal issue in this matter was whether the claimant's work on the project was maritime employment which is a legal issue to which the Section 20(a) presumption does not attach.

Next the Board noted that within the jurisdiction of the **Fourth Circuit**, within whose jurisdiction this case arises, the jurisprudence has drawn a distinction between workers engaged to repair or replace existing harbor or shipyard facilities and those engaged in the construction of new land-based facilities. The Board cited the lead **Fourth Circuit** case of *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT)(**4th Cir.** 1994), *cert. denied*, 514 **U.S.** 1063 (1995)(*Held*, a pipe fitter employed to construct a power plant on the premises of the Norfolk Naval Shipyard was not a covered employee; court declined to expand coverage to include this worker merely

because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations.).

The Board noted that the ALJ found that 1) the claimant was on the premises solely to construct a building, and not to maintain or repair shipyard facilities; 2) pursuant to *Prevetire*, a finding of coverage cannot rest on the future use of the facility; and 3) the claimant's work was not integral to the loading, unloading, repair or building of vessels. The Board then affirmed the ALJ's finding that the claimant was not engaged in maritime employment. In so doing, the Board distinguished the claimants in *Stewart v. Brown & Root, Inc*., 7 BRBS 356 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (**4th Cir.** 1979), *cert. denied*, 446 **U.S.** 981 (1980) who had been engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. The Board also specifically noted that in the instant case, the claimant's relationship to this facility was merely temporary as he was on the premises solely under a subcontract to build the facility.

Topic 1.4.1 LHWCA v. Jones Act

Becker v. Tidewater, Inc., 335 F.3d 376 (**5th Cir.** June 19, 2003)(*Rehearing en banc denied* July 21, 2003).

Here the **Fifth Circuit** overturned a federal district court jury's finding of Jones Act seaman status. After first addressing the differences between the Jones Act and the LHWCA, the **Fifth Circuit** addressed the issue at hand, namely, was the plaintiff's connection to the vessel substantial in duration and nature, and therefore warranting coverage under the Jones Act. It noted that in *Chandris, Inc. v. Latsis*, 515 **U.S.** 347 (1995)(Held, temporary workers are not seamen, although such workers may be treated as regular crew members by their peers.), the **Supreme Court** had evoked a status-based standard wherein the Court rejected a "voyage test. The **Fifth Circuit** noted that while it has quantified the duration of time necessary to allow submission of the issue of seaman status to a jury by using a 30 percent rule of thumb, the **Supreme Court**, in *Chandris*, articulated an exception to temporal guidelines such as the **Fifth Circuit's** 30 percent rule. The *Chandris* exception states that "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." Seaman status does not attach to a worker simply because he is necessary to the vessel's mission at the time of injury. *Chandris*, 515 **U.S.** at 358.

Thus, a worker who, over the course of his employment, has worked in the service of a vessel in navigation well under 30 percent of his time may still qualify for seaman status if he has been reassigned to a new position ("substantial change in status") that meets this temporal requirement. In applying the facts of this particular case to the law, the **Fifth Circuit** found that the evidence was insufficient for a finder of fact to conclude that the plaintiff had proven his case.

Topic 1.4.1 LHWCA v. Jones Act

Lorimer v. Great Lakes Dredge & Dock Co., (Unpublished) (No. 01-70849) (June 3, 2002) (**9th Cir.** 2002).

At issue here was whether the claimant was excluded from coverage under the LHWCA because he was a "seaman." The Board and the **Ninth Circuit** found that, although the claimant worked 12 hour shifts, came ashore to sleep, and had no seaman papers, he was nevertheless a seaman. The court noted that the claimant's duties as a deckhand included tying up barges alongside the dredge where he was stationed, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance, all of which contributed to the accomplishment of the vessel's mission of dredging in Los Angeles and Long Beach Harbors.

Topic 1.4.1 LHWCA v. Jones Act

Soloman v. Blue Chip Casino, Inc., 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the state court of appeals upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *Reeves v. Mobile Dredging & Pumping Co*., 26 F.3d 1247,(**3d Cir.** 1994)(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

Topic 1.4.1 LHWCA v. Jones Act–Generally

Uzdavines v. Weeks Marine, Inc., 37 BRBS 45 (2003).

In determining whether the worker had status under the LHWCA or was covered under the Jones Act, the Board deferred to the ALJ's rational, factual interpretation that a barge used to dredge navigational channels (either pulled by a tug or moving on spuds) was a "vessel in navigation." Thus the worker was a member of the crew covered by the Jones Act. In determining that the barge was a vessel, the ALJ had relied upon *Bernard v. Binnings Constr. Co., Inc*, 741 F.2d 824 (**5th Cir.** 1984) and *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (**2d Cir.** 1996). In *Bernard*, the **Fifth Circuit** had considered three factors in determining whether a floating work platform is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. In *Tonnesen*, the **Second Circuit** applied the second and third *Bernard* factors but disagreed with regard to the first factor (focus on the original purpose for the structure). Instead, the **Second Circuit** concluded that the inquiry should look to whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident.

The Board also noted the *Tonnesen* court's conclusion that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and that except in rare cases, only the trier of facts can determine its application in the circumstances of a particular case.

Topic 1.4.1 LHWCA v. Jones Act

Becker v. Tidewater, Inc., 335 F.3d 376 (**5th Cir.** June 19, 2003)(*Rehearing en banc denied* July 21, 2003).

Here the **Fifth Circuit** overturned a federal district court jury's finding of Jones Act seaman status. After first addressing the differences between the Jones Act and the LHWCA, the **Fifth Circuit** addressed the issue at hand, namely, was the plaintiff's connection to the vessel substantial in duration and nature, and therefore warranting coverage under the Jones Act. It noted that in *Chandris, Inc. v. Latsis*, 515 **U.S.** 347 (1995)(*Held*, temporary workers are not seamen, although such workers may be treated as regular crew members by their peers.), the **Supreme Court** had evoked a status-based standard wherein the Court rejected a "voyage test." The **Fifth Circuit** noted that while it has quantified the duration of time necessary to allow submission of the issue of seaman status to a jury by using a 30 percent rule of thumb, the **Supreme Court**, in *Chandris*, articulated an exception to temporal guidelines such as the **Fifth Circuit's** 30 percent rule. The *Chandris* exception states that "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his

activities in his new position." Seaman status does not attach to a worker simply because he is necessary to the vessel's mission at the time of injury. *Chandris*, 515 **U.S.** at 358.

Thus, a worker who, over the course of his employment, has worked in the service of a vessel in navigation well under 30 percent of his time may still qualify for seaman status if he has been reassigned to a new position ("substantial change in status") that meets this temporal requirement. In applying the facts of this particular case to the law, the **Fifth Circuit** found that the evidence was insufficient for a finder of fact to conclude that the plaintiff had proven his case.

Topic 1.4.2 Jurisdiction/Coverage—Master/member of the Crew (seaman)

Radut v.State Street Bank & Trust Co., ___ F.Supp 2d ___ (03 Civ. 7663 (SAS))(S. D. N.Y. Nov. 4, 2004).

Here the court found, as a matter of law, that a marine corrosion and coatings specialist retained as an independent contractor to perform a "steel and coating survey" on a vessel, and who worked while the ship was at sea, was a "Sieracki seaman." This case has a good historical discussion of "Sieracki seaman" doctrine.

Topic 1.4.2 Jurisdiction—Master/member of the Crew (seaman)

Nicole v. Southstar Industrial Contractors, __ F. Supp 2d __ (Civ. Action No. 03-1432 Sec. A (2)) (E.D. La. April 29, 2004), 2004 WL 936848.

The federal district court found that an injured worker who was land-based and had only a sporadic or transitory connection to a vessel was not entitled to Jones Act coverage. Here the worker (an electrician's helper on a barge) had been contracted out to a customer by his employer. While the worker was supposed to be contracted out for seven weeks of work on the barge, he was injured on the third day. There was no evidence as to the worker's past employment and any allegations as to future employment were found to be speculative: "[S]eaman status is Plaintiff's burden to prove and he has nothing other than speculation to offer as to what his next job assignment might be. But Plaintiff cannot rely upon mere future possibilities to create seaman status in the present."

Topic 1.4.2 Master/member of the Crew (seaman)

Lacy v. Southern California Ship Services, 38 BRBS 160 (2004).

Here the Board upheld the ALJ's determination that there was substantial evidence to support a finding that the claimant was a longshoreman, rather than a seaman. The claimant's duties incorporated stereotypical tasks of both longshoremen and

seamen. He worked as a rigger and deckhand for the employer and was in the process of loading cargo from one of employer's boats onto a ship anchored outside the breakwaters of the Los Angeles/Long Beach Harbor when a swinging pallet hit him and caused injury to his back. The employer's primary business is to provide water taxi and supply service to vessels at anchor in the harbor.

While the claimant was called a "deckhand" he performed duties both on land and aboard vessels. Claimant worked 35 percent of his work time on vessels and 65 percent on land. The land time included time preparing cargo and vessels to be launched as well as disposal and clean up after docking. When the claimant was assigned to a vessel, he and another deckhand would prepare the cargo nets and pallets for loading, including getting them from the storage area, using forklifts to load them onto the nets, and using a crane to load them onto the vessels. The claimant would handle the dock lines upon leaving and returning to the dock, and he would ride in the vessel to deliver the supplies or passengers to the ship. His main duty in transport was to be sure the supplies were secure, and he typically would have time to drink coffee during the ride. Once the vessel arrived at the ship, he would assist in loading the supplies onto the ship, or help transfer passengers to/from the ship.

The Board noted that the ALJ had correctly found that while the claimant met the first prong of the *Chandris* test (contributing to the function of the vessel and the accomplishment of its mission) he could not meet the second prong (a substantial connection to a vessel or fleet of vessels). While recognizing that the claimant's 35 percent of time spent on boats exceeded the 30 percent rule of thumb set forth by the **Fifth Circuit**, the ALJ had stated that time alone does not satisfy the inquiry. Rather, the ALJ found that the connection must also be substantial in nature, and he found that the claimant's on-board work was not "primarily sea-based" work. The ALJ determined that the claimant's "vessel-related" duties were "secondary and minor compared to his regular occupation as a loader and unloader" and that these longshore duties were "neither primarily sea-based nor inherently vessel related."

While upholding the ALJ, the Board however pointed out that a claimant's duties should not be segregated into steering/maintenance duties and loading/unloading duties. The Board stated that it needed only to address whether the ALJ rationally relied upon the **Ninth Circuit's** language to ascertain whether the claimant's connection to the employer's fleet was substantial. In assessing whether the claimant's duties were "sea-based" or "vessel-related," the ALJ determined that the bulk of the claimant's job required him to perform land-based loading, unloading, storing and disposing of items transported by the employer's vessels. The Board stated, "As this work is performed on land, the [ALJ] rationally concluded it was not "sea-based. Moreover, the [ALJ] found that claimant did not sleep on the vessels, was more often assigned to land jobs because of his skills, and did not get paid per vessel trip but was a regular hourly employee. Thus, in ascertaining whether claimant's connection to employer's fleet was substantial in nature, it was rational for the [ALJ] to rely on **Ninth Circuit** language and to conclude that the connection was not substantial in nature."

Topic 1.4.2 Master/member of the Crew (seaman)

Songui v. City of New York, 2003 N.Y. App. Div. LEXIS 13890 (Index No. 10780/99)(Dec. 22, 2003).

This is a summary judgment order wherein the private contractor, Reynolds Shipyard Corporation, successfully argued that a Jones Act claim should be dismissed since the barge repairman was a land-based worker with only a transitory connection to a vessel in navigation and was hired on a temporary basis to weld a metal plate onto a garbage barge owned by the City of New York. The court found that the worker was more properly covered under the LHWCA. The City of New York also moved for summary judgment claiming that federal maritime law should preempt state labor law. In denying the city's motion, the court noted that the New York Court of Appeals has previously held that the LHWCA does not preempt New York labor law and that an action may proceed to determine if there is any fault on the part of the city.

Topic 1.4.2 Master/member of the Crew (seaman)

Gros v. Settoon, Inc., __ So. 3rd __ (03-461) (La. App. 3 Cir Dec. 23, 2003), 2003 La. App. LEXIS 3602).

In this jurisdictional (Jones Act versus LHWCA) case, the Third Circuit Court of Appeals for the State of Louisiana made the extraordinary finding that, despite **Fifth Circuit** jurisprudence to the contrary; it would follow the **Ninth Circuit** and hold that a formal award of LHWCA benefits would not preclude the filing of a Jones Act claim. It found that Congress envisioned pursuing both LHWCA and Jones Act claims, despite the real possibility that an employer may be forced to engage in repetitious litigation.

While this matter was before an ALJ, the employer argued that the worker was a shore based worker only entitled to Louisiana state workers compensation. The ALJ found that the worker's injury upon navigable waters was sufficient to qualify him for LHWCA benefits. The worker then alleged his status as a seaman making claims for negligence, unseaworthiness and maintenance and cure under the Jones Act and also filing a claim for vessel negligence under 905(b). ***[ED. NOTE:*** *Using the Saving to Suitors clause of the U.S. Constitution, this matter was filed in state court rather than in federal district court where most similar cases are normally filed.**]***

The Louisiana Third Circuit noted the competing federal circuit positions as well as the **Fifth Circuit's** limitation on *Southwest Marine Inc. v. Gizoni*, 502 **U.S.** 81 (1991) wherein a worker sought and received voluntarily paid benefits. However, the state circuit court stated, "We are satisfied, during the administrative hearing to determine [the worker's] entitlement to LHWCA benefits, seaman status was not at issue. The Louisiana Third Circuit also states that, "The Administrative Law Judge found [the worker's] injury upon navigable waters was sufficient to qualify him for benefits under the LHWCA."

However, a reading of the ALJ's Decision and Order indicates that the issue of coverage was not glossed over. *Gros v. Fred Settoon, Inc*. (Unpublished) (Case No. 2000-LHC-2179)(April 9, 2001). The ALJ not only specifically listed "jurisdiction" as an issue, he specifically addressed both situs as well as status and found coverage under the LHWCA.

Topic 1.4.2 Master/member of the Crew (seaman)

Southcombe v. A Mark, B Mark, C Mark Corp., 37 BRBS 169 (2003).

In this status issue case, the Board upheld the ALJ's determination that the claimant was not engaged in maritime employment pursuant to Section 2(3) of the LHWCA. The claimant had been employed by a subcontractor as an ironworker. The general contractor was constructing a marina on a river. The marina was to include an 80-foot high "mega yacht" service facility. At the time of the claimant's injury he was unloading steel beams from a flat-bed trailer which were intended for use as the frame of the yacht service facility. The Board first noted that the seminal issue in this matter was whether the claimant's work on the project was maritime employment which is a legal issue to which the Section 20(a) presumption does not attach.

Next the Board noted that within the jurisdiction of the **Fourth Circuit**, within whose jurisdiction this case arises, the jurisprudence has drawn a distinction between workers engaged to repair or replace existing harbor or shipyard facilities and those engaged in the construction of new land-based facilities. The Board cited the lead **Fourth Circuit** case of *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT)(**4th Cir.** 1994), *cert. denied*, 514 **U.S.** 1063 (1995)(*Held*, a pipe fitter employed to construct a power plant on the premises of the Norfolk Naval Shipyard was not a covered employee; court declined to expand coverage to include this worker merely because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations.).

The Board noted that the ALJ found that 1) the claimant was on the premises solely to construct a building, and not to maintain or repair shipyard facilities; 2) pursuant to *Prevetire*, a finding of coverage cannot rest on the future use of the facility; and 3) the claimant's work was not integral to the loading, unloading, repair or building of vessels. The Board then affirmed the ALJ's finding that the claimant was not engaged in maritime employment. In so doing, the Board distinguished the claimants in *Stewart v. Brown & Root, Inc*., 7 BRBS 356 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (**4th Cir.** 1979), *cert. denied*, 446 **U.S.** 981 (1980) who had been engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. The Board also specifically noted that in the instant case, the claimant's relationship to this facility was merely temporary as he was on the premises solely under a subcontract to build the facility.

Topic 1.4.2 Master/member of the Crew (seaman)

Lorimer v. Great Lakes Dredge & Dock Co., (Unpublished) (No. 01-70849) (June 3, 2002) (**9th Cir.** 2002).

At issue here was whether the claimant was excluded from coverage under the LHWCA because he was a "seaman." The Board and the **Ninth Circuit** found that, although the claimant worked 12 hour shifts, came ashore to sleep, and had no seaman papers, he was nevertheless a seaman. The court noted that the claimant's duties as a deckhand included tying up barges alongside the dredge where he was stationed, taking depth readings, greasing the dredge's clamshell bucket, painting, cleaning, and other general maintenance, all of which contributed to the accomplishment of the vessel's mission of dredging in Los Angeles and Long Beach Harbors.

Topic 1.4.3. Jurisdiction/Coverage—Vessel—"In Navigation"

Watson v. Indiana Gaming Co., (Unpublished)(No. 2003-24)(E.D. Kentucky September 21, 2004).

In this summary judgment matter, the federal district court found that a card dealer on an indefinitely moored riverboat casino is not a Jones Act seaman since the vessel was not in navigation for Jones Act purposes. The court reasoned that the permanently moored vessel no longer served a maritime purpose and no longer had any relationship to traditional maritime activity such as transporting cargo or people.

Topic 1.4.3 Jurisdiction/Coverage--Vessel

Anastasiou v. M/T World Trust, ___ F.Supp 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

The court found that the plaintiff satisfied both pre- and post-1972 LHWCA amendment tests for coverage. The plaintiff had alleged that he did not fall under the protections of the LHWCA because his work in conducting the radio survey was not an "integral or essential part of loading or unloading a vessel." The court found that the plaintiff misread pertinent case law and that the **Second Circuit** has held that an

individual satisfies the status test where he has "a significant relationship to navigation or to commerce on navigable waters." The court noted that the LHWCA "clearly divides maritime workers into two mutually exclusive categories: seamen, on the one hand, and longshoremen, harbor workers and all other employees entitled to protection under the Act, on the other hand." The court pointed out that in rare instances longshoremen and harbor worker type workers not covered by the LHWCA ["Sieracki seamen"] may avail themselves of the duty of seaworthiness.

The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American Bureau of Shipping standards. His claim also failed to put forward any evidence that there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

Topic 1.4.3 Jurisdiction/Coverage—LHWCA v. Jones Act—"Vessel"—"In Navigation"

Howard v. Southern Ill. Riverboat Casino Cruises Inc., ___ **U.S.** ___ (S.Ct. No. 04-51) (**Cert. denied** October 18, 2004).

Let stand **Seventh Circuit's** ruling that employees exposed to chemicals working on a moored riverboat casino on a navigable river were not "seamen" and therefore not entitled to bring Jones Act claims. Riverboat casino indefinitely moored to a dock is not a vessel in navigation, although it is classified as a passenger vessel by the Coast Guard. The circuit court, 364 F.3d 854 (**7th Cir.** 2004)(rehearing and suggestion for rehearing *en banc* denied), had held that the purpose of the riverboat casino was "not to move or transport cargo or people, but merely to provide a legal venue under Illinois law for gambling."

Topic 1.4.3 Jurisdiction/Coverage—"Vessel"

Howard v. S. Illinois Riverboat Casino Cruises, Inc., 364 F.3d 854 (No. 02-3818, 02-3819)(**7th Cir.** April 9, 2004).

The **Seventh Circuit** held that an indefinitely moored dockside casino with no transportation function or purpose is not a "vessel in navigation" and therefore the plaintiffs are not entitled to Jones Act status. The casino had been docked for over a year and was connected to land-based utilities, including electricity, telephone, water, and sewer. Nevertheless it could be disconnected from the dock in about 15 to 20 minutes and was licensed and classified as a passenger vessel with the U.S. Coast Guard. It employed a captain and crew qualified to move the casino if necessary.

The court found that in order for a vessel to satisfy the navigation requirement of the *Chandris* test, the purpose of the vessel "must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." The court further noted that while a factor to take into account is whether a ship is a vessel for state law gambling purposes, this factor does not govern the question of whether it is a vessel in navigation for purposes of the Jones Act. Citing to several cases, the court noted that courts will need to examine, among other factors, the current use of the vessel and the question "whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary."

Topic 1.4.3 Jurisdiction—"Vessel"

Stewart v. Dutra Const. Co., ___ **U.S.** ___ , 124 **S.Ct.** 1414 (No. 03-814) (*Cert. granted* Feb. 23, 2004).

The **U.S. Supreme Court** will consider whether a dredge is a "vessel" under the Jones Act. The dredge in question was used to dig a trench under Boston Harbor. The **First Circuit** had held that it was not a vessel because it was not primarily used in navigation or commerce.

Topic 1.4.3 Jurisdiction/Coverage—Vessel

Morganti v. Lockheed Martin Corp., 37 BRBS 126 (2003).

In this coverage case, the Board upheld the ALJ's finding of situs/navigability of a lake; but reversed his findings that the worker did not have status, or was excluded under the clerical exclusion of the LHWCA. The decedent here had worked for an employer who manufactures sonar transducers for the United State Navy. He was a test engineer. As such, he worked 70 percent of his time on land, and 30 percent of his time testing the devices over water on a barge that had been moored for 20 years for that purpose. (Of the 30 percent of his time spent over water, 1 percent was spent on a 32 foot shuttle boat going between land and the moored barge.) While untying a boat line, the worker fell into the lake and drowned.

The Board found that the ALJ correctly held that an economic viability test should not be applied when determining whether a waterway is navigable for purposes of the LHWCA. In doing so, the Board noted that the ALJ correctly applied the **Second Circuit's** "navigability in fact" test to determine if the waterway is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

As to the status issue, the ALJ had found that the worker's job was not maritime, that the moored barge was a fixed platform, that the worker was transiently over

navigable water only 1 percent of his work time, and that even if the worker did have coverage, he was specifically excluded by the clerical worker exclusion of Section 2(3)(A). In reversing the ALJ, the Board made the following legal determinations.

Citing to *Director, OWCP v. Perini North River Associates*, 459 **U.S.** 297, 15 BRBS 62(CRT) (1983), the Board stated that a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. The Board found that the ALJ had incorrectly applied *Bienvenu v. Texaco, Inc.*, 1964 F. 3d 901,32 BRBS 217(CRT)(**5th Cir.** 1999)(*en banc*)(*Held* that a worker injured upon navigable waters in the course of employment "meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous."). Finding that "it is clear that decedent's presence on navigable waters was neither transient nor fortuitous, the Board noted that it need not determine if *Bienvenu* should be followed in this **Second Circuit** case.

In determining that the decedent was a maritime worker, the Board found that the ALJ was mistaken in relying upon case law construing a "vessel in navigation" under the Jones Act, when the issue presented was decedent's coverage under the LHWCA. While the Board acknowledged that under the Jones Act, the key to seaman status is an employment-related connection to a "vessel in navigation," the Board went on to state, "The courts have developed tests for determining whether a floating structure is a ‘vessel in navigation' or a work platform." According to the Board, "A structure may be a vessel for other purposes, yet it will not meet the Jones Act test unless it is ‘in navigation.' An employee injured on a floating structure which is not a ‘vessel in navigation' is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a ‘member of the crew' under Section 2(3). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini*, the [ALJ] erred in relying on it." The Board summed, "As claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act."

The Board reversed the ALJ's finding that the decedent's presence on navigable waters at the time of his injury and death was transient since it found that the decedent worked over navigable water 30 percent of the time.

While the Board noted that the decedent's employment responsibilities required him to input the data necessary for the computer to run the appropriate test and print results, it held that it was incorrect to characterize the work as clerical and data processing work. "The mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker."

Topic 1.4.3 “Vessel”

Hertz v. Treasure Chest Casino, 274 F. Supp 2d 795 (E.D. La. 2003).

Here the federal district court found that a river boat casino was no longer a vessel in navigation, but rather had become a work platform. The purpose of the vessel was for gambling and the state legislature had amended its gambling legislation to forbid the boat from sailing while gaming was in progress. The "captain" had been injured while removing carpeting from the deck of the vessel and sued under the Jones Act and the general maritime law. After finding that the boat was no longer a vessel, the court ruled out the possibility of a Jones Act recovery. As to the general maritime law, the court found that while he retained the title of captain, "he was a captain in name only. His vessel has been beached. He has no 'captain duties' while the Treasure Chest is being used as a gambling site, the purpose for which it was built and operated. What he was doing at the time of his injury-removing carpet-had no potentially disruptive impact on maritime commerce and has no substantial relationship to traditional maritime activity." While the captain satisfied the locus aspect of the maritime law test, the court found that he did not satisfy the nexus aspect of the test, and, consequently, the matter was not within the admiralty jurisdiction of the court.

Topic 1.4.3 "Vessel"

Martinez v. Signature Seafoods Inc; Lucky Buck F/V, Official #567411, her machinery, appurtenances, equipment and cargo, in rem, 303 F.3d 1132 (**9th Cir**. 2002).

The **Ninth Circuit** held that a seaworthy fish processing barge that is towed across navigable waters twice a year can qualify as a "vessel in navigation" for certain purposes of the Jones Act. This barge is a documented vessel with the United States Coast Guard and has no means of self-propulsion The Lucky Buck has a shaped raked bow, a flat main deck, a flat bottom, flat sides, a square raised stern, and is equipped with a bilge pump. It also has living quarters used by fish processors and administrators while it is moored in Alaska. Pursuant to coast Guard requirements for vessels, the Lucky Buck is equipped with navigational lights. Other that these lights, however, it has no navigational equipment—specifically, the Lucky Buck has no rudder, keel or propeller. Nor is it equipped with lift rafts. In Alaska, it is moored by four anchors and a cable affixed to shore. It floats 200 feet off shore and is accessible to land via a floating walkway. It receives water from a pipe connected to the shore.

The court distinguished this case from *Kathriner v. Unisea*, 975 F.2d 657 (**9th Cir.** 1992) (Floating fish processing plant permanently anchored to a dock and which had not moved for 7 years and had a large opening cut into its hull to allow for dock traffic, was not a "vessel in navigation" since floating structures should not be classified as vessels in navigation if they are "incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.") The court noted that the Lucky Buck is actually sea-worthy and has a transportation function (carrying the fish processing plant, crew quarters, and incidental supplies between Seattle and Alaska twice each year. "Even if the transportation function

of the Lucky Buck is incidental to its primary purpose of serving as a floating fish processing factory, that fact does not preclude a finding that it was a vessel in navigation." Additionally the court noted that the fact that it was designed to be transported among various fish processing sites raises a substantial factual issue about its status.

The court refused to adopt a test established by the **Fifth Circuit** to determine whether a work platform qualifies as a vessel in navigation. *See Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (**5th Cir.** 1984).

Topic 1.4.3 "Vessel"

Haire v. Destiny Drilling (USA.) Inc., 36 BRBS 93 (2002), *aff'g* 35 BRBS 738 (ALJ)(2002).

Board affirmed ALJ's finding that the marshy area upon which an air boat "got stuck" was not "navigable in fact." The ALJ noted that only air boats could navigate the area, and even such boats got stuck. (Claimant injured his back while attempting to free the air boat.) The Board noted that the ALJ, based on the limited evidence in the record, determined that only air boats could navigate the shallow bayou where claimant was injured and that the floating vegetation rendered the navigational capability of even such boats doubtful. The ALJ found that this hindrance to navigation was evident from the fact that the boats were equipped with lubricants to free the vessels from the vegetation.

It should be noted that the Board stated, "Although the fact of navigational capability by air boats alone may, in a given case, render a waterway navigable in fact within the meaning of admiralty jurisdiction, the evidence in the instant case regarding the vegetation's impediment to navigation and the lack of any other evidence of navigable capability support the [ALJ's] finding that claimant was not injured on navigable waters pursuant to Section 3(a) of the Act.." Furthermore, it should be noted that the marsh was separated from the main waterway by a levee.

Topic 1.4.3 "Vessel"

[ED. NOTE:** The following federal district court cases are included for informational purposes only.**]

Ayers v. C&D General Contractors, 2002 WL 31761235, 237 F.Supp. 2d 764 (W.D. Ky. Dec. 6, 2002).

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working

underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

Topic 1.4.3 "Vessel"

Uzdavines v. Weeks Marine, Inc., 37 BRBS 45 (2003).

In determining whether the worker had status under the LHWCA or was covered under the Jones Act, the Board deferred to the ALJ's rational, factual interpretation that a barge used to dredge navigational channels (either pulled by a tug or moving on spuds) was a "vessel in navigation." Thus the worker was a member of the crew covered by the Jones Act. In determining that the barge was a vessel, the ALJ had relied upon *Bernard v. Binnings Constr. Co., Inc*, 741 F.2d 824 (**5th Cir.** 1984) and *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30 (**2d Cir.** 1996). In *Bernard*, the **Fifth Circuit** had considered three factors in determining whether a floating work platform is a vessel: 1) if the structure involved was constructed and used primarily as a work platform; 2) if the structure was moored or otherwise secured at the time of the accident; and 3) if the structure was capable of movement across navigable waters in the course of normal operations, was this transportation merely incidental to its primary purpose of serving as a work platform. In *Tonnesen*, the **Second Circuit** applied the second and third *Bernard* factors but disagreed with regard to the first factor (focus on the original purpose for the structure). Instead, the **Second Circuit** concluded that the inquiry should look to whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident.

The Board also noted the *Tonnesen* court's conclusion that "[c]ourts considering the question of whether a particular structure is a 'vessel in navigation' typically find that the term is incapable of precise definition," and that except in rare cases, only the trier of facts can determine its application in the circumstances of a particular case.

Topic 1.4.3.1 Jurisdiction/Coverage—Vessel--Floating Dockside Casinos

Watson v. Indiana Gaming Co., (Unpublished)(No. 2003-24)(E.D. Kentucky September 21, 2004).

In this summary judgment matter, the federal district court found that a card dealer on an indefinitely moored riverboat casino is not a Jones Act seaman since the vessel was not in navigation for Jones Act purposes. The court reasoned that the permanently moored vessel no longer served a maritime purpose and no longer had any relationship to traditional maritime activity such as transporting cargo or people.

Topic 1.4.3.1 Jurisdiction/Coverage—LHWCA v. Jones Act—"Vessel"—Floating Dockside Casinos

Howard v. Southern Ill. Riverboat Casino Cruises Inc., ___ **U.S.** ___ (S.Ct. No. 04-51) (**Cert. denied** October 18, 2004).

Let stand **Seventh Circuit's** ruling that employees exposed to chemicals working on a moored riverboat casino on a navigable river were not "seamen" and therefore not entitled to bring Jones Act claims. Riverboat casino indefinitely moored to a dock is not a vessel in navigation, although it is classified as a passenger vessel by the Coast Guard. The circuit court, 364 F.3d 854 (**7th Cir.** 2004)(rehearing and suggestion for rehearing *en banc* denied) had held that the purpose of the riverboat casino was "not to move or transport cargo or people, but merely to provide a legal venue under Illinois law for gambling."

Topic 1.4.3.1 Floating Dockside Casinos

Riverboat Casino Law Journal Article

For a thorough discussion of riverboat casino law, *see* "Riverboat Casinos and Admiralty and Maritime Law: Place Your Bets!," 28 Tul. Mar. L. Journ. 315 (Summer 2004).

Topic 1.4.3.1 Jurisdiction/Coverage—Floating Dockside Casinos

Bazor v. Boomtown Belle Casino, ___ **U.S.** ___, 124 **S.Ct.** 65 (Mem), 2003 WL 21180139 (C*ert denied* Oct. 6, 2003).

As previously noted in the Digest and Supplement, in denying status to the claimant, the **Fifth Circuit** had held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (**5th Cir.** 2002). The **Fifth Circuit** had found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ''individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further had found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.4.3.1 Floating Dockside Casinos

Howard v. S. Illinois Riverboat Casino Cruises, Inc., 364 F.3d 854 (No. 02-3818, 02-3819)(**7th Cir.** April 9, 2004).

The **Seventh Circuit** held that an indefinitely moored dockside casino with no transportation function or purpose is not a "vessel in navigation" and therefore the plaintiffs are not entitled to Jones Act status. The casino had been docked for over a year and was connected to land-based utilities, including electricity, telephone, water, and sewer. Nevertheless it could be disconnected from the dock in about 15 to 20 minutes and was licensed and classified as a passenger vessel with the U.S. Coast Guard. It employed a captain and crew qualified to move the casino if necessary.

The court found that in order for a vessel to satisfy the navigation requirement of the *Chandris* test, the purpose of the vessel "must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." The court further noted that while a factor to take into account is whether a ship is a vessel for state law gambling purposes, this factor does not govern the question of whether it is a vessel in navigation for purposes of the Jones Act. Citing to several cases, the court noted that courts will need to examine, among other factors, the current use of the vessel and the question "whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary."

Topic 1.4.3.1 Floating Dockside Casinos

Scott v. Trump Indiana, Inc., 337 F.3d 939, (**7th Cir.** July 28, 2003).

In this Admiralty Extension Act and LHWCA 905(b) case, the **Seventh Circuit** found that neither a land-based crane nor a life raft were “appurtenances” to a vessel. The circuit court further found that the director of safety training was not engaged in maritime employment” for purposes of the LHWCA. The director had been injured on a dock while observing a life raft being lowered onto the dock. His employer had contracted with Trump Indiana to design, install and maintain the lifesaving equipment required by the U.S. Coast Guard for the vessel “Trump Casino.”

Topic 1.4.3.1 Floating Dockside Casinos

Boomtown Belle Casino v. Bazor, 313 F.3d 300(**5th Cir.** 2002).

In denying status to the claimant, the **Fifth Circuit** held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.4.3.1 Floating Dockside Casinos

Soloman v. Blue Chip Casino, Inc., 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 **U.S.** 557 (1870); *Reeves v. Mobile Dredging & Pumping Co*., 26 F.3d 1247,(**3rd Cir.** 1994 (A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

Topic 1.4.4 Jurisdiction—Attachment to Vessel

Nicole v. Southstar Industrial Contractors, __ F. Supp 2d __ (Civ. Action No. 03-1432 Sec. A (2)) (E.D. La. April 29, 2004). 2004 WL 936848.

The federal district court found that an injured worker who was land-based and had only a sporadic or transitory connection to a vessel was not entitled to Jones Act coverage. Here the worker (an electrician's helper on a barge) had been contracted out to a customer by his employer. While the worker was supposed to be contracted out for

seven weeks of work on the barge, he was injured on the third day. There was no evidence as to the worker's past employment and any allegations as to future employment were found to be speculative: "[S]eaman status is Plaintiff's burden to prove and he has nothing other than speculation to offer as to what his next job assignment might be. But Plaintiff cannot rely upon mere future possibilities to create seaman status in the present."

Topic 1.4.4 Jurisdiction/Coverage—Attachment to Vessel

Morganti v. Lockheed Martin Corp., 37 BRBS 126 (2003).

In this coverage case, the Board upheld the ALJ's finding of situs/navigability of a lake; but reversed his findings that the worker did not have status, or was excluded under the clerical exclusion of the LHWCA. The decedent here had worked for an employer who manufactures sonar transducers for the United State Navy. He was a test engineer. As such, he worked 70 percent of his time on land, and 30 percent of his time testing the devices over water on a barge that had been moored for 20 years for that purpose. (Of the 30 percent of his time spent over water, 1 percent was spent on a 32 foot shuttle boat going between land and the moored barge.) While untying a boat line, the worker fell into the lake and drowned.

The Board found that the ALJ correctly held that an economic viability test should not be applied when determining whether a waterway is navigable for purposes of the LHWCA. In doing so, the Board noted that the ALJ correctly applied the **Second Circuit's** "navigability in fact" test to determine if the waterway is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

As to the status issue, the ALJ had found that the worker's job was not maritime, that the moored barge was a fixed platform, that the worker was transiently over navigable water only 1 percent of his work time, and that even if the worker did have coverage, he was specifically excluded by the clerical worker exclusion of Section 2(3)(A). In reversing the ALJ, the Board made the following legal determinations.

Citing to *Director, OWCP v. Perini North River Associates,* 459 **U.S.** 297, 15 BRBS 62(CRT) (1983), the Board stated that a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. The Board found that the ALJ had incorrectly applied *Bienvenu v. Texaco, Inc.*, 1964 F. 3d 901,32 BRBS 217(CRT)(**5th Cir.** 1999)(*en banc*)(*Held* that a worker injured upon navigable waters in the course of employment "meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous."). Finding that "it is clear that decedent's presence on navigable waters was neither transient nor fortuitous, the Board noted that it need not determine if *Bienvenu* should be followed in this **Second Circuit** case.

In determining that the decedent was a maritime worker, the Board found that the ALJ was mistaken in relying upon case law construing a "vessel in navigation" under the Jones Act, when the issue presented was decedent's coverage under the LHWCA. While the Board acknowledged that under the Jones Act, the key to seaman status is an employment-related connection to a "vessel in navigation," the Board went on to state, "The courts have developed tests for determining whether a floating structure is a 'vessel in navigation' or a work platform." According to the Board, "A structure may be a vessel for other purposes, yet it will not meet the Jones Act test unless it is 'in navigation.' An employee injured on a floating structure which is not a 'vessel in navigation' is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a 'member of the crew' under Section 2(3). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini*, the [ALJ] erred in relying on it." The Board summed, "As claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act."

The Board reversed the ALJ's finding that the decedent's presence on navigable waters at the time of his injury and death was transient since it found that the decedent worked over navigable water 30 percent of the time.

While the Board noted that the decedent's employment responsibilities required him to input the data necessary for the computer to run the appropriate test and print results, it held that it was incorrect to characterize the work as clerical and data processing work. "The mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker."

Topic 1.4.6 Jurisdiction/Coverage--LHWCA v. Jones Act—Jurisdictional Estoppel

Lewis v. SSA Gulf Terminals, Inc., (Unpublished) (BRB No. 03-0523)(April 22, 2004).

When the claimant moved to stay the longshore proceeding until his Jones Act suit was complete, the Board found that the ALJ was within his authority to stay the LHWCA claim. The Board noted that the ALJ had based his reasoning on the case law applicable in the **Fifth Circuit**. *Sharp v. Johnson Brothers Corp*., 973 F.2d 423, 26 BRBS 59(CRT) (**5th Cir.** 1992), *cert. denied*, 508 **U.S.** 907 (1993)(If a formal award under the LHWCA is issued after the ALJ makes findings of fact and conclusions of law, the claimant is precluded from pursuing a Jones Act suit, because he had the *opportunity* to litigate the coverage issue, even if it was not actually litigated.); *contra, Figueroa v. Campbell Industries*, 45 F.3d 311 (**9th Cir.** 1995). "As the [ALJ] provided a rational basis for canceling the hearing and holding the case in abeyance, and as employer has not demonstrated an abuse [of] the {ALJ]'s discretion in this regard, we affirm …the action." The Board however, did not affirm the ALJ's decision to remand the case to the district

director. Rather, the ALJ must retain the case on his docket and award or deny benefits after a formal hearing is held.

Topic 1.5.1 Jurisdiction/Coverage—Development of Jurisdiction/Coverage

Tsaropoulos v. The State of New York, 775 N.Y. S.2d 23, 9 A.D. 3d 1(April 13, 2004); 2004 N.Y. App. Div. LEXIS 4074.

The court in this Section 905 case notes the historical changes that affected third party recover from vessel owners after the 1972 amendments to the LHWCA. ***[ED. NOTE:*** *After the 1972 amendments, workers covered under the LHWCA could only recover from vessel owners under a negligence standard; the "seaworthiness" standard—a much more liberal standard--had been replaced.****]***

Topic 1.5.2 Jurisdiction—Development of Jurisdiction/Coverage—Navigable waters

Thibodeaux v. Grasso Production Management Inc., 370 F.3d 486 (**5th Cir**. May 18, 2004).

At issue here was whether a fixed oil production platform built on pilings over marsh and water and inaccessible from land constitutes either a "pier" or an "other adjoining area" within the meaning of Section 3(a) of the LHWCA. Distinguishing itself from both the **Second Circuit** and the **Ninth Circuit** in its analytical approach, the **Fifth Circuit** held that the platform in question was neither. The court held that the context of the statute indicates the enumerated sites should have some maritime purpose.

Noting that the ALJ and Board had disagreed as to whether a portion of the platform was driven into dry land as opposed to marsh, the court stated that it adhered to a functional approach to defining "pier," thus making it unnecessary to decide whether the platform was in fact secured to dry land or marsh, "a determination that would likely change with the tide."

Historically the **Fifth Circuit** has followed a functional approach when construing the parenthetically enumerated structures in Section 3(a). *Jacksonville Shipyards, Inc. v. Perdu*e, 539 F.2d 533, 541 (**5th Cir.** 1976), *vacated and remanded, Pfeiffer Co., Inc. v. Ford*, 433 **U.S.** 904, 53 L.Ed. 2d 1088 (1977), *reaffirmed*, 575 F.2d 79 (**5th Cir.** 1978), *cert. denied*, 440 **U.S.** 967 (1979), *overruled on other grounds*, *Texports Stevedoring Co. v. Winchester*, 632 F.2d 504, 516 (**5th Cir.** 1980). "In *Jacksonville Shipyards* [sic], we required an employee to demonstrate that "a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. In this way, we interpreted the statute not to encompass all possible instances of the enumerated structures, but rather only those with some relation to the purpose of the LHWCA—providing compensation for maritime workers injured in areas used for

maritime work. Under the reasoning of *Jacksonville Shipyards* [sic], while a structure built on pilings and straddling both land and water may bear some physical resemblance to a pier, it it does not serve a maritime purpose, it is not a pier within the meaning of § 903(a)." The **Fifth Cicuit** noted that its position has been criticized in *Hurston v. Dir., OWCP*, 989 F.2d 1547 (**9th Cir.** 1993), and *Fleischmann v. Dir., OWCP*, 137 F.3d 131 (**2d Cir.** 1998).

In the instant case the claimant was a pumper/gauger injured on a fixed oil production platform in the territorial waters of Louisiana. As part of his duties, the claimant monitored gauges both on the platform and on nearby wells, reaching the wells by using a 17-foot skiff. He also piloted a 24-foot vessel used to transport employees to the platform along with their personal supplies and, on occasion, equipment used for production. The platform where he spent the majority of his working hours rests on wooden pilings driven into a small bank next to a canal; the platform extends over marsh and water, but is accessible only by vessel and has a docking area. In order to inspect a discharge line which was leaking oil under the deck of the platform, the claimant lowered himself to a small wooden platform below the deck and the wood gave way.

Topic 1.5.2 Jurisdiction/Coverage—Navigable Waters

Desoto v. Pride International, Inc., (Unpublished) (No. Civ. A 03-1868)(E.D. La. March 3, 2004).

Here a Motion for Summary Judgment was granted to the defendants because the claimant was injured on a fixed platform located within the territorial waters of Mexico, within the Gulf of Mexico. The plaintiff was injured by a falling crate while employed as a crane operator and motorman mechanic aboard a drilling rig. The plaintiff alleged federal question jurisdiction and in an amended complaint relied upon the general maritime law of the United States ("GML") and the OCSLA. The fact that the accident occurred on a fixed platform in Mexican territorial waters was uncontested. Since the **Fifth Circuit** has previously held that an injury on a fixed platform does not fall within the admiralty and maritime jurisdiction, the district court found that the GML does not support federal question jurisdiction. The court further found that the OCSLA was inapplicable since the OCSLA provides that "the soil and seabed of the outer continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition." Thus, the claim was outside the scope of the OSCLA. (*Cf. Weber v. S.C.Loveland Co. (Weber II), 35 BRBS 75 (2001*)(Claimant injured in the port of Kingston, Jamaica, while walking on employer's catwalk on barge, was covered under the LHWCA.)

Topic 1.5.2 Development of Jurisdiction/Coverage--Navigable Waters

United States of America v. Angell, 292 F.3d 333 (***2d Cir.*** 2002).

This non-LHWCA case addresses the issue of navigability. Here the Army Corps of Engineers upheld an injunction issued in federal district court requiring the defendant to remove floats attached to his pier in a tidal canal. The court found that the defendant had violated the Rivers and Harbors Appropriation Act. 33 U.S.C. § 403 (2000). The circuit court noted that Army Corps regulations define "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. §§ 329.4 (2001).

Topic 1.5.2 Navigable Waters

Soloman v. Blue Chip Casino, Inc., 772 N.E.2d 515, (2002 WL 1763935) (Ind. App. July 31, 2002).

This is a consolidation of casino boat cases where the court of appeals court upheld the lower court's finding that the workers were not covered under the Jones Act. The court of appeals held that: (1) the casino boat was not located on "navigable" waters for purposes of the Jones Act; (2) the Coast Guard's exercise of authority over the boat did not mandate finding the waters were navigable for purposes of the Jones Act; and (3) a finding of being on navigable waters for purposes of the state gaming statute did not mean the boat was on "navigable waters" as that term is used in Jones Act jurisprudence.

The casino boat in question was located at Michigan City, Indiana in a small man-made, rectangular area of water that was dug out of dry land connected to the Trail Creek (a navigable body of water) by a narrow and shallow opening. However, no commercial vessel can pass through this shallow opening that is 2.5 feet deep. The court first reviewed Jones Act jurisprudence to determine that the water on which the boat floated was not navigable for purposes of the commerce clause. *The Daniel Ball*, 10 Wall. 557, 77 **U.S.** 557 (1870); *Reeves v. Mobile Dredging & Pumping Co*., 26 F.r 1247,(**3rd Cir**. 1994(A body of water is navigable "if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce."). Next the court noted that the term "navigability" has at least four definitions and that what is navigable for purposes of the Coast Guard, is not necessarily navigable for purposes of the commerce clause. Finally, the court noted that the state's definition of "navigable" is not co-extensive with the definition under admiralty jurisdiction or the Jones Act.

Topic 1.5.2 "Navigable Water"

Weber v. S.C. Loveland Co. (Weber III), 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had

situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (**5th Cir.** 2001) (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.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

Topic 1.6 Jurisdiction--Situs

Morrissey v. Kiewit-Atkinson-Kenny, 36 BRBS 5 (2002).

In this jurisdiction case, the claimant argued that he had jurisdiction under the LHWCA either by way of the Outer Continental Shelf Lands Act (OCSLA), the Defense Base Act (DBA), or the LHWCA itself. The Board upheld the ALJ's denial of jurisdiction in this matter. The claimant worked on a major construction project known as the Harbor Clean-up Project undertaken by the Massachusetts Water Resources Authority to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. The claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as a cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. When injured, the claimant was working in the outfall tunnel approximately five miles from Deer Island.

The ALJ found that the claimant's work site was located in bedrock hundreds of feet below any navigable water and thus could not be viewed as being "upon the navigable waters of the United States." Additionally the ALJ found that the claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Further, the ALJ found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities. The ALJ also rejected claims for coverage under the OCSLA and DBA.

The Board first rejected coverage under the OCSLA noting that claimant's contentions on appeal pertain to the geographic location of the injury site (more than 3 miles offshore under the seabed), and erroneously disregard the statutory requirement that the claimant's injury must result from explorative and extractive operations involving natural resources.

Next, the Board rejected coverage under the DBA. The claimant had contended that the oversight provided by the United States District Court to the project is sufficient to bring the claim under the jurisdiction of the DBA. However, the DBA provides benefits under the LHWCA for those workers injured while engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. The Board stated that the ALJ properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract.

Finally the Board rejected coverage directly under the LHWCA. The rock where the tunnel was being drilled rose above the surface of the water at the point where the claimant was injured. The bedrock was at all times dry ground, and there is no assertion that the tunnel itself was used in interstate commerce as a waterway. Thus, the Board found that the injury did not occur on navigable water. As to the claimant's contention that he was injured on a "marine railway," the Board rejected this allegation after

examining the definition of "marine railway" and noting that the claimant did not contend that the railway used in the tunnel played any part in removing ships from the water for repair.

Topic 1.6.1 Jurisdiction–Situs–"Over Water"

Ezell v. Direct Labor Inc., 37 BRBS 11 (2003).

In this status issue case, the Board held that a claimant's travel by boat to and from his work sites on 53 percent of his days prior to his injury is sufficient to establish that his presence on navigable waters was not transient or fortuitous.

Here, the claimant, by virtue of his employment, was transported by boat for 18 of the 34 days (53 percent) he worked pre-injury and performed more than eight percent of his total work from barges located on navigable water. Most of his work was performed on a fixed platform replacing creosote boards and in pipe threading. The claimant was required to regularly travel by boat, 45 minutes each way, to specific jobs assignments during the course of his day and as part of his overall work. The claimant maintained that the **Fifth Circuit** in *Bienvenu v. Texaco*, 164 F.3d 901, 32 BRBS 217(CRT) (**5th Cir.** 1999)(*en banc*), did not intend to exclude from coverage a worker, like himself, who was routinely transported to a work site over water and was injured during such transport.

In reaching its holding the Board distinguished this case from *Brockington v. Certified Electric, Inc*., 903 F.2d 1523 (**11th Cir.** 1990), *cert. denied*, 498 **U.S.** 1026 (1991), where that claimant was using water transportation to commute to his job. In contrast, the claimant in the instant case was already at work when required by his employer to travel by water to his work assignment. He was given this assignment on a regular basis, and thus his presence on the water was not merely incidental to his employment. Rather, claimant's presence on the boat involved a significant portion of his day and was a necessary part of his overall employment. Unlike *Brockington*, claimant was not merely commuting to work. In addressing *Bienvenu*, the Board relied on its opinion in *Ezell v. Direct Labor Inc*., 33 BRBS 19 (1999)("While *Bienvenu* rules out coverage for employees who are transiently and fortuitously on navigable water at the time of injury, it does not hold that a worker injured on navigable water during the course of his employment should be denied coverage under the Act if he is regularly required by his employment to travel by boat over navigable water, as well as where he performs some work on a vessel.").

Topic 1.6.2 Jurisdiction/coverage—Situs—"Over land"

Tarver v. BO-MAC Contractors, Inc., ___ F.3d ___ (No. 03-61028)(**5th Cir.** September 21, 2004).

Situs was found to be absent where two barge slips were being built on vacant dry land near the intracoastal waterway. The slips had been dug but the holes were separated from the waterway by a dirt wall. The claimant was seriously injured during the construction project while working on the land side of the excavation when an 80-foot beam came loose and pinned him to construction scaffolding. Finding that there was no jurisdiction, the **Fifth Circuit** reiterated its position that "Whether an adjoining area is a § 903(a) situs is determined by the nature of the adjoining area *at the time of injury*." The court also noted its exception to this general rule (where a construction site—although not serving a maritime purpose—was carved out of a covered situs and promised to support navigation in the future, there would be a finding of situs), but found that in the instant case there was not a covered situs as the area had not yet been used for a maritime purpose.

Topic 1.6.2 Situs—"Over land"

Bazor v. Boomtown Belle Casino, ___ **U.S.** ___, 124 **S.Ct.** 65 (Mem), 2003 WL 21180139 (C*ert denied* Oct. 6, 2003).

As previously noted in the Digest and Supplement, in denying status to the claimant, the **Fifth Circuit** had held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (**5th Cir.** 2002). The **Fifth Circuit** had found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further had found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.6.2 Situs–"Over land"

Cunningham v. Bath Iron Works Corp., 37 BRBS 76 (2003).

At issue here was whether there was situs at an "adjoining area" since the injury here occurred at a pipe prefabrication site away from the main shipyard. This case takes place within the jurisdiction of the **First Circuit**. The Board noted that, thus far, the **First Circuit** has not considered the situs issue where the place of injury was on a facility which was not immediately adjacent to navigable water. Before the Board analyzed the fact situation of *Cunningham* in relation to three bodies of water, it noted:

> Thus far, the **First Circuit** has not considered the situs issue where the place of injury was on a facility which was not immediately adjacent to navigable waters. In its insistence, however, that an adjoining area is one which adjoins ‘navigable waters.' not a loading area...,'‘ *Prolerized New England Co.*, 637 F. 2d at 38, 12 BRBS at 818, the **First Circuit's** approach to the situs issue appears to be consistent with that of the **Fourth Circuit** in *Sidwell v. Director, OWCP,* 71 F.3d 1134, 1138-39, 29 BRBS 138, 143(CRT) (**4th Cir.** 1995), *cert. denied*, 518 **U.S.** 1028 (1996), which held; "that an area is ‘adjoining' navigable waters only if it ‘adjoins' navigable waters...."

Although the **First** and **Fourth Circuits** agree that a covered situs necessarily entails adjoining navigable waters, one cannot reasonably project from the **First Circuit** statements that it would adopt the **Fourth Circuit's** test for situs set forth in *Sidwell*.

The Board then noted that in the **First Circuit**, the Board has consistently applied the **Ninth Circuit's** standard set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (**9th Cir.** 1978). The Board then found that one body of water did not meet neither the **Ninth nor Fifth Circuit's** test. As to the second body of water, the Board found it was not navigable since it lacked an "interstate nexus" which allows the body of water to function as a continuous highway for commerce between ports. Accordingly, the Board once again rejected the commerce clause definition of navigability.

As to the third body of water, the Board relied on the *Herron* test again and found that there was no functional relationship; the pipe prefabrication was not, and need not be, done on the water or on a maritime site.

As to the relationship of the pipe pre-fabrication site's relationship with the main shipyard, the Board held as a matter of law that the pre-fab site was not an "adjoining area" solely by its function; rather, as discussed above, the test involved both a functional use and geographic proximity to navigable water." (Later, the Board noted that both the geographical and functional nexus must be with the same body of water.) Although, the prefab area may have been built as close as feasible to the main shipyard, that factor alone, is insufficient to mandate the conclusion that the unit qualifies as an adjoining area.

Topic 1.6.2 Situs–"Over land"

Maraney v. Consolidation Coal Co., 37 BRBS 97 (2003).

This is a situs/status issue case. At the time of the claimant's injury, he was working in his classified job as a mobile equipment operator assigned to "make the footprint" for phase two of an upstream construction project to prepare the site to serve as a coal impoundment, or depository for coal slurry. The Board held that Pond 4 [where he was working at the time of injury] was separate and apart from the employer's

unloading/loading area, was not used for a maritime purpose and was not "an adjoining area," under Section 3(a). Having found no situs, the board did not address the status issue.

The claimant had argued that he met the situs requirement in that the employer's facility was "an adjoining area" as defined by the **Fifth Circuit** in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (**5th Cir.** 1980) (*en banc*), *cert. denied*, 452 **U.S.** 905 (1981).

In denying situs, the Board noted that Pond No. 4 was functionally and geographically separate from the employer's unloading/loading operations, and that Pond No. 4 was not used for any maritime purpose. The pond functioned solely as the final resting point for the employer's coal refuse and did not store products destined for vessels. It was merely a repository for slate and slurry, which are byproducts of the cleaning process of coal. In essence, Pond No. 4 represented the tail end of the employer's coal preparation process and thus had no functional relationship with the navigable water where the employer's unloading/loading operations occurred. From a geographic standpoint, Pond 4 was distinct from the employer's unloading/loading area. It was separated from the processing plant by about .8 miles, was buffered by some woods, and was connected to the unloading/loading area only by a road.

Topic 1.6.2 Situs--"Over land"

Sowers v. Metro Machine Corp., 35 BRBS 181(2002) (*en banc*) *upholding* 35 BRBS 154 (2001).

In this *en banc* situs issue case the Board upheld its original panel opinion affirming the ALJ's finding that the claimant was not injured on a covered situs. The claimant was injured at one of the employer's two facilities adjacent to navigable water. The claimant was injured at the Mid-Atlantic facility used for prefabricating steel components and painting items for Navy ships that are under repair at the employer's other facility, the Imperial Docks, where there are wet and dry docks. Ninety-five percent of the items sent to Mid-Atlantic for repair, or returned to the main shipyard after completion, are sent over land by truck. The remaining five percent are too large or too heavy to be trucked and are sent by barge.

The ALJ found that the Mid-Atlantic facility was not a covered situs pursuant to *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (**4th Cir.** 1998), *cert. denied*, 525 **U.S.** 1040 (1998). The ALJ noted that the claimant was engaged in fabrication of ship components that had to be shipped elsewhere before they were installed on the vessels and that the workers at the Mid-Atlantic facility did not engage in ship repair at the water's edge, and thus the work could be done at any site. The fact that the large components occasionally had to be shipped by barge was deemed insufficient to cover the site under the LHWCA, as this was not the customary method of transportation.

The Board, first in a panel opinion, and now *en banc*, held that the ALJ properly applied *Brickhouse*. Although the employer's facility was contiguous with navigable waters, and thus had a geographic nexus to navigable waters, the facility did not have the functional nexus with navigable waters required by the **Fourth Circuit's** *Brickhouse* decision. The Board noted that this facility was used to fabricate vessel components for ships undergoing repair at the employer's other facility, but this activity did not require more than the rare use of the navigable river.

Topic 1.6.2 Situs–"Over land"

Charles v. Universal Ogden Services, 37 BRBS 37 (2003).

Whether a warehouse could be considered an "adjoining area" was the primary issue in this situs determination case. Here a claimant would load boxes of groceries onto a truck at his employer's warehouse adjacent to the Mississippi river in Harahan, Louisiana, then truck the groceries to the Mississippi Gulf Coast some 70 miles away where he would then unload the boxes into containers so that they could be taken to offshore locations. While on the Gulf Coast, he would empty containers of "spoiled" groceries, from containers, back onto his truck and drive the 70 miles back to his employer's warehouse location. While unloading the returns at his employer's warehouse, the claimant injured his back. In denying coverage, the Board found that there was no coverage since the claimant lacked "situs." The Board found that the employer's warehouse was not an "adjoining area" since its location had no functional relationship to the Mississippi River and was too far away from the Gulf Coast docks to be considered part of that general area. "The facility functioned as a warehouse from which trucks, not vessels, were loaded. Although near navigable waters, neither employer's business nor surrounding properties had facilities on the water for loading, unloading, building or repairing vessels." In reaching its decision, the Board cited both *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (**5th Cir.** 2002)(Whether a site is an "adjoining area" is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of the injury.) and *Bennett v. Matson Terminals, Inc*., 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (**9th Cir.** 1982) (Facility was not a covered situs as it was not particularly suited to maritime uses, the site was not as close as feasible to employer's terminal and it was chosen on the basis of economic factors considered by businesses generally.).

Topic 1.6.2 Situs—"Over land"

Boomtown Belle Casino v. Bazor, 313 F.3d 300 (**5th Cir.** 2002).

In denying status to the claimant, the **Fifth Circuit** held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity,

and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.6.2 Situs—“Over land”

Bianco v. Georgia Pacific Corp., 304 F.3d 1053 (**11th Cir.** 2002).

The **Eleventh Circuit** found that a worker in a sheetrock production plant did not have situs under the LHWCA. "Even if GPC's sheet-rock production plant ‘adjoins’ navigable waters, it is not an ‘area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.'" The area was used solely to manufacture sheetrock. Simply because maritime activity occurred in other areas of the GPC facility (namely where raw gypsum was unloaded from vessels), the entire GPC facility did not become an "area customarily used...." The court reasoned: "Indeed, were we to conclude that GPC's entire facility (irrespective of what GPC does at different areas therein) is an ‘‘adjoining area' simply because certain areas of the GPC facility engage in maritime activity, we would effectively be writing out of the statue the requirement that the adjoining area ‘‘be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

Topic 1.6.2 Situs–“Over land”

Dickerson v. Mississippi Phosphates Corp., 37 BRBS 58 (2003).

In this case involving situs and status, the claimant fell off of a ladder while welding in employer’s phosphoric acid plant located about 100 feet from the water’s edge. Employer’s chemical plant manufactures fertilizer and is on a navigable waterway. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant’s work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water’s edge.

The Board affirmed the ALJ's finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water's edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity. Moreover, the Board found that this case was distinguishable from other cases involving "covered" employees working in loading operations at fertilizer plants, as the claimant's work herein was not integral to the loading and unloading. Thus, the Board upheld the ALJ's determination that the claimant was not an employee covered under the LHWCA.

Turning to situs, the Board determined that the ALJ had correctly found that there was not a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ's determination that this phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts navigable waters and has a dock area on the property. The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

Topic 1.7 Status

Bazor v. Boomtown Belle Casino, ___ **U.S.** ___, **S.Ct.** ___ (Mem), 2003 WL 21180139 (C*ert. denied* Oct. 6, 2003). **[*See* next entry.]**

As previously noted in the Digest and Supplement, in denying status to the claimant, the **Fifth Circuit** had held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (**5th Cir.** 2002). The **Fifth Circuit** had found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage 'individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further had found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.7 Status

Boomtown Belle Casino v. Bazor, 313 F.3d 300 (**5th Cir.** 2002). **[*See* above.]**

In denying status to the claimant, the **Fifth Circuit** held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

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Topic 1.7.1 Status—“Maritime worker” (Maritime Employment

Anastasiou v. M/T World Trust, ___ F.Supp 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying A Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

The court found that the plaintiff satisfied both pre- and post-1972 LHWCA amendment tests for coverage. The plaintiff had alleged that he did not fall under the protections of the LHWCA because his work in conducting the radio survey was not an “integral or essential part of loading or unloading a vessel.” The court found that the plaintiff misread pertinent case law and that the **Second Circuit** has held that an individual satisfies the status test where he has “a significant relationship to navigation or to commerce on navigable waters.” The court noted that the LHWCA “clearly divides maritime workers into two mutually exclusive categories: seamen, on the one hand, and longshoremen, harbor workers and all other employees entitled to protection under the Act, on the other hand.” The court pointed out that in rare instances longshoremen and harbor worker type workers not covered by the LHWCA [“Sieracki seamen”] may avail themselves of the duty of seaworthiness.

The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American

Bureau of Shipping standards. His claim also failed to put forward any evidence that there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

Topic 1.7.1 Status--"Maritime Worker"

Southcombe v. A Mark, B Mark, C Mark Corp., 37 BRBS 169 (2003).

In this status issue case, the Board upheld the ALJ's determination that the claimant was not engaged in maritime employment pursuant to Section 2(3) of the LHWCA. The claimant had been employed by a subcontractor as an ironworker. The general contractor was constructing a marina on a river. The marina was to include an 80-foot high "mega yacht" service facility. At the time of the claimant's injury he was unloading steel beams from a flat-bed trailer which were intended for use as the frame of the yacht service facility. The Board first noted that the seminal issue in this matter was whether the claimant's work on the project was maritime employment which is a legal issue to which the Section 20(a) presumption does not attach.

Next the Board noted that within the jurisdiction of the **Fourth Circuit**, within whose jurisdiction this case arises, the jurisprudence has drawn a distinction between workers engaged to repair or replace existing harbor or shipyard facilities and those engaged in the construction of new land-based facilities. The Board cited the lead **Fourth Circuit** case of *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT)(**4th Cir.** 1994), *cert. denied*, 514 **U.S.** 1063 (1995)(*Held*, a pipe fitter employed to construct a power plant on the premises of the Norfolk Naval Shipyard was not a covered employee; court declined to expand coverage to include this worker merely because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations.).

The Board noted that the ALJ found that 1) the claimant was on the premises solely to construct a building, and not to maintain or repair shipyard facilities; 2) pursuant to *Prevetire*, a finding of coverage cannot rest on the future use of the facility; and 3) the claimant's work was not integral to the loading, unloading, repair or building of vessels. The Board then affirmed the ALJ's finding that the claimant was not engaged in maritime employment. In so doing, the Board distinguished the claimants in *Stewart v. Brown & Root, Inc*., 7 BRBS 356 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (**4th Cir.** 1979), *cert. denied*, 446 **U.S.** 981 (1980) who had been engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. The Board also specifically noted that in the instant case, the claimant's relationship to this facility was merely temporary as he was on the premises solely under a subcontract to build the facility.

Topic 1.7.1 Status--"Maritime Employment"

Maher Terminals Inc. v. Director, OWCP, **_ U.S. _** (No. 03-312) (*Cert. denied* (December 15, 2003). **[*See* next entry.]**

The **Supreme Court** let stand the **Third Circuit's** holding, *Maher Terminals, Inc. v Riggio*, 330 F.3d 162 (**3d Cir.** May 29, 2003), that a worker who spent half his time as a checker and half his time doing office work, was covered by the LHWCA even though he was assigned as a delivery clerk on the day of his injury (injured his arm when he fell off of a chair). Both jobs involved paperwork for cargo. The LHWCA specifically excludes workers who are engaged "exclusively" to perform office clerical, secretarial, security or data processing work.

Topic 1.7.1 Status–"Maritime Worker"

Maher Terminals, Inc. v. Director, OWCP, 330 F.3rd 162 (**3rd Cir.** 2003). **[*See* Above.]**

In this status case, the **Third Circuit** found coverage by looking at the claimant's overall duties, notwithstanding that he was working at an excluded job the day of injury. The court found that because the claimant spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he was covered under the LHWCA even though he worked as a delivery clerk on the day of his injury. The court cited to the **Supreme Court's** test for coverage in *Northeast Marine Terminal Co. v. Caputo*, 432 **U.S.** 249 (1977), in stating that "we believe that we must look at the claimant's regular duties to determined whether he is engaged on a regular basis in maritime employment." The **Third Circuit** noted that, in *Caputo*, the **Supreme Court** had specifically rejected the "moment of injury" principle in which the coverage analysis depended on the task the employee was engaged in at the time of the injury.

Topic 1.7.1 Status

Morganti v. Lockheed Martin Corp., 37 BRBS 126 (2003).

In this coverage case, the Board upheld the ALJ's finding of situs/navigability of a lake; but reversed his findings that the worker did not have status, or was excluded under the clerical exclusion of the LHWCA. The decedent here had worked for an employer who manufactures sonar transducers for the United State Navy. He was a test engineer. As such, he worked 70 percent of his time on land, and 30 percent of his time testing the devices over water on a barge that had been moored for 20 years for that purpose. (Of the 30 percent of his time spent over water, 1 percent was spent on a 32 foot shuttle boat going between land and the moored barge.) While untying a boat line, the worker fell into the lake and drowned.

The Board found that the ALJ correctly held that an economic viability test should not be applied when determining whether a waterway is navigable for purposes of the LHWCA. In doing so, the Board noted that the ALJ correctly applied the **Second Circuit's** "navigability in fact" test to determine if the waterway is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

As to the status issue, the ALJ had found that the worker's job was not maritime, that the moored barge was a fixed platform, that the worker was transiently over navigable water only 1 percent of his work time, and that even if the worker did have coverage, he was specifically excluded by the clerical worker exclusion of Section 2(3)(A). In reversing the ALJ, the Board made the following legal determinations.

Citing to *Director, OWCP v. Perini North River Associates,* 459 **U.S.** 297, 15 BRBS 62(CRT) (1983), the Board stated that a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. The Board found that the ALJ had incorrectly applied *Bienvenu v. Texaco, Inc.*, 1964 F. 3d 901,32 BRBS 217(CRT)(**5th Cir.** 1999)(*en banc*)(*Held* that a worker injured upon navigable waters in the course of employment "meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous."). Finding that "it is clear that decedent's presence on navigable waters was neither transient nor fortuitous, the Board noted that it need not determine if *Bienvenu* should be followed in this **Second Circuit** case.

In determining that the decedent was a maritime worker, the Board found that the ALJ was mistaken in relying upon case law construing a "vessel in navigation" under the Jones Act, when the issue presented was decedent's coverage under the LHWCA. While the Board acknowledged that under the Jones Act, the key to seaman status is an employment-related connection to a "vessel in navigation," the Board went on to state, "The courts have developed tests for determining whether a floating structure is a ‘vessel in navigation' or a work platform." According to the Board, "A structure may be a vessel for other purposes, yet it will not meet the Jones Act test unless it is ‘in navigation.' An employee injured on a floating structure which is not a ‘vessel in navigation' is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a ‘member of the crew' under Section 2(3). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini,* the [ALJ] erred in relying on it." The Board summed, "As claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act."

The Board reversed the ALJ's finding that the decedent's presence on navigable waters at the time of his injury and death was transient since it found that the decedent worked over navigable water 30 percent of the time.

While the Board noted that the decedent's employment responsibilities required him to input the data necessary for the computer to run the appropriate test and print results, it held that it was incorrect to characterize the work as clerical and data processing work. "The mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker."

Topic 1.7.1 Status–"Maritime Worker"

Scott v. Trump Indiana, Inc., 337 F.3d 939, (**7th Cir.** July 28, 2003).

In this Admiralty Extension Act and LHWCA 905(b) case, the **Seventh Circuit** found that neither a land-based crane nor a life raft were "appurtenances" to a vessel. The circuit court further found that the director of safety training was not engaged in maritime employment" for purposes of the LHWCA. The director had been injured on a dock while observing a life raft being lowered onto the dock. His employer had contracted with Trump Indiana to design, install and maintain the lifesaving equipment required by the U.S. Coast Guard for the vessel "Trump Casino."

Topic 1.7.1 Status-"Maritime Worker

Watkins v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

Topic 1.7.1 Status

McKenzie v. Crowley American Transport, Inc., 36 BRBS 41(2002).

Here the Board held that the case law defining "maritime employment" is not so broad as to include a trucker engaged in the land-based movement of cargo outside of the employer's terminal to locations in a port and to the rail head nearby. In other words, this status case turned on determining the point at which cargo moves from the stream of maritime commerce and longshoring operations to the land-based portion of its ultimate destination.

Specifically, the claimant testified that his job duties as a truck driver at the time of his accident consisted of transporting containers and/or trailers between the maritime yard at the port and the U.S. Customs facility, also located within the port but not within the maritime yard and/or the railroad yard which is located outside the port. He also stated that about 5-10 percent of the time he would transport containers to areas away from the port, such as to Miami. The claimant stated that usually his deliveries would originate or end at a holding yard in the maritime yard, although occasionally he would be required to make deliveries and/or pick-ups alongside the dock, termed "hot loads." He stated that at no time did he ever board any ships, as the containers at the dockside were loaded onto and unloaded from ships. The manager of intermodal transportation and trucking operations concurred with the claimant's description of his work. Specifically, he stated that there were other drivers hired by another entity that transported cargo inside the port facility, while cargo moved into or out of the port facility.

In reaching its decision, the Board noted that the claimant's primary job duties, which involved the transport of cargo between a holding yard at the port and a rail yard outside the port, are not covered activities. "[C]laimant drove a truck not to move cargo as part of a loading process, but to start it on its overland journey." The Board also noted that the fact that the claimant may have made stops inside the port does not alter the fact that he was an overland truck driver. The evidence established that on the occasions that the claimant drove to customs, he continued on to his destination beyond the port.

Topic 1.7.1 Status—"Maritime Worker" ("Maritime Employment")

Sumler v. Newport News Shipbuilding & Dry Dock Company, 36 BRBS 97 (2002), *aff'g* 35 BRBS 968(ALJ), 34 BRBS 213(ALJ).

Here the Board affirmed the ALJ's finding that the Section 2(3) status requirement was satisfied as the uncontroverted evidence of record supported his conclusion that the claimant's work, changing air conditioning filters in the fabrication shops in the employer's shipyard, was integral to the operation of those shops. In the course of the claimant's work in the employer's air conditioning department, the claimant cut, delivered, and helped to change air conditioning filters used in the employer's buildings

throughout the shipyard. The Board found it significant that the claimant delivered filters to buildings where ship construction work was being performed. The air conditioning filters with which the claimant worked were used for the ventilation of the employer's shipyard buildings which were all inside the shipyard and where the ships were actually constructed. Filters needed to be changed more frequently in buildings in which actual ship construction activity was performed than in other shipyard buildings.

The employer argued that there was no evidence to suggest that ventilation in its fabrication facilities would be impeded without the claimant to occasionally change the filters and that air conditioning itself was merely a comfort measure, incidental to the shipbuilding process. However, the Board noted evidence that claimant's duties included the continuous changing of filters in the shipyard buildings where ship fabrication and construction was performed, and that those filters where fabrication occurred were changed on a frequent basis. The Board reasoned that the evidence supported the ALJ's conclusion that the claimant's work was integral.

As to the argument that air conditioning is "merely a comfort measure" the Board stated, "[I]t defies common sense to suggest that employer would have incurred the considerable expense of installing and maintaining an air-conditioning system for the past fifty years if such a system were not required in order for employer to operate a competitive shipbuilding operation in the Commonwealth of Virginia.

Employer also argued that the claimant's duties have no traditional maritime characteristics, but rather, are typical of "support services" performed in any industrial setting. However, the Board noted that reliance on this reasoning regarding support services is misplaced, as this rationale has previously been rejected as a test for coverage. Moreover, the Board, in its earlier decision in this case, expressly stated that the standard for coverage does not concern whether the claimant's duties were more maritime specific than those conducted in non-maritime settings.

Next, the Board rejected the employer's contention that the evidence does not establish that ventilation in the fabrication shop would be impeded without the claimant's work changing the filters in those areas. "It would be inconsistent with the **Supreme Court's** decision in *Schwalb [Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 **U.S.** 40, 23 BRBS 96 (CRT)(1989)] to require claimant to demonstrate with specific evidence, such as the level of particulates in the air in the shipyard fabrication shops or the frequency with which air conditioning filters require changing, the effects of claimant's failure to perform her job....Moreover, claimant is not required to demonstrate that the effect on the air conditioning system would be immediate were she not to replace the filter rather, her work is considered essential if her failure to replace the filters would eventually impede the operation of the air conditioning system."

As the only evidence of record supports the conclusion that the claimant's work was essential to the continued functioning of the employer's shipyard's air conditioning system, and that this system was integral to the employer's shipyard operations, the [ALJ's] finding of Section 2(3) coverage was affirmed.

Topic 1.7.1 Status "Maritime Worker" ("Maritime Employment")

Christensen v. Georgia-Pacific Corp, 279 F.3d 807 (**9th Cir**.2002).

[ED. NOTE:** While the forum for "905(b) negligence claims is federal district court, the **Ninth Circuit's** general language as to "coverage" under the LHWCA is noteworthy here.**]

At issue in this "905(b)" claim [33 U.S.C. § 905(b)] was whether the district court had properly granted a motion for summary judgment when it held that, as a matter of law, the injury was not a foreseeable result of the appellee's acts. The **Ninth Circuit** reversed, finding that genuine issues of material fact existed as to breach of duty and proximate cause that must be resolved at trial.

Under Section 905(b), a claimant can sue a vessel for negligence under the LHWCA. However the **Supreme Court** has limited the duties that a vessel owner owes to the stevedores working for him or her. *Scindia Steam Navigation Co. v. De Los Santos*, 451 **U.S.** 156, (1981) (A vessel owes three duties to its stevedores: the turnover duty, the active control duty, and the intervention duty.).

In *Christensen*, the **Ninth Circuit** noted that "Coverage does not depend upon the task which the employee was performing at the moment of injury." [**Ninth Circuit** cites *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (**9th Cir.** 1978); H. Rep. No. 98-570, at 3-4 (1984), reprinted in 1984 U.S.C.C.A.N. §§ 2734, 2736-37.] The court found that claimant "was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA."

Topic 1.7.1 Status-"Maritime Worker

Watkins v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

Topic 1.7.1 Status–"Maritime Worker"

Buck v. General Dynamics Corp/Electric Boat Corp., 37 BRBS 53 (2003); consolidated with *Rondeau v. General Dynamics Corp/Electric Boat Corp*., (BRB No. 02-0535) (April 24, 2003).

At issue in these consolidated cases was whether the employer was entitled to summary decision as a matter of law where the ALJs concluded that the claimants' work was not integral to the shipbuilding and repair process. The relevant facts concerning the claimants' job duties, as alleged by the employer and accepted by the ALJs are: 1) the only relationship between the claimants' duties and the shipbuilding process was to administer workers' compensation claims for all Electric Boat employees; and 2) the responsibilities of a workers' compensation adjuster at Electric Boat include adjusting workers' compensation claims, using a new computer system, setting up payment schedules, organizing files, and reporting to supervisors. Further, the motions for summary decision averred that claimant Buck did not enter the shipyard to fulfill his job duties, and that Claimant Rondeau entered the shipyard four times to interview supervisors in connection with weekly safety meetings with department and yard supervisors and superintendents.

The claimants contend that their responsibilities resulted in injured employees' being returned to the work force as soon as possible, and thus that their work was integral to the shipbuilding process. The Board noted pertinent case law. *Sanders v. Alabama Dry Dock & Shipbuilding Co*., 841 F.2d 1085, 21 BRBS 18(CRT) (**11th Cir.** 1988), *rev'g* 20 BRBS 104 (1987)(*Held*, labor relations assistant was covered under § 2(3)); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 **U.S.** 40, 23 BRBS 96(CRT)(1989)(*Held*, it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity...will be deemed maritime only if it is an integral or essential part of loading or unloading [or building or repairing] a vessel." Coverage "is not limited to employees who are denominated 'longshore' or who physically handle the cargo."); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (**2d Cir.** 2001), *aff'g* 34 BRBS 112 (2000)(Union shop steward covered.). [However, subsequently the **Eleventh Circuit** observed that the "significant relationship" test for coverage used in *Sanders* was rejected by the **Supreme Court** in *Schwalb*.]

The Board found that the claimants' attempt to establish that they interacted with employees and supervisors to the extent the claimants did in *Sanders* and *Marinelli* was not borne out by the portion of their depositions attached to the employer's motions for summary decision. Based on the evidence, the Board found that the ALJs had rationally concluded that they could not infer that the claimants' failure to perform their jobs would eventually lead to work stoppages or otherwise interrupt the shipbuilding and repair activities at the employer's shipyard.

Topic 1.7.1 Status–"Maritime Worker"

Dickerson v. Mississippi Phosphates Corp., 37 BRBS 58 (2003).

In this case involving situs and status, the claimant fell off of a ladder while welding in employer's phosphoric acid plant located about 100 feet from the water's edge. Employer's chemical plant manufactures fertilizer and is on a navigable waterway. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into a fertilizer. The fertilizer leaves the plant by rail, truck or barge. The claimant described his job as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. His supervisor stated that the claimant's work required him to perform a lot of steel fabrication work, some expansion work in the plant, some pipefitting, and foundation work for machinery. The claimant conceded that he never loaded or unloaded vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. For two weeks during his employment, the claimant did remove wood pilings from the water's edge.

The Board affirmed the ALJ's finding that the piling removal work was not covered employment as there was no evidence establishing that the removing of the pilings from the water's edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity. Moreover, the Board found that this case was distinguishable from other cases involving "covered" employees working in loading operations at fertilizer plants, as the claimant's work herein was not integral to the loading and unloading. Thus, the Board upheld the ALJ's determination that the claimant was not an employee covered under the LHWCA.

Turning to situs, the Board determined that the ALJ had correctly found that there was not a covered situs. The Board noted that for coverage, one must look to the nature of the place of work at the moment of injury and that to be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. The Board noted that an "adjoining area" must therefore have a maritime use. It upheld the ALJ's determination that this phosphoric acid plant was solely used in the fertilizer manufacturing process and had no relation to any customary maritime activity. The Board further rejected the claimant's contention that his injury occurred on a covered situs merely because employer's entire facility abuts

navigable waters and has a dock area on the property. The Board noted prior case law distinguishing a plant from its docks when a worker worked solely in the plant.

Topic 1.7.1 Status—"Maritime Worker" ("Maritime Employment")

Sidwell v. Virginia International Terminals, 372 F.3d 238 (**4th Cir.** 2004).

The **Fourth Circuit** held that employment as president of a local longshore union did not constitute maritime employment that exposed the worker to injurious stimuli and that therefore, the local union was not responsible for his noise-induced hearing loss. The claimant was diagnosed with his hearing loss while union president. Although the president generally discharged his duties as president from his home, in order to address specific issues or grievances he would appear from time to time at one or more of the waterfront terminals where his members worked. As a result of these visits, he spent approximately one hour per week at locations where longshoring activity was taking place. Prior to becoming a full-time employee of the local union, the claimant worked as a container repair mechanic routinely using air-powered pressure-washers, chippers, grinders, and tire changers. It was undisputed that the operation of these tools as well as other machinery and vehicles in the area contributed to high levels of noise throughout the work-day.

In deciding this issue, the **Fourth Circuit** found that the question becomes one of whether the president's duties were such that his occupation can be considered "integral or essential" to the process of loading or unloading vessels so as to bring him within the category of other persons engaged in longshoring operations. The court distinquished the instant case from that of *American Stevedoring Limited v. Marinelli*, 248 F.3d 54 (**2d Cir.** 2001)(work of a union steward paid by a stevedoring company was integral and essential to the company's longshoring operation.) In *Marinelli*, the steward worked at the waterfront terminal serving as an arbitrator between the company and union members. "Significantly, as an adjunct to his responsibilities for maintaining safety and enforcing its terms, the collective bargaining agreement under which the shop steward worked vested him with authority to unilaterally order a work stoppage. Important to the court was the fact that the union steward in *Marinelli* could stop work, halting the ship loading process.

Topic 1.7.2 Status—Harbor Worker

Tarver v. BO-MAC Contractors, Inc., 37 BRBS 120 (2003).

In this situs issue case, the Board overturned the ALJ's finding of coverage based on circuit case law that was issued subsequent to the ALJ's decision. Here the claimant was a welder involved in the construction of barge slips on undeveloped land adjacent to the intracoastal waterway. He was injured on the land side of the excavation. At the time of his injury the slip walls were in place and some water would enter into the excavated

hole at high tide through a pipe in the wall. The ALJ had found that the injury occurred on a covered situs because the site had a maritime purpose, even though it was incomplete.

Subsequent to the ALJ issuing his decision, the **Fifth Circuit** issued *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (**5th Cir.** 2002), *cert. denied*, ___ **U.S.** ___, 124 **S.Ct.** 65, 2003 WL 21180139 (Oct. 6, 2003) (Future maritime use does not suffice to confer situs.) The Board acknowledged that "[a]lthough the barge slip under construction was being built solely for maritime purposes, we are constrained by the foregoing case law to hold that this site is not covered pursuant to Section 3(a) of the Act." The Board noted that the circuit case law now makes the nature of the site prior to its completion a deciding factor. It further noted that although the site was suitable for maritime uses, at the time of the claimant's injury, neither the site nor any immediately surrounding areas was used for a maritime purpose. "The **Fifth Circuit's** decisions….contemplate either that, at the time of claimant's injury, the location have a current maritime use, or that the site of the project under construction had been navigable waters or another covered site previously."

Topic 1.7.2 Status—Harbor Worker

Terlemezian v. J.H. Reid General Contracting, 37 BRBS 112 (2003).

In this status case, the claimant was a "dock builder foreman" on a road project at Ports Elizabeth and Newark where he was responsible for driving sheet piling for a cofferdam. The Board upheld the ALJ's opinion that the claimant did not have status. The claimant had contended that his work was integral to the loading process as the road project was designed to alleviate delays in loading and unloading while rail cars are brought in and out of the port. The Board affirmed the ALJ's finding that the claimant was not a covered employee as his work was not an essential element of the loading process. The Board noted that while the project the claimant was working on had the potential to affect the loading and unloading process in the future by increasing the volume of containers moving through the port, it did not affect the loading and unloading process at the time of the claimant's injury. "More importantly, claimant has not demonstrated that his work on the project was integral to the loading or unloading process or that his failure to perform his work would impede that process." The Board stated that the claimant has not established a sufficient nexus between a road project designed to improve the movement of rail cars and trucks in land transportation in the future and the actual task of loading and unloading containers from ships on the docks or in moving cargo in intermediate steps within the port.

Topic 1.7.4 Self Employed Worker

Anastasiou v. M/T World Trust, ___ F.Supp 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying A Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

The court found that the plaintiff satisfied both pre- and post-1972 LHWCA amendment tests for coverage. The plaintiff had alleged that he did not fall under the protections of the LHWCA because his work in conducting the radio survey was not an "integral or essential part of loading or unloading a vessel." The court found that the plaintiff misread pertinent case law and that the **Second Circuit** has held that an individual satisfies the status test where he has "a significant relationship to navigation or to commerce on navigable waters." The court noted that the LHWCA "clearly divides maritime workers into two mutually exclusive categories: seamen, on the one hand, and longshoremen, harbor workers and all other employees entitled to protection under the Act, on the other hand." The court pointed out that in rare instances longshoremen and harbor worker type workers not covered by the LHWCA ["Sieracki seamen"] may avail themselves of the duty of seaworthiness.

The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American Bureau of Shipping standards. His claim also failed to put forward any evidence that there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

Topic 1.9 Maritime Employer

Anastasiou v. M/T World Trust, ___ F.Supp 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

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The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American Bureau of Shipping standards. His claim also failed to put forward any evidence that there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

Topic 1.11.6 "Employee" exclusions

Scott v. Trump Indiana, Inc., 337 F.3d 939, (**7th Cir.** July 28, 2003).

In this Admiralty Extension Act and LHWCA 905(b) case, the **Seventh Circuit** found that neither a land-based crane nor a life raft were "appurtenances" to a vessel. The circuit court further found that the director of safety training was not engaged in maritime employment" for purposes of the LHWCA. The director had been injured on a dock while observing a life raft being lowered onto the dock. His employer had contracted with Trump Indiana to design, install and maintain the lifesaving equipment required by the U.S. Coast Guard for the vessel "Trump Casino."

Topic 1.11.7 Jurisdiction/Coverage—Exclusions To Coverage-- Clerical/secretarial/security/data processing employees

Morganti v. Lockheed Martin Corp., 37 BRBS 126 (2003).

In this coverage case, the Board upheld the ALJ's finding of situs/navigability of a lake; but reversed his findings that the worker did not have status, or was excluded under the clerical exclusion of the LHWCA. The decedent here had worked for an employer who manufactures sonar transducers for the United State Navy. He was a test engineer. As such, he worked 70 percent of his time on land, and 30 percent of his time testing the

devices over water on a barge that had been moored for 20 years for that purpose. (Of the 30 percent of his time spent over water, 1 percent was spent on a 32 foot shuttle boat going between land and the moored barge.) While untying a boat line, the worker fell into the lake and drowned.

The Board found that the ALJ correctly held that an economic viability test should not be applied when determining whether a waterway is navigable for purposes of the LHWCA. In doing so, the Board noted that the ALJ correctly applied the **Second Circuit's** "navigability in fact" test to determine if the waterway is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

As to the status issue, the ALJ had found that the worker's job was not maritime, that the moored barge was a fixed platform, that the worker was transiently over navigable water only 1 percent of his work time, and that even if the worker did have coverage, he was specifically excluded by the clerical worker exclusion of Section 2(3)(A). In reversing the ALJ, the Board made the following legal determinations.

Citing to *Director, OWCP v. Perini North River Associates,* 459 **U.S.** 297, 15 BRBS 62(CRT) (1983), the Board stated that a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision. The Board found that the ALJ had incorrectly applied *Bienvenu v. Texaco, Inc.*, 1964 F. 3d 901,32 BRBS 217(CRT)(**5th Cir.** 1999)(*en banc*)(*Held* that a worker injured upon navigable waters in the course of employment "meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous."). Finding that "it is clear that decedent's presence on navigable waters was neither transient nor fortuitous, the Board noted that it need not determine if *Bienvenu* should be followed in this **Second Circuit** case.

In determining that the decedent was a maritime worker, the Board found that the ALJ was mistaken in relying upon case law construing a "vessel in navigation" under the Jones Act, when the issue presented was decedent's coverage under the LHWCA. While the Board acknowledged that under the Jones Act, the key to seaman status is an employment-related connection to a "vessel in navigation," the Board went on to state, "The courts have developed tests for determining whether a floating structure is a ‘vessel in navigation' or a work platform." According to the Board, "A structure may be a vessel for other purposes, yet it will not meet the Jones Act test unless it is ‘in navigation.' An employee injured on a floating structure which is not a ‘vessel in navigation' is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a ‘member of the crew' under Section 2(3). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini*, the [ALJ] erred in relying on it." The Board summed, "As claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act."

The Board reversed the ALJ's finding that the decedent's presence on navigable waters at the time of his injury and death was transient since it found that the decedent worked over navigable water 30 percent of the time.

While the Board noted that the decedent's employment responsibilities required him to input the data necessary for the computer to run the appropriate test and print results, it held that it was incorrect to characterize the work as clerical and data processing work. "The mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker."

Topic 1.11.7 Jurisdiction/Coverage–Exclusions to Coverage-- Clerical/secretarial/security/data processing employees

Boone v. Newport News Shipbuilding & Dry Dock Co., 37 BRBS 1 (2003).

In this coverage case, the employer alleges that the ALJ used an overly narrow definition of the term "office" to determine that the claimant was not excluded from coverage pursuant to Section 2(3)(A) of the LHWCA. The Board noted that in *Williams v. Newport News Shipbuilding & Dry Dock Co*., 47 F.3d 1166, 29 BRBS 75(CRT)(**4th Cir.** 1995)(table), *vacating* 28 BRBS 42 (1994), the **Fourth Circuit** held that the ALJ failed to consider "the ultimate questions whether Petitioner's duties were exclusively clerical and performed exclusively in a business office." In its previous decision on reconsideration in the present case, the Board agreed with the Director's position that the legislative history regarding Section 2(3)(A) indicated that the term "office" modified the term "clerical," and that only clerical work performed exclusively in a business office was intended to be excluded. On remand, the ALJ had found that while the term "business office" was not defined by statute or pertinent case law, it was generally understood to be an enclosed or semi-enclosed area which was likely to be characterized by the presence of desks, chairs, telephones, computer terminals, copy machines, and perhaps book shelves. The ALJ found that this contrasted with a warehouse, which is a large open area where supplies are received, stored and dispensed. In the instant case, the Board found that these determinations by the ALJ were rational.

The ALJ next found that the claimant's main work area in the instant case was in a warehouse and that computer work, telephoning, copying and other traditional business office functions would not have been performed in that area. Thus, the ALJ concluded that the claimant did not work exclusively in a business office. The ALJ based this finding on the photographs submitted by employer, claimant's affidavit, and claimant's testimony at the hearing, all of which he found were un-contradicted. The employer contended that the claimant's work area should be characterized as a "rolling business office." However, the Board further noted that the legislative history of Section 2(3)(a) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." *See* 1984 U.S.C.C.A.N. §§ 2734, 2737. The Board noted that the ALJ considered the function of the claimant's work area

and concluded that it was a warehouse floor and not a “business office,” and found that this finding was rational and supported by substantial evidence.

Topic 1.11.8 Jurisdiction/Coverage--Exclusions To Coverage—Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet

Bazor v. Boomtown Belle Casino, ___ **U.S.** ___, ___ **S.Ct.** ___ (Mem), 2003 WL 21180139 (C*ert. denied* Oct. 6, 2003). **[*See* next entry.]**

As previously noted in the Digest and Supplement, in denying status to the claimant, the **Fifth Circuit** had held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (**5th Cir.** 2002). The **Fifth Circuit** had found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further had found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

Topic 1.11.8 Jurisdiction/Coverage--Exclusions To Coverage—Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet

Boomtown Belle Casino v. Bazor, 313 F.3d 300 (**5th Cir**. 2002). **[*See* Above.]**

In denying status to the claimant, the **Fifth Circuit** held that a floating casino is a "recreational operation," and thus comes within the Section 2(3)(B) exclusion. The court found that this exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs: "The plain language of [the section] excludes from coverage ‘‘individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' without reference to the nature of the work they do."

The **Fifth Circuit** further found that the claimant did not have "situs" when it stated, "Whether an adjoining area is a Section 3(a) situs is determined by the nature of the adjoining area at the time of injury." In the instant case, at the time of the decedent's stroke, the Boomtown facility had yet to be used for a maritime purpose. Nobody had loaded or unloaded cargo, and nobody had repaired, dismantled, or built a vessel.

TOPIC 2

Topic 2.2.2 Definitions—Section 2(2) Injury—Arising Out of Employment

Announcement--Possible Gulf War Fire/Lung Cancer Link

According to the Associated Press, a committee of the Institute of Medicine [a branch of the National Academy of Science, an independent group chartered by Congress to advise the government on scientific matters], states that Gulf War personnel exposed to pollution from the well fires, exhaust and other sources may face an increased lung cancer risk. More than 600 oil well fires were ignited by Iraqi troops during their retreat from Kuwait in 1991.

Topic 2.2.3 Injury

Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., ___ **U.S.** ___, ___ **S.Ct.** ___, (S.Ct. No. 03-1457)(**Cert. denied** Oct. 12, 2004).

Let stand **Ninth Circuit** decision that the last stevedoring company to employ a longshoreman before he underwent bilateral knee replacement surgery is liable for his disability benefits.

Topic 2.2.3 Injury

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., [Price], 339 F.3d 1102(**9th Cir.** 2003), *cert. denied,* ___ ***U.S.*** ___, ___ **S.Ct.** ___ (October 12, 2004).

The **Ninth Circuit** found that under the "two-injury variant" of the "last responsible employer" rule, where the disability is a result of cumulative traumas, the responsible employer depends upon the cause of the worker's ultimate disability. If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, the employer of the worker at the time of the most resent injury is the responsible, liable party.

In the instant case, the **Ninth Circuit** turned its attention to just how minuscule the aggravation, acceleration or combination can be. Here the claimant worked as an industrial mechanic and fork lift driver for several companies for varying periods. After experiencing pain in his knees that increased significantly over time, he sought medical care and his doctor told him that x-rays revealed medial joint line "collapse" requiring

total bilateral knee replacement surgery. His last employer before this visit to his doctor was Cresent City Marine Ways. In the months following, the claimant received injections and other prescribed pain medications to avoid or delay the need for surgery. X-rays showed degeneration of the knee condition with no cartilage remaining. His knees were described as "bone on bone." The claimant asked his doctor to schedule the knee replacement surgery. His last employer before this visit to his doctor was Cresent Wharf and Warehouse. On his last day of employment before the scheduled surgery, the claimant worked a forklift for Metropolitan Stevedore. Claimant testified that his condition "got progressively worse" over the course of the day. After surgery he filed a claim against Metropolitan Stevedore.

The ALJ determined that injuries suffered on that last day caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. Since the claimant had still been able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery. Thus the aggravation was a "disability," as defined by the LHWCA.

The **Ninth Circuit** found that the ALJ had correctly concluded that Metropolitan was the last responsible employer. In making its holding, the circuit court refused to use "diminished earning capacity" as the identifying feature of "disability" in two injury cases. In upholding the ALJ, the court agreed that in traumatic, two injury cases, disability is more appropriately defined as a physical harm. In explaining the difference in approach taken in this two traumatic injury case, as opposed to an occupational disease claim, the **Ninth Circuit** stated, "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression on the disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times."

The Director, like Metropolitan Stevedore, had urged the court to use diminished earning capacity as a benchmark, and had also argued for a rule that assigned liability to the claimant's last employer before the need for surgery arose. The **Ninth Circuit** declined to make this departure from its prior approach finding that such a departure would introduce new uncertainty into the process of determining liability under the last employer rule.

Topic 2.2.4 Injury–Physical Harm as an Injury

Jones v. CSX Transportation, 287 F.3d 1341 (**11th Cir.** 2002).

[ED. NOTE:** This case is included for informational purposes only.**]

This is a claim under the Federal Employers' Liability Act (FELA) for emotional distress damages based on the fear of contracting cancer. The district court dismissed that claim because the plaintiffs made no showing of any objective manifestations of their emotional distress. In upholding that dismissal, the circuit court found that by requiring an objective manifestation it could avoid "unpredictable and nearly infinite liability." It noted that several other circuits also require objective manifestations, and that this includes some that have dealt with Jones Act claims. The plaintiffs had based their claims for emotional distress on *Metro-North Commuter R.R. Co. v. Buckley*, 521 **U.S.** 424 (1997) (*Held*, a worker exposed to asbestos could not recover for negligently inflicted emotional distress based on his fear of contracting cancer until he exhibited symptoms of a disease.) The plaintiffs in Jones argued that they had exhibited symptoms of an asbestos-related disease, i.e. asbestosis. However, because the sole ground of CSX's motion was the plaintiffs' failure to show objective manifestations of their emotional distress, and because the district court granted partial summary judgment on this basis alone, the circuit court did not address the question of whether *Buckley* permits recovery for the plaintiffs' fear of contracting cancer when they have exhibited symptoms of an asbestos-related disease but not of cancer specifically.

Topic 2.2.4 Definitions–Physical Harm as an Injury

[ED. NOTE:** The following FECA case is included for informational value only.**]

Moe v. United States of America, 326 F.3d 1065 (**9th Cir.** 2003).

Here the **Ninth Circuit** held that psychological injury accompanied by physical injury, regardless of the order in which they occur, is within the scope of the Federal Employee's compensation Act (FECA). In the instant case, the federal employee suffered from Post-Traumatic Stress Disorder (PTSD) after someone went on a shooting rampage at a medical facility. The employee's PTSD aggravated her preexisting ulcerative colitis, requiring the removal of her colon. The **Ninth Circuit** saw no reason for the chronological order of physical and psychological injuries to impact FECA's scope.

Topic 2.2.5 Multiple Injuries

Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., ___ **U.S.** ___, ___ **S.Ct.** ___, (S.Ct. No. 03-1457)(**Cert. denied** Oct. 12, 2004).

Let stand **Ninth Circuit** decision that the last stevedoring company to employ a longshoreman before he underwent bilateral knee replacement surgery is liable for his disability benefits.

Topic 2.2.5 Multiple Injuries

New Haven Terminal Corp. v. Lake, 337 F.3d 261 (**2d Cir.** 2003).

The **Second Circuit** reversed an ALJ's termination of permanent partial disability benefits for a 1993 injury and remanded to determine whether a settlement for a 1997 injury overcompensated the worker in order to bypass the last employer rule. The court noted that it was concerned that a last employer, such as the one here, may offer an inflated award that overcompensates a claimant for the damages due proportionately to the last injury, so that the claimant will not take advantage of the last employer rule for the earlier injury and instead seek the rest of the compensation from an earlier employer. The court explained that "Because the aggravation rule must be defended against such manipulation an ALJ should inquire whether the claimant's explanation for the settlement is credible, and if not, should reject the claim against the earlier employer." Additionally, the court noted that on remand, the ALJ should address specifically whether, and estimate to what extend, the first injury contributed to the second. "When a claimant cannot recover from the last employer because of a settlement, we will permit recovery from an earlier employer where the claimant has acted in good faith and has not manipulated the aggravation rule." The court further noted that there is no statutory authority for a previous employer to use the aggravation rule as a shield from liability. "Permitting the prior employer to use the aggravation rule as a defense to limit full recovery would frustrate the statute's goal of complete recovery for injuries."

Topic 2.2.5 Multiple Injuries

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., [Price], 339 F.3d 1102(**9th Cir.** 2003), *cert. denied,* ___ ***U.S.*** ___, ___ **S.Ct.** ___ (Oct. 12, 2004).

The **Ninth Circuit** found that under the "two-injury variant" of the "last responsible employer" rule, where the disability is a result of cumulative traumas, the responsible employer depends upon the cause of the worker's ultimate disability. If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, the employer of the worker at the time of the most recent injury is the responsible, liable party.

In the instant case, the **Ninth Circuit** turned its attention to just how minuscule the aggravation, acceleration or combination can be. Here the claimant worked as an industrial mechanic and fork lift driver for several companies for varying periods. After experiencing pain in his knees that increased significantly over time, he sought medical care and his doctor told him that x-rays revealed medial joint line "collapse" requiring total bilateral knee replacement surgery. His last employer before this visit to his doctor

was Cresent City Marine Ways. In the months following, the claimant received injections and other prescribed pain medications to avoid or delay the need for surgery. X-rays showed degeneration of the knee condition with no cartilage remaining. His knees were described as "bone on bone." The claimant asked his doctor to schedule the knee replacement surgery. His last employer before this visit to his doctor was Cresent Wharf and Warehouse. On his last day of employment before the scheduled surgery, the claimant worked a forklift for Metropolitan Stevedore. Claimant testified that his condition "got progressively worse" over the course of the day. After surgery he filed a claim against Metropolitan Stevedore.

The ALJ determined that injuries suffered on that last day caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. Since the claimant had still been able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery. Thus the aggravation was a "disability," as defined by the LHWCA.

The **Ninth Circuit** found that the ALJ had correctly concluded that Metropolitan was the last responsible employer. In making its holding, the circuit court refused to use "diminished earning capacity" as the identifying feature of "disability" in two injury cases. In upholding the ALJ, the court agreed that in traumatic, two injury cases, disability is more appropriately defined as a physical harm. In explaining the difference in approach taken in this two traumatic injury case, as opposed to an occupational disease claim, the **Ninth Circuit** stated, "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression on the disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times."

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Topic 2.2.6 Aggravation/Combination

Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., ___ **U.S.** ___, ___ **S.Ct.** ___, (S.Ct. No. 03-1457)(**Cert. denied** Oct. 12, 2004).

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Topic 2.2.7 Natural Progression

Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., ___ **U.S.** ___, ___ **S.Ct.** ___, (S.Ct. No. 03-1457)(**Cert. denied** Oct. 12, 2004).

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Topic 2.2.7 Natural Progression

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Topic 2.2.7 Natural Progression

Delaware River Stevedores, Inc. v. Director, OWCP, 279 F.3d 233 (**3rd Cir**. 2002).

At issue here was whether the claimant's condition was a natural progression of an original injury or the result of an aggravation or acceleration. In addressing the issue, the court agreed with the Board's assessment that "[i]f the conditions of a claimant's employment cause him to become symptomatic, even if no permanent harm results, the claimant has sustained an injury within the meaning of the Act" and that "where claimant's work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for the resulting temporary total disability." The court then cited approvingly the last responsible employer rule as applied by *Kelaita v. Director, OWCP*, 799 F.2d 1308 (**9th Cir.** 1986) ("If on the other hand, the [subsequent] injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the [subsequent] injury is the compensable injury, and [the subsequent employer] is...responsible..."). Lastly, the court agreed with the Board that "[t]he fact that the earlier injury was the precipitant event' is not determinative." The determinative question is whether the claimant's subsequent work aggravated or exacerbated the claimant's condition first manifested earlier.

Topic 2.2.18 Definitions—Representative Injuries/Diseases

Harris v. Elmwood Dry Dock & Repair, (Unpublished) (BRB No. 04-0171)(Oct. 19, 2004).

At issue in this Section 20(a) case was whether the death of a deceased worker was causally related to his employment. He died of septic shock caused by aeromanas hydrophilia. Aeromonas hydrophilia is a bacterium commonly found in fresh water. Aeromonas hydrophilia can enter the bloodstream from a cut or puncture would and contact with fresh water, by ingestion from drinking water into the gastro-intestinal tract, or by aspiration directly into the lungs. Aeromonas hydrophilia may cause skin and soft tissue infection at the site of the cut or would, and intestinal tract infection. In rare cases it causes pneumonia or sepsis.

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

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., [Price], 339 F.3d 1102 (**9th Cir.** 2003), *cert. denied,* ___ ***U.S.*** ___, ___ **S.Ct.** ___ (Oct. 12, 2004).

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In the instant case, the **Ninth Circuit** turned its attention to just how minuscule the aggravation, acceleration or combination can be. Here the claimant worked as an industrial mechanic and fork lift driver for several companies for varying periods. After experiencing pain in his knees that increased significantly over time, he sought medical care and his doctor told him that x-rays revealed medial joint line "collapse" requiring total bilateral knee replacement surgery. His last employer before this visit to his doctor was Cresent City Marine Ways. In the months following, the claimant received injections and other prescribed pain medications to avoid or delay the need for surgery. X-rays showed degeneration of the knee condition with no cartilage remaining. His knees were described as "bone on bone." The claimant asked his doctor to schedule the knee replacement surgery. His last employer before this visit to his doctor was Cresent Wharf and Warehouse. On his last day of employment before the scheduled surgery, the claimant worked a forklift for Metropolitan Stevedore. Claimant testified that his condition "got progressively worse" over the course of the day. After surgery he filed a claim against Metropolitan Stevedore.

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The Director, like Metropolitan Stevedore, had urged the court to use diminished earning capacity as a benchmark, and had also argued for a rule that assigned liability to the claimant's last employer before the need for surgery arose. The **Ninth Circuit** declined to make this departure from its prior approach finding that such a departure would introduce new uncertainty into the process of determining liability under the last employer rule.

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

[ED. NOTE:** The following Michigan case is included for informational value only.**]

Daniel v. Department of Corr., Mich.(No. 120460)(Mich. Supreme Court)(March 26, 2003).

The Michigan Supreme Court ruled that a worker disciplined for sexual harassment is not eligible for depression-related compensation benefits since the injury was caused by intentional and willful action. The court distinguished intentional and willful misconduct of a quasi-criminal nature from that of gross negligence where a worker can recover despite his responsibility for an injury. Here a probation officer had propositioned several female attorneys and later alleged that he had felt "harassed." by his accusers as well as by his supervisor who had suspended him.

Topic 2.2.13 Occupational Diseases: General Concepts

Bath Iron Works Corp. v. U.S. Labor, [Onebeacon f/k/a Commercial Union York Insurance Co. v Knight], 336 F.3d 51(**1st Cir.** 2003).

The **First Circuit** upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3 mos." duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband's asbestos exposure in the workplace.

In upholding the ALJ, the **First Circuit** found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. " An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The **First Circuit** also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

Topic 2.2.13 Occupational Diseases: General Concepts

[ED. NOTE:** The following is included for informational value only.**]

Stavenjord v. Montana State Fund, Mont., 314 Mont.466 (Mont. S. Ct. 2003).

Citing equal protection arguments, the Montana Supreme Court ruled that it is unconstitutional for workers' compensation rules to treat occupational diseases differently from other job related injuries.

Topic 2.2.13 Occupational Disease: General Concepts

Norfolk & Western Railway Co. v. Ayers, 538 **U.S.** 135, 123 **S.Ct.** 1210 (2003).

The **Court** held that former employees can recover damages for mental anguish caused by the "genuine and serious" fear of developing cancer where they had already

been diagnosed with asbestosis caused by work-related exposure to asbestos. This adheres to the line of cases previously set in motion by the **Court**. *See Metro-North Commuter R. Co. v. Buckley*, 521 **U.S.** 424 (1997)(When the fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear.) The **Court** noted that the railroad's expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the claimants' expert that some ten percent of asbestosis suffers have died of mesothelioma. Thus, the **Court** found that claimants such as these would have good cause for increased apprehension about their vulnerability. The **Court** further noted that the claimants must still prove that their asserted cancer fears are genuine and serious.

[ED. NOTE:** Mesothelioma is not necessarily preceded by asbestosis.**]

Topic 2.2.15 Occupational Disease vs. Traumatic Injury

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., [Price], 339 F.3d 1102 (**9th Cir.** 2003), *cert. denied,* ___ ***U.S.*** ___, ___ **S.Ct.** ___ (Oct. 12, 2004).

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Topic 2.2.16 Occupational Diseases and the Responsible Employer

Metropolitan Stevedore Co. v. Cresent Wharf and Warehouse Co., [Price], 339 F.3d 1102 (**9th Cir.** 2003), *cert. denied,* ___ ***U.S.*** ___, ___ **S.Ct.** ___ (Oct. 12, 2004).

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The ALJ determined that injuries suffered on that last day caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. Since the claimant had still been able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was gradual wearing away of the bone even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery. Thus the aggravation was a "disability," as defined by the LHWCA.

The **Ninth Circuit** found that the ALJ had correctly concluded that Metropolitan was the last responsible employer. In making its holding, the circuit court refused to use "diminished earning capacity" as the identifying feature of "disability" in two injury cases. In upholding the ALJ, the court agreed that in traumatic, two injury cases, disability is more appropriately defined as a physical harm. In explaining the difference in approach taken in this two traumatic injury case, as opposed to an occupational disease claim, the **Ninth Circuit** stated, "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression on the disease with particular points in time or specific work experiences. However, cumulative traumatic injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times."

The Director, like Metropolitan Stevedore, had urged the court to use diminished earning capacity as a benchmark, and had also argued for a rule that assigned liability to the claimant's last employer before the need for surgery arose. The **Ninth Circuit** declined to make this departure from its prior approach finding that such a departure would introduce new uncertainty into the process of determining liability under the last employer rule.

Topics 2.2.16 Definitions--Occupational Diseases and the Responsible Employer/Carrier—Borrowed Employee Doctrine

Hebert v. Pride International, (Unpublished) (Civ. No. 03-0804)(E. D. La. March 5, 2004); 2004 U.S. Dist. LEXIS 3436.

This OCS summary judgment matter dealt with whether a worker was a borrowed employee making his exclusive remedy workers' compensation benefits under the LHWCA. Noting **Fifth Circuit** case law, the federal district court listed the nine factors a court must consider in making a borrowed employee determination.

Topic 2.2.16 Occupational diseases and the Responsible Employer/Carrier

New Orleans Stevedores v. Ibos, ___ **U.S.** ___, 124 **S.Ct.** 1038 (Mem.)(*Cert. denied* January 12, 2004). **[*See* next entry.]**

Here the **U.S. Supreme Court** declined to consider this *Cardillo* rule related case. The **Fifth Circuit** had previously held that the amounts that a widow received from LHWCA settlements with longshore employers who were not the last responsible employer were not relevant to the amount owed by the last responsible maritime employer and should not have reduced liability for the last responsible maritime employer. Thus, the **Fifth Circuit's** opinion stands.

Topic 2.2.16 Occupational Diseases and the Responsible Employer/Carrier

New Orleans Stevedores v. Ibos, 317 F.3d 480 (**5th Cir.** 2003). **[*See* Above.]**

In this matter, where the worker had mesothelioma, the **Fifth Circuit** followed the **Second Circuit's** rule annunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (**2d Cir.** 1955) that liability under Section 2(2) of the LHWCA rests with the last maritime employer regardless of the absence of actual causal contribution by the final exposure. Employer in the instant case had argued that it could not be liable because of the worker's mesothelioma and that disease's latency period. However, in following *Cardillo*, the **Fifth Circuit** found that a link between exposure while working for the last employer and the development of the disabling condition was not necessary.

The **Fifth Circuit** has previously held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 190 (**5th Cir.** 1992).

The **Fifth Circuit** also ruled that the employer was not entitled to a credit for the claimant's settlement receipts from prior maritime employers. Judge Edith Jones issued a vigorous dissent on this issue.

Topic 2.2.16 Responsible Employer

New Haven Terminal Corp. v. Lake, 337 F.3d 135 (**2d Cir.** 2003).

The **Second Circuit** reversed an ALJ's termination of permanent partial disability benefits for a 1993 injury and remanded to determine whether a settlement for a 1997 injury overcompensated the worker in order to bypass the last employer rule. The court noted that it was concerned that a last employer, such as the one here, may offer an inflated award that overcompensates a claimant for the damages due proportionately to the last injury, so that the claimant will not take advantage of the last employer rule for the earlier injury and instead seek the rest of the compensation from an earlier employer. The court explained that "Because the aggravation rule must be defended against such manipulation an ALJ should inquire whether the claimant's explanation for the settlement is credible, and if not, should reject the claim against the earlier employer." Additionally, the court noted that on remand, the ALJ should address specifically whether, and estimate to what extend, the first injury contributed to the second. "When a claimant cannot recover from the last employer because of a settlement, we will permit recovery from an earlier employer where the claimant has acted in good faith and has not manipulated the aggravation rule." The court further noted that there is no statutory authority for a previous employer to use the aggravation rule as a shield from liability. "Permitting the prior employer to use the aggravation rule as a defense to limit full recovery would frustrate the statute's goal of complete recovery for injuries."

Topic 2.2.16 Definitions–Occupational Diseases and the Responsible Employer/Carrier

Stevedoring Services of America v. Director, OWCP, 297 F.3d 797 (**9th Cir.** 2002).

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate reliable audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The **Ninth Circuit**, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The **Ninth Circuit** explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the ‘‘last employer doctrine' is a rule of

convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ‘‘determinative' and hand off the burden of primary liability."

Topic 2.5 "Carrier"

Weber v. S.C. Loveland Co. (Weber III), 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92 (CRT) (**5th Cir.** 2001) (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.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

Topic 2.8 Section 2(8)--State

Hines v. Georgia Ports Authority, ___ S.E. 2d ___, 2004 WL 2282948, (Ga. S.Ct. Oct. 12, 2004).

An injured longshoreman working on a vessel docked at the Georgia Ports Authority terminal can sue the Ports Authority under maritime law. The Ports Authority is not entitled to immunity under the Eleventh Amendment. The state court distinguished this holding from state court jurisprudence which held that an organization is an agency of the state for purposes of state-conferred immunity. The state supreme court held that the Ports Authority was immune under the state constitution but that admiralty law preempted that finding since the Authority was self-sufficient and did not rely on the state treasury. ***[ED. Note:*** *The Board previously dodged the issue of sovereign immunity in Fitzgerald v. Stevedoring Services of America, 34 BRBS 202 (2001). See also Vierling v. Celebrity Cruises, Inc., 339 F.3d 1309 (**11th Cir.** 2003), denied rehearing, 87 Fed. Appx 717 (table) (Oct. 27, 2003)(Everglades Port Authority lacked immunity since it had an anticipated and actual history of financial and operational independence.) citing Hess v. Port Authority Trans-Hudson Corp, 513* ***U.S.*** *30 (1994).**]***

Topic 2.8 Definitions–"State"

Vierling v. Celebrity Cruises. Inc., 339 F.3d 1309 (**11th Cir.** 2003), *denied rehearing*, 87 Fed. Appx 717 (table) (Oct. 27, 2003).

While the focus of this case is primarily directed to contractual indemnity and warranty of workmanlike performance issues between a cruise line and a port authority, it does address the issue as to when a port authority is a separate entity from a state, and therefore amenable to suit. Citing to *Hess v. Port Authority. Trans-Hudson Corp*., 513 **U.S.** 30 (1994), the **Eleventh Circuit** found that Everglades Port Authority lacked

immunity. The court noted that the port authority had an anticipated and actual history of financial and operational independence; that it was financially self-sufficient, generated its own revenues, and paid its own debts.

Topic 2.13 Definitions—"Wages"

Tahara v. Matson Terminals, Inc., (Unpublished)(BRB No. 03-0860)(September 28, 2004).

The Board affirmed, albeit on other grounds, the ALJ's compensation award during the period the claimant was in the state and federal witness protection programs. The Board found that the employer did not establish that the claimant was able to perform suitable alternate employment while the claimant was enrolled in the witness protection program. The claimant's testimony was uncontradicted that he was not allowed to work by the state and federal authorities during his time in the programs. Further, it was uncontested that his enrollment in the programs was related to the circumstances surrounding his work injury. Under these circumstances, the claimant was found to be entitled to compensation for total disability as the employer could not meet its renewed burden of proof after claimant was forced to leave suitable alternate employment through no fault of his own. The Board found that the facts in this case were analogous to those cases where a claimant is entitled to total disability compensation while participating in a Department of Labor-sponsored vocational rehabilitation program that precludes him from working. *See, e.g. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994); *Castro v. General Constr. Co*., 37 BRBS 65 (2003).

Citing *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (**9th Cir.** 1988), 21 BRBS 122(CRT), the Board found that this holding, that the claimant was entitled to total disability benefits due to his inability to work while he was in the witness protection programs, is consistent with **Ninth Circuit** case law. In *Hairston*, the court held that suitable alternate employment was not established by a position at a bank that the claimant physically could perform, as the job was not realistically available because the claimant had a criminal record. "In this case, no jobs were realistically available to claimant while he was in the witness protection programs."

The Board also affirmed the ALJ's finding that the state stipend the claimant received during his participation in the state witness protection program does not establish that he had a post-injury wage-earning capacity. The ALJ correctly rejected the employer's contention that the $1,200 to $1,400 per month stipend was a wage. "The [ALJ] correctly reasoned that the stipend was paid by the state and not an employer and that the stipend was not received pursuant to a contract for hire; these conditions are required for sums to constitute wages under the plain language of Section 2(13). The [ALJ] found that the stipend is analogous to unemployment compensation, which also is

not a wage under Section 2(13). Moreover, there is no evidence that the state stipend was subject to tax withholding." (Citations omitted.)

Topic 2.13 Wages

Custom Ship Interiors v. Roberts, 300 F.3d 510 (**4th Cir.** 2002), *cert. denied*, ___ **U.S.** ___, 123 **S.Ct.** 1255 (Mem.) (2003).

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

The claimant was injured while remodeling a Carnival Cruise Line Ship for Custom Ship Interiors. Custom Ship's employment contract entitled the claimant to per diem payments without any restrictions. Carnival provided free room and board to its remodelers and Custom Ship knew this. Custom Ship argued that the per diem was a non-taxable advantage.

The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a 'wage.' Whether or not a payment is subject to withholding is not the exclusive test of a 'wage.'" Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequisite of wage treatment.

The court explained that because the payments were included as wages under the first clause of Section 2(13), Custom Ship's invocation of the second clause of Section 2(13) is unavailing. "This second clause enlarges the definition of ''wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member plurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

The Dissent noted that the definition of "wages" found at Section 2(13) requires that a wage be compensation for "service," not a reimbursement for expenses. *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (**4th Cir.** 1998).

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Topic 2.14 "Child"

Duck v. Fluid Crane & Construction, 36 BRBS 120(2002).

Here the Board upheld the ALJ's finding that Sections 2(14) and 9 of the LHWCA provide that a legitimate or adopted child is eligible for benefits without requiring proof of dependency but that an illegitimate child is eligible for death benefits only if she is acknowledged and dependent on the decedent.

The Board first noted that it has held that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (**6th Cir.** 1984).

The Board found that the instant case was akin to *Mathews v. Lucas*, 427 **U.S.** 495 (1976). In *Lucas,* the **Supreme Court** sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The **Court** held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 **U.S.** at 513. The presumption of dependency, observed the **Court**, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the **Court** relied predominantly on the Congressional purpose in adopting the statutory presumptions of dependency, i.e., to serve administrative convenience.

Applying the court's holding in *Lucas*, Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but rather is "carefully tuned to alternative considerations" by withholding a presumption of dependency to illegitimate children "only in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 **U.S.** at 513. The Board found that the LHWCA's distinction between legitimate and illegitimate children is reasonable, for as the **Court** stated in *Lucas*, "[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support, " *Lucas*, 427 **U.S.** at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support.

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Topic 2.21 "Vessel"

[ED. NOTE:** The following federal district court cases are included for informational purposes only.**]

Ayers v. C&D General Contractors, 2002 WL 31761235, 237 F. Supp. 2d 764 (W.D. Ky. Dec. 6, 2002).

Here the widow of a worker killed while removing supports from a dock settled the LHWCA claim but subsequently filed third party actions under the general maritime law and the Admiralty Extension Act. At issue in the third party action was whether "water craft exclusion" excluded this claim since the worker had been working underneath a barge. The court concluded that the claim should not be excluded since the barge was not used for transportation but merely aided the work under the dock.

TOPIC 3

Topic 3.2.2 Other Exclusions–Willful Intention

***[ED. NOTE:** The following Michigan case is included for informational value only.]*

Daniel v. Department of Corr., Mich., (No. 120460)(Mich. Supreme Court)(March 26, 2003).

The Michigan Supreme Court ruled that a worker disciplined for sexual harassment is not eligible for depression-related compensation benefits since the injury was caused by intentional and willful action. The court distinguished intentional and willful misconduct of a quasi-criminal nature from that of gross negligence where a worker can recover despite his responsibility for an injury. Here a probation officer had propositioned several female attorneys and later alleged that he had felt "harassed." by his accusers as well as by his supervisor who had suspended him.

Topic 3.4 Coverage—Credit for Prior Awards

ERRATA

The reference to "Topic 50.4.1" in the first paragraph of this subsection should have been to "Topic 85.4.1."

Topic 3.4 Coverage—Credit for Prior Awards

Carpenter v. California United Terminals, 38 BRBS 56 (2004), *grant'g and partly deny'g recon of* 37 BRBS 149 (2003).

This matter involves whether a second employer is entitled to a credit when a claimant first sustains a permanent partial disability while working for a first employer and then sustains a permanent total disability while working for the second employer. In this case, within the jurisdiction of the **Ninth Circuit**, the Board cited to *Stevedoring Services of Americ v. Price*, 366 F.3d 1045, 38 BRBS ___ (CRT)((**9th Cir.** 2004), *rev'g in pert. part* 36 BRBS 56 (2002) as being dispositive. In *Price*, the **Ninth Circuit** held that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping."

In the instant case, the ALJ had determined, as recognized by the Board, "that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits did not exceed two-thirds of claimant's average weekly wage at the time of [the second injury]. The Board affirmed the ALJ's finding that the instant case presented no danger of "double dipping," and his consequent determination that the

claimant was entitled to receive concurrent awards of permanent partial and total disability benefits for purposes of Section 8(a).

The Board further noted that the **Ninth Circuit** additionally held in *Price* that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, rather than from all awards combined. In this regard, the **Ninth Circuit** reversed the Board's holding that the combined amount of the awards could not exceed the maximum compensation rate under Section 6(b)(1) is consistent with the plain language of the LHWCA. The **Ninth Circuit's** decision in *Price* thus rejects the Board's interpretation of Section 6(b)(1). The Board concluded that as the present case arises in the **Ninth Circuit**, the court's opinion was controlling.

In the Board's first opinion in this matter, the Board reversed the ALJ's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held that claimant's total award of benefits was limited to this applicable maximum. The Board then held, based on the reversal of the ALJ's aforementioned determination, that "[s]ince claimant is limited to the maximum award permissible under Section 6(b)(1), [the second employer] is entitled to a credit for permanent partial disability benefits paid by [the first employer.]" Now the Board finds that, pursuant to *Price*, "we vacate our prior decision regarding Section 6(b)(1) and reinstate the ALJ's holding that Section 6(b)(1) is inapplicable to the combined concurrent awards, there can be no credit due to [the first employer] for any payments made by [the second employer].

Topic 3.4.1 LHWCA, Jones Act, and State Compensation

Songui v. City of New York, 2003 N.Y. App. Div. LEXIS 13890 (Index No. 10780/99)(Dec. 22, 2003).

This is a summary judgment order wherein the private contractor, Reynolds Shipyard Corporation, successfully argued that a Jones Act claim should be dismissed since the barge repairman was a land-based worker with only a transitory connection to a vessel in navigation and was hired on a temporary basis to weld a metal plate onto a garbage barge owned by the City of New York. The court found that the worker was more properly covered under the LHWCA. The City of New York also moved for summary judgment claiming that federal maritime law should preempt state labor law. In denying the city's motion, the court noted that the New York Court of Appeals has previously held that the LHWCA does not preempt New York labor law and that an action may proceed to determine if there is any fault on the part of the city.

Topic 3.4.1 LHWCA, Jones Act, and State Compensation

[ED. NOTE: *The following Social Security Disability offset case is included for informational value.****]***

Sanfilippo v. Jo Anne B. Barnhart, Commissioner of Social Security, 325 F.3d 391 (**3rd Cir.** 2003).

At issue here is how a lump sum workers' compensation settlement will offset the worker's social security disability payments. Here the claimant's Social Security disability insurance benefit was reduced by his workers' compensation benefit. Subsequently the worker settled his workers' compensation claim for a lump sum. The Social Security Administration chose to offset this lump sum by continuing to make the same monthly setoffs until the lump sum amount is reached (a period of 4.3 years). The worker argued that the setoff of the lump sum award should have been prorated over his life expectancy (1,487 weeks). The **Third Circuit** noted that when an individual's workers' compensation benefits are paid in a lump sum, the Social Security Act requires the Commissioner to prorate the lump sum payment and "approximate as nearly as practicable" the rate at which the award would have been paid on a monthly basis. "In sum, we find nothing irrational about applying a periodic rate received prior to a lump-sum settlement to determine the offset rate that will approximate as nearly as practicable the hypothetical, future period rate of the lump-sum settlement."

TOPIC 4

Topic 4.1.1 Compensation Liability—Employer Liability—Contractor/Subcontractor Liability]

Love v. AAA Temporaries, Inc. ___ So.3d ___ (No. 2003 CA 2735)(La. App. 1 Cir. Nov. 10, 2004).

In this procedural matter, a plaintiff temporary worker filed suit against the agency assigning the worker and the company employing the worker, for injuries sustained while working as a deckhand on a barge. A finding of the company's tort liability was contingent upon a determination of whether it possessed LHWCA coverage under Section 4 at the time of the accident. The appellate court found that although tort liability was contingent on whether there was coverage at the time of the accident and that this determination was pending on appeal, the trial court still retained jurisdiction to determine the issue of liability.

Topic 4.1.1 Compensation Liability—Contractor/Subcontractor Liability

Maumau v. Healy Tibbits Builders, Inc., (Unpublished)(BRB Nos. 03-0830 and 04-0311)(Sept. 8, 2004).

The Board upheld the ALJ's determination that in a Section 4(a) subcontractor case, where the subcontractor fails to secure compensation, the general contractor is liable for attorney fees. While Section 4(a) mentions only "compensation," it must be read in conjunction with Section 5(a), under which an employer, as the general

contractor, is liable for the benefits awarded to claimants because of its subcontractors. Since the subcontractor failed to comply with the insurance coverage requirements of the LHWCA, the employer must be treated as the "employer" for compensation purposes. The ALJ concluded that, as is the case with any employer liable for compensation under the LHWCA, it is additionally liable for an award of an attorney's fees if the provisions of Section 28(a) or (b) are satisfied. The Board affirmed this analysis and interpretation.

Topic 4.1.1 Compensation Liability—Contractor/subcontractor Liability

Hebert v. Pride International, (Unpublished) (Civ. No. 03-0804)(E. D. La. March 5, 2004); 2004 U.S. Dist. LEXIS 3436.

This OCS summary judgment matter dealt with whether a worker was a borrowed employee making his exclusive remedy workers' compensation benefits under the LHWCA. Noting **Fifth Circuit** case law, the federal district court listed the nine factors a court must consider in making a borrowed employee determination.

Topic 4.1.1 Compensation Liability–Contractor/Subcontractor Liability

Sobratti v. Tropical Shipping and Const. Co., Ltd., 267 F. Supp. 2d 455 (D. Vir. Isls. 2003), 2003 WL 21418333.

The issue here is whether a trial court correctly granted a borrowing employer summary judgment when a worker injured upon a vessel filed a LHWCA claim and then filed an action in the Virgin Islands Territorial trial court against the borrowing employer. [The Federal District Court of the Virgin Islands serves as the appellate court of the Territorial Court.] Prior to the filing of the trial court action, OWCP had found the claimant to be covered by the LHWCA and the borrowing employer, Tropical Shipping, to be responsible. Claimant received benefits from Tropical Shipping. He then filed a negligence action against Tropical Shipping, claiming he fell into a "twilight zone" status of uncertain LHWCA coverage.

The Virgin Islands Federal District Court concluded the summary judgment against the claimant was proper given the claimant's prior admissions on the issue of borrowed employee. It found that his assertions "conclusively determined the issue of Tropical's employer status thereby removing any genuine dispute on that issue." The court noted that, "The factual basis of appellant's entire negligence claim was that he was working for Tropical at the time he was injured; that Tropical had a duty, as his employer, to provide safe equipment and failed to do so in this instance by providing him with a defective ladder, and that Tropical's safety standards were breached. Additionally, the assertions in the initial pleadings were consistent with Sobratti's claims to the administrative agency, for the purpose of recovering benefits under the LHWCA. Throughout the administrative proceedings following his injury, Sobratti continuously asserted and relied on the fact that he was an employee of Alltempts, performing duties

for Tropical." In sum, the court found that the record was replete with admissions and facts which establish that Tropical was the borrowed employer with control over the claimant's work at the time he was injured and that Tropical was protected under Section 5 of the LHWCA.

Topic 4.1.1 Compensation Liability–Contractor/Subcontractor Liability

Hudson v. Forest Oil Corp., (Unpublished) (No. Civ. A. 02-2225)(E.D. La. June 2, 2003); 2003 WL 21276385; *aff'd at* 372 F.3d 742 (**5th Cir.** 2004).

In this "borrowing employer" case, the insurer of the claimant's formal employer paid compensation benefits and sought reimbursement from the insurer of the borrowing employer. The federal district court rejected this claim for reimbursement. The insurer of the formal employer had first cited *Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774 (**5th Cir.** 1996), for the proposition that when a formal employer has already paid benefits, it is entitled to reimbursement for the borrowing employer. However, *Total Marine* is distinguishable since its holding was conditioned on the fact that there was no valid and enforceable indemnification agreement. In the instant case there was such an agreement. The formal employer also argued that any indemnification and waiver of subrogation clauses were invalid under the Louisiana Oilfield Anti-Indemnity Act (LOAIA), La. Rev. Stat. Ann. § 9:2780. The federal district court found the statute inapplicable and thus the indemnification and waiver of subrogation were valid.

TOPIC 5

Topic 5 Exclusiveness of Remedy and Third Party Liability--Generally

In Re: Kirby Inland Marine, 2002 WL 31746725, 237 F. Supp. 2d 753 (S.D. Tex. Dec. 2, 2002).

This matter involves a third party action commenced after a longshoreman was injured when he fell from the deck of a vessel onto the hopper. After the longshoreman filed his 905(b) Action in state court, the vessel owner filed under the Limitation of Vessel Owners Liability Act, 46 U.S.C. §§ 181 *et seq.* to stay the state court action pending the Limitation proceeding. The longshoreman stipulated that the federal court had exclusive jurisdiction over the limitation action and that he would not try to enforce a 905(b) judgment in excess of the declared value of the vessel until the Limitation action had been determined. However, since the 905(b) Action included claims by other corporate entities for indemnification and contribution, the federal district court would not lift the stay since there was no assurance by these "other plaintiffs" that they would not seek enforcement prior to the determination of the Limitation action.

Topic 5.1 Exclusiveness of Remedy and Third Party Liability--Generally

Riley v. F A Richard & Associates Inc; Ingalls Shipbuilding; and Hyland, (Unreported) (No. 01-60337) (August 1, 2002) (**5th Cir.** 2002).

At issue here was whether a claim filed against an employer, a self-insured administrator, and an individual of that administrator, was properly removed from state court to federal court and then ultimately dismissed by the federal district court. The longshore claimant (Riley) asserted that Hyland, a nurse employee/agent of F A Richard, posed as Riley's medical case manager and that Hyland, while purporting to assist Riley in obtaining appropriate medical care, engaged in ex parte communications with Riley's doctor. According to Riley, these communications caused the doctor to reverse his opinion regarding the nature and causation of Riley's back condition. After contact with Hyland, the doctor concluded that a natural progression of Riley's congenital spondylolisthesis caused Riley's back pain rather than the work-related accident. In a suit filed in Mississippi state court, Riley alleged that Ingalls and FA Richard established a close working relationship with the Orthopaedic Group, where numerous injured Ingalls employees are sent for treatment.

According to Riley, this close relationship allowed Ingalls and F A Richard to exert inappropriate influence over the Orthopaedic Group's physicians so as to interfere with the medical treatment of injured Ingalls employees. Specifically, Riley asserted the following nine state law claims: (1) intentional interference with contract, (2) breach of fiduciary duty, (3) intentional interference with prospective advantage, (4) medical malpractice by Hyland, as nurse, (5) fraud and misrepresentation, (6) negligence, (7) intentional infliction of emotional distress, (8) intentional interference with medical care and/or breach of confidentiality of doctor/patient privilege, and (9) intentional interference with medical care by ex parte communication.

The **Fifth Circuit** found that Riley did not fraudulently join Ingalls in order to avoid federal diversity and found that Riley's claim against Ingalls was not for wages, compensation benefits or bad faith refusal to pay benefits; but rather was "for damages that are completely independent of the employer/employee relationship."

The court concluded that the federal district court lacked both federal question jurisdiction and diversity jurisdiction over this matter. The court noted that the LHWCA is nothing more than a ‘‘statutory defense' to a state-court cause of action and that the LHWCA does not create federal subject matter jurisdiction supporting removal.

Topic 5.1.1 Exclusiveness of Remedy and Third Party Liability—Exclusive Remedy

Hebert v. Pride International, (Unpublished) (Civ. No. 03-0804)(E. D. La. March 5, 2004); 2004 U.S. Dist. LEXIS 3436.

This OCS summary judgment matter dealt with whether a worker was a borrowed employee making his exclusive remedy workers' compensation benefits under the LHWCA. Noting **Fifth Circuit** case law, the federal district court listed the nine factors a court must consider in making a borrowed employee determination.

Topic 5.1.1 Exclusiveness of Remedy and Third Party Liability—Exclusive Remedy

Cheramie v. Superior Shipyard and Fabrication, Inc., (Unpublished) (Civ. A 02-3099)(E.D. La. July 7, 2003).

Here the claimant was injured while working in a ship repair facility. He settled with the owner of the boat on which he was working and filed a 905 action against his employer. His employer filed a motion for summary judgment noting that the claimant had not sought the employer's written permission prior to entering into the settlement with the boat owner. The claimant alleges that he was entitled to file the 905 action because his employer failed to secure LHWCA insurance. In denying the motion for summary judgment, the federal district judge found that "Section 933(g) is inapplicable because [claimant] is suing [his employer] for damages, not compensation or benefits under the LHWCA." The judge went on to state, "[T]he Court does not consider whether Plaintiff's action is permissible under Section 905(a), or whether [the employer] has failed to secure payment of compensation because the record is devoid of any reference as to whether [the claimant] has either sought or received compensation from [the employer]."

Topic 5.1.1 Exclusiveness of Remedy and Third Party Liability–Exclusive Remedy

Sobratti v. Tropical Shipping and Const. Co., Ltd., 267 F. Supp. 2d 455 (D. Vir. Isls. 2003), 2003 WL 21418333.

The issue here is whether a trial court correctly granted a borrowing employer summary judgment when a worker injured upon a vessel filed a LHWCA claim and then filed an action in the Virgin Islands Territorial trial court against the borrowing employer. [The Federal District Court of the Virgin Islands serves as the appellate court of the Territorial Court.] Prior to the filing of the trial court action, OWCP had found the claimant to be covered by the LHWCA and the borrowing employer, Tropical Shipping, to be responsible. Claimant received benefits from Tropical Shipping. He then filed a negligence action against Tropical Shipping, claiming he fell into a "twilight zone" status of uncertain LHWCA coverage.

The Virgin Islands Federal District Court concluded the summary judgment against the claimant was proper given the claimant's prior admissions on the issue of borrowed employee. It found that his assertions "conclusively determined the issue of

Tropical's employer status thereby removing any genuine dispute on that issue." The court noted that, "The factual basis of appellant's entire negligence claim was that he was working for Tropical at the time he was injured; that Tropical had a duty, as his employer, to provide safe equipment and failed to do so in this instance by providing him with a defective ladder, and that Tropical's safety standards were breached. Additionally, the assertions in the initial pleadings were consistent with Sobratti's claims to the administrative agency, for the purpose of recovering benefits under the LHWCA. Throughout the administrative proceedings following his injury, Sobratti continuously asserted and relied on the fact that he was an employee of Alltempts, performing duties for Tropical." In sum, the court found that the record was replete with admissions and facts which establish that Tropical was the borrowed employer with control over the claimant's work at the time he was injured and that Tropical was protected under Section 5 of the LHWCA.

Topic 5.1.2 Exclusiveness of Remedy and Third Party Liability--Right to Sue Employer If No Coverage

[ED. NOTE:** The following California Workers' compensation case is included for informational purposes only.**]

Le Parc Community Association v. Worker's Compensation Appeals Board, ___ Cal. App. 2 Dist, 2003; 2 Cal. Rptr. 3d 408, (W.C.A.B. No. VNO041798) (July 25, 2003).

The California Court of Appeal held that a civil action for negligence by an injured employee against an illegally uninsured employer pursuant to the California Labor Code, as a matter of law, is not based on the same cause of action as an application for compensation filed with the compensation Board pursuant to the code and that the principles of *res judicata* and collateral *estoppel* do not bar the employee's pursuit of his workers' compensation remedy.

Topic 5.1.2 Exclusiveness of Remedy and Third Party Liability--Right to Sue Employer If No Coverage

Cheramie v. Superior Shipyard and Fabrication, Inc., ___ F. Supp 2d ___ (Civ. A 02-3099)(E.D. La. July 7, 2003).

Here the claimant was injured while working in a ship repair facility. He settled with the owner of the boat on which he was working and filed a 905 action against his employer. His employer filed a motion for summary judgment noting that the claimant had not sought the employer's written permission prior to entering into the settlement with the boat owner. The claimant alleges that he was entitled to file the 905 action because his employer failed to secure LHWCA insurance. In denying the motion for summary judgment, the federal district judge found that "Section 933(g) is inapplicable because [claimant] is suing [his employer] for damages, not compensation or benefits

under the LHWCA." The judge went on to state, "[T]he Court does not consider whether Plaintiff's action is permissible under Section 905(a), or whether [the employer] has failed to secure payment of compensation because the record is devoid of any reference as to whether [the claimant] has either sought or received compensation from [the employer]."

Topic 5.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability—Generally

Anastasiou v. M/T World Trust, ___ F. Supp. 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying A Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

The court found that the plaintiff satisfied both pre- and post-1972 LHWCA amendment tests for coverage. The plaintiff had alleged that he did not fall under the protections of the LHWCA because his work in conducting the radio survey was not an "integral or essential part of loading or unloading a vessel." The court found that the plaintiff misread pertinent case law and that the **Second Circuit** has held that an individual satisfies the status test where he has "a significant relationship to navigation or to commerce on navigable waters." The court noted that the LHWCA "clearly divides maritime workers into two mutually exclusive categories: seamen, on the one hand, and longshoremen, harbor workers and all other employees entitled to protection under the Act, on the other hand." The court pointed out that in rare instances longshoremen and harbor worker type workers not covered by the LHWCA ["Sieracki seamen"] may avail themselves of the duty of seaworthiness.

The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American Bureau of Shipping standards. His claim also failed to put forward any evidence that there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

Topic 5.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability

Lively v. Diamond Offshore Drilling, Inc., (Unpublished)(No. Civ. A. 03-1989)(E.D. La. August 3, 2004).

At issue here was whether, under the OCSLA, general maritime law or Louisiana law would apply. (Louisiana law prohibits enforcement of an indemnity provision pursuant to the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). In addressing whether state law would apply as surrogate law, the court reviewed the law of the **Fifth Circuit** to determine if federal maritime law applied of its own force in this case. Noting that circuit law indicates that a contract to furnish labor to work on special purpose vessels to service oil wells is a maritime contract, the district court concluded that the worker's duties were in furtherance of the vessel's primary purpose and that the agreement was maritime. Thus federal law and not Louisiana law governed.

The court next held that Section 905(c) and not 905(b) governed since the worker was a non-seaman engaged in drilling operations on the OCS. (As a non-seaman engaged in drilling operations on the OCS, the worker is subject to the exclusive remedy of the LHWCA by virtue of 43 U.S.C. § 1333(b) of the OCSLA, rather than 33 U.S.C. § 901, *et seq.* When the LHWCA is applicable by virtue of Section 1333(b), the third-party remedy against the vessel owner is governed by Section 905(c).) Under Section 905(c) "any reciprocal indemnity provision" between the vessel and the employer is enforceable.

Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531 (**5th Cir.** 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Koch v. R.E. Staite Engineering, Inc., (Unpublished), 2004 Cal. App. Unpub. LEXIS 898 (D041657)(Court of Appeal of California, Fourth Appellate District, Division One) (January 29, 2004).

In this 905(b) related matter, the injured worker was a commercial diver and marine construction worker employed injured in an underwater industrial accident while he was repairing the decaying wall of a quay at a San Diego Navy base near a self-propelled barge owned by his employer. This is the de novo appeal of a summary judgment issued in favor of the employer which had found that the undisputed material facts showed that the accident occurred during marine construction activity due to co-workers' acts and not in the employer's capacity as vessel owner.

The court noted that Section 905(b) of the LHWCA authorizes certain covered employees to bring an action against the vessel as a third party if their employment-related injury was caused by the negligence of the vessel. It found that the employer here was a "dual-capacity" employer and that liability in vessel negligence under Section 905(b) will only lie where the dual-capacity defendant breached its duties of care while acting in its capacity as vessel owner. Thus, the analysis must determine whether the negligent actions of a dual-capacity defendant's employees were undertaken in pursuance of the defendant's role as vessel owner or as employer. The court found here that the conclusion was correct that the actions had been taken by co-workers in pursuance of the employer's role as an employer. Thus the summary judgment decision was upheld.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Beasley v. U.S. Welding Service, Inc. (Unreported) (Civ. A. 02-2567)(E.D. La. January 20, 2004).

In this potential 905(b) case, the court found that it did not need to determine the worker's seaman status (Claimant sued under both the Jones Act and filed a 905(b) action) since he failed to carry his burden of proving that an incident occurred and that it caused his injury. The court found that the worker's version of the facts defied the laws of physics. It seems his injuries were more consistent with previous injuries.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

[ED. NOTE: *The following case has been revised by the* ***Fifth Circuit*** *twice now. The outcome remains the same however.****]***

Moore v. ANGELA MV, 353 F.3d 376 (**5th Cir.** 2004).

In this 905(b) action, the **Fifth Circuit** found that the non-pecuniary award (for loss of love and affection totaling $750,000) given to the surviving widow was excessive. (The couple, both approximately 50 years old, had been married for six months after having been together for seven years. They had no children.) It further held that the district court exceeded its authority in increasing the security posted in lieu of the vessel.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Lincoln v. Reksten Mgmt., 354 F.3d 262 (**4th Cir.** 2003).

At the federal district court level, a motion for summary judgment was issued in this 905(b) claim wherein the court found that the longshoreman had not provided sufficient evidence that the turnover duty (the duty to use reasonable care when turning over the ship for stevedoring activities) to the longshoreman had been breeched. The **Fourth Circuit** found that Reksten may have breached its duty by failing to inspect or warn. The vessel might have been negligent in the maintenance, upkeep, and especially the inspection of the deck where the longshoreman was injured so that, in the exercise of reasonable care, it might have discovered the defect or hole in the decking into which he fell, enabling it to warn the stevedore of the defect. Therefore the circuit court vacated the district court's grant of summary motion.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Stewart v. Dutra Construction Co., ___ F.3d ___, (No. 02-1713) (**1st Cir.** Sept. 4, 2003), c*ert. granted*, ___ **U.S.** ___ , 124 **S.Ct.** 1414 (No. 03-814) **Supreme Court** will consider whether a dredge is a “vessel” under the Jones Act.).

In this "905(b)" and Jones Act case the **First Circuit** granted summary judgment against the Jones Act claim after finding that there was not a "vessel in navigation" for purposes of the Jones Act. The court next determined that it need not labor over "vessel status" for purposes of the LHWCA: "Although the LHWCA permits an employee to sue in negligence only in the event of an injury caused by the negligence of a vessel, 33 U.S.C. § 905(b), the LHWCA's definition of ‘vessel' is ‘significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" Citing *Morehead v. Atkinson-Kiewit*, 97 F.3d 603 **(1st Cir**. 1996)(*en banc*).

As to the 905(b) matter, the court addressed the "dual capacity" issue where the Longshore employer is also the vessel owner. If a dual capacity defendant's alleged acts of negligence were committed in its capacity *qua* employer (for which it is immune from tort liability under 905(b)) or *qua* vessel owner (for which it may be held liable under 905(b)). The circuit court rejected using a "functional" approach because it increased uncertainty and contravened the Congressional intent behind the LHWCA by expanding vessel owner liability. The court concluded that the dual capacity vessel could be held liable under 905(b) only to the extent that it breached its duties of care while acting in its capacity as a vessel.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Cheramie v. Superior Shipyard and Fabrication, Inc., ___ F. Supp 2d ___ (Civ. A 02-3099)(E.D. La. July 7, 2003).

Here the claimant was injured while working in a ship repair facility. He settled with the owner of the boat on which he was working and filed a 905 action against his employer. His employer filed a motion for summary judgment noting that the claimant had not sought the employer's written permission prior to entering into the settlement with the boat owner. The claimant alleges that he was entitled to file the 905 action because his employer failed to secure LHWCA insurance. In denying the motion for summary judgment, the federal district judge found that "Section 933(g) is inapplicable because [claimant] is suing [his employer] for damages, not compensation or benefits under the LHWCA." The judge went on to state, "[T]he Court does not consider whether Plaintiff's action is permissible under Section 905(a), or whether [the employer] has failed to secure payment of compensation because the record is devoid of any reference as to whether [the claimant] has either sought or received compensation from [the employer]."

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Scott v. Trump Indiana, Inc., 337 F.3d 939, (**7th Cir.** July 28, 2003).

In this Admiralty Extension Act and LHWCA 905(b) case, the **Seventh Circuit** found that neither a land-based crane nor a life raft were "appurtenances" to a vessel. The circuit court further found that the director of safety training was not engaged in maritime employment" for purposes of the LHWCA. The director had been injured on a dock while observing a life raft being lowered onto the dock. His employer had contracted with Trump Indiana to design, install and maintain the lifesaving equipment required by the U.S. Coast Guard for the vessel "Trump Casino."

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Christensen v. Georgia-Pacific Corp, 279 F.3d 807 (**9th Cir.** 2002).

***[ED. NOTE:** While the forum for "905(b) negligence claims is federal district court, the **Ninth Circuit's** general language as to "coverage" under the LHWCA is noteworthy here.]*

At issue in this "905(b)" claim [33 U.S.C.§ 905(b)] was whether the district court had properly granted a motion for summary judgment when it held that, as a matter of

law, the injury was not a foreseeable result of the appellee's acts. The **Ninth Circuit** reversed, finding that genuine issues of material fact existed as to breach of duty and proximate cause that must be resolved at trial.

Under Section 905(b), a claimant can sue a vessel for negligence under the LHWCA. However the **Supreme Court** has limited the duties that a vessel owner owes to the stevedores working for him or her. *Scindia Steam Navigation Co. v. De Los Santos*, 451 **U.S.** 156, (1981) (A vessel owes three duties to its stevedores: the turnover duty, the active control duty, and the intervention duty.).

In *Christensen*, the **Ninth Circuit** noted that "Coverage does not depend upon the task which the employee was performing at the moment of injury." [**Ninth Circuit** cites *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (**9th Cir.** 1978); H. Rep. No. 98-570, at 3-4 (1984), reprinted in 1984 U.S.C.C.A.N. §§ 2734, 2736-37.] The court found that claimant "was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA."

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

Mayberry v. Daybrook Fisheries, Inc., Unpublished) (2002 WL 1798771) (E.D. La. Aug 5, 2002).

A "905(b) action" is not available where it was dock-side, land-based equipment that caused an injury. For there to be a 905(b) action against the vessel owner, there must be vessel negligence. Therefore, the vessel owner is not liable for breaching the "turnover duty" (failing to warn a stevedore when turning over the ship hidden defects of which the owner should know) since the faulty equipment was not part of the vessel.

Topic 5.2.1 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Generally

In the Matter of The Complaint of Kirby Inland Marine, 241 F. Supp. 2d 721 (S.D. Texas Jan. 15, 2003), 2003 WL 168673.

This proceeding under the Limitation of Vessel Owners Liability Act was filed in connection with a 905(b) action. The district court held that where a seaman performing longshore duties could have avoided an accident by watching his step more carefully, the vessel owner was not liable for injuries sustained when the seaman fell from the main deck into a hopper.

Topics 5.2.2 Exclusiveness of Remedy and Third Party Liability—Indemnification

Clayton Williams Energy, Inc. v. National Union Fire Ins. Co. of Louisiana, ___ F. Supp. 2d ___ (Civ. Action No. 03-2980)(E.D. of La. Nov. 2, 2004)

This 905(b) claim addresses choice of law clauses and indemnity issues as they relate to the Texas Oilfield Anti-Indemnity Act (TOIA), Tex. Civ. Prac. & Rem. Code § 127.005. The district court found that "Because the TOIA conflicts with section 905(b) on the particular facts present in this case, the choice of law clause will not be enforced and Texas law does not govern the enforceability of the indemnity agreement."

Topic 5.2.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Indemnification

Lively v. Diamond Offshore Drilling, Inc., (Unpublished)(No. Civ. A. 03-1989)(E.D. La. August 3, 2004).

At issue here was whether, under the OCSLA, general maritime law or Louisiana law would apply. (Louisiana law prohibits enforcement of an indemnity provision pursuant to the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). In addressing whether state law would apply as surrogate law, the court reviewed the law of the **Fifth Circuit** to determine if federal maritime law applied of its own force in this case. Noting that circuit law indicates that a contract to furnish labor to work on special purpose vessels to service oil wells is a maritime contract, the district court concluded that the worker's duties were in furtherance of the vessel's primary purpose and that the agreement was maritime. Thus federal law and not Louisiana law governed.

The court next held that Section 905(c) and not 905(b) governed since the worker was a non-seaman engaged in drilling operations on the OCS. (As a non-seaman engaged in drilling operations on the OCS, the worker is subject to the exclusive remedy of the LHWCA by virtue of 43 U.S.C. § 1333(b) of the OCSLA, rather than 33 U.S.C. § 901, *et seq.* When the LHWCA is applicable by virtue of Section 1333(b), the third-party remedy against the vessel owner is governed by Section 905(c).) Under Section 905(c) "any reciprocal indemnity provision" between the vessel and the employer is enforceable.

Topic 5.2.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability--Indemnification

Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531 (**5th Cir.** 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator

of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

Topic 5.2.2 Exclusiveness of Remedy and Third Party Liability—Third Party Liability--Indemnification

Hudson v. Forest Oil Corp., (Unpublished)(No. Civ. A. 02-2225)(E.D. La. June 2, 2003), *aff'd at* 372 F.3d 742 (**5th Cir.** 2004).

In this "borrowing employer" case, the insurer of the claimant's formal employer paid compensation benefits and sought reimbursement from the insurer of the borrowing employer. The federal district court rejected this claim for reimbursement. The insurer of the formal employer had first cited *Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774 (**5th Cir.** 1996), for the proposition that when a formal employer has already paid benefits, it is entitled to reimbursement for the borrowing employer. However, *Total Marine* is distinguishable since its holding was conditioned on the fact that there was no valid and enforceable indemnification agreement. In the instant case there was such an agreement. The formal employer also argued that any indemnification and waiver of subrogation clauses were invalid under the Louisiana Oilfield Anti-Indemnity Act (LOAIA), La. Rev. Stat. Ann. § 9:2780. The federal district court found the statute inapplicable and thus the indemnification and waiver of subrogation were valid.

Topic 5.2.3 Exclusiveness of Remedy & Third Party Liability—Third Party Liability--Dual Capacity States of Maritime Employer

Stewart v. Dutra Construction Co., ___ F.3d ___, (No. 02-1713) (**1st Cir.** Sept. 4, 2003), c*ert. granted*, ___ **U.S.** ___ , 124 **S.Ct.** 1414 (No. 03-814) (2004) **Supreme Court** will consider whether a dredge is a "vessel" under the Jones Act.).

In this "905(b)" and Jones Act case the **First Circuit** granted summary judgment against the Jones Act claim after finding that there was not a "vessel in navigation" for purposes of the Jones Act. The court next determined that it need not labor over "vessel status" for purposes of the LHWCA: "Although the LHWCA permits an employee to sue in negligence only in the event of an injury caused by the negligence of a vessel, 33 U.S.C. § 905(b), the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" Citing *Morehead v. Atkinson-Kiewit*, 97 F.3d 603 (**1st Cir.** 1996)(*en banc*).

As to the 905(b) matter, the court addressed the "dual capacity" issue where the Longshore employer is also the vessel owner. If a dual capacity defendant's alleged acts

of negligence were committed in its capacity *qua* employer (for which it is immune from tort liability under 905(b)) or *qua* vessel owner (for which it may be held liable under 905(b)). The circuit court rejected using a "functional" approach because it increased uncertainty and contravened the Congressional intent behind the LHWCA by expanding vessel owner liability. The court concluded that the dual capacity vessel could be held liable under 905(b) only to the extent that it breached its duties of care while acting in its capacity as a vessel.

Topic 5.3 Exclusiveness of Remedy and Third Party Liability Indemnification in OCSLA Claims

Clayton Williams Energy, Inc. v. National Union Fire Ins. Co. of Louisiana, ___ F. Supp. 2d ___ (Civ. Action No. 03-2980)(E.D. of La. Nov. 2, 2004)

This 905(b) claim addresses choice of law clauses and indemnity issues as they relate to the Texas Oilfield Anti-Indemnity Act (TOIA), Tex. Civ. Prac. & Rem. Code § 127.005. The district court found that "Because the TOIA conflicts with section 905(b) on the particular facts present in this case, the choice of law clause will not be enforced and Texas law does not govern the enforceability of the indemnity agreement."

Topic 5.3 Exclusiveness of Remedy & Third Party Liability—Third Party Liability--Indemnification in OCSLA Claims

Diamond Offshore Co. v. A & B Builders, Inc., 302 F.3d 531 (**5th Cir.** 2002).

This 905(b) summary judgment case concerning whether there has been a breach of an indemnity provision in a contract, has an extensive discussion of "situs" and "status" under the OCSLA. The matter was remanded for supplementation of the record in order for there to be a determination as to if there was a genuine issue of material fact as to whether the repair contractor's employee's injury on an offshore drilling rig qualified as an OCSLA situs so that the contractor could validly contract to indemnify the operator of the rig with respect to the injury. The court noted that because an employee of a contractor repairing an offshore drilling rig was injured on navigable water (qualifying for benefits under the LHWCA) did not preclude the possibility of also qualifying for benefits under the OCSLA. If the worker qualified for benefits directly under the OSCLA, the contractor could validly contract to indemnify the rig operator as to the worker's injury.

Topic 5.3 Exclusiveness of Remedy & Third Party Liability—Third Party Liability--Indemnification in OCSLA Claims

Hudson v. Forest Oil Corp., (Unpublished)(No. Civ. A. 02-2225)(E.D. La. June 2, 2003), *aff'd at* 372 F.3d 742 (**5th Cir.** 2004).

In this "borrowing employer" case, the insurer of the claimant's formal employer paid compensation benefits and sought reimbursement from the insurer of the borrowing employer. The federal district court rejected this claim for reimbursement. The insurer of the formal employer had first cited *Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774 (**5th Cir.** 1996), for the proposition that when a formal employer has already paid benefits, it is entitled to reimbursement for the borrowing employer. However, *Total Marine* is distinguishable since its holding was conditioned on the fact that there was no valid and enforceable indemnification agreement. In the instant case there was such an agreement. The formal employer also argued that any indemnification and waiver of subrogation clauses were invalid under the Louisiana Oilfield Anti-Indemnity Act (LOAIA), La. Rev. Stat. Ann. § 9:2780. The federal district court found the statute inapplicable and thus the indemnification and waiver of subrogation were valid.

TOPIC 6

Topic 6.2.1 Commencement of Compensation—Maximum Compensation for Disability and Death Benefits

Carpenter v. California United Terminals, 38 BRBS 56 (2004), *grant'g and partly deny'g recon of* 37 BRBS 149 (2003).

This matter involves whether a second employer is entitled to a credit when a claimant first sustains a permanent partial disability while working for a first employer and then sustains a permanent total disability while working for the second employer. In this case, within the jurisdiction of the **Ninth Circuit**, the Board cited to *Stevedoring Services of Americ v. Price*, 366 F.3d 1045, 38 BRBS ___ (CRT)(**9th Cir.** 2004), *rev'g in pert. part* 36 BRBS 56 (2002) as being dispositive. In *Price*, the **Ninth Circuit** held that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping."

In the instant case, the ALJ had determined, as recognized by the Board, "that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits did not exceed two-thirds of claimant's average weekly wage at the time of [the second injury]. The Board affirmed the ALJ's finding that the instant case presented no danger of "double dipping," and his consequent determination that the claimant was entitled to receive concurrent awards of permanent partial and total disability benefits for purposes of Section 8(a).

The Board further noted that the **Ninth Circuit** additionally held in *Price* that Section 6(b)(1) delineates the maximum compensation that an employee may receive

from each disability award, rather than from all awards combined. In this regard, the **Ninth Circuit** reversed the Board's holding that the combined amount of the awards could not exceed the maximum compensation rate under Section 6(b)(1) is consistent with the plain language of the LHWCA. The **Ninth Circuit's** decision in *Price* thus rejects the Board's interpretation of Section 6(b)(1). The Board concluded that as the present case arises in the **Ninth Circuit**, the court's opinion was controlling.

In the Board's first opinion in this matter, the Board reversed the ALJ's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held that claimant's total award of benefits was limited to this applicable maximum. The Board then held, based on the reversal of the ALJ's aforementioned determination, that "[s]ince claimant is limited to the maximum award permissible under Section 6(b)(1), [the second employer] is entitled to a credit for permanent partial disability benefits paid by [the first employer.]" Now the Board finds that, pursuant to *Price*, "we vacate our prior decision regarding Section 6(b)(1) and reinstate the ALJ's holding that Section 6(b)(1) is inapplicable to the combined concurrent awards, there can be no credit due to [the first employer] for any payments made by [the second employer].

Topic 6.2.1 Commencement of Compensation—Maximum Compensation for Disability and Death Benefits

Stevedoring Servs. Of Am. v. Price, 366 F.3d 1045 (**9th Cir.** 2004).

When a longshoreman has worked more than 75 percent of the workdays in the year preceding injury, the **Ninth Circuit** found that Section 10(a) does not excessively overcompensate the claimant.

The court also found that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, not from all awards combined. In situations of multiple awards, the court stated that it recognized that the amount of adjustments needed, if any, depended on the factual determination of the cause of the employee's increase in earnings between the time of his first and second injury:

> "If an employee's increase in earnings is not caused by a change in his wage-earning capacity, allowing the employee to retain the full amount of both awards does not result in any double dipping. The reason is that the prior partial disability award compensates the employee for the reduction in his wage-earning capacity from the first accident, and the subsequent permanent total disability award compensates the employee for what remains of his earning capacity after that accident. [Citation omitted.] Taken together, the awards do not compensate the employee for more earning capacity than he has actually lost. In comparison, a double dipping problem would arise if a change in conditions since the first accident has mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. In that case, because the first award overestimated the effect of the first injury on the employee's wage end up

compensating the employee for more wage-earning capacity than he has actually lost."

The **Ninth Circuit** stated that its holding as to Section 6(b)(1) is consistent with the plain language of the LHWCA and effectuates the underlying policy of the Act by shielding employers from high compensation payments for injuries to highly paid workers while providing employers an incentive to prevent future injuries to formerly injured employees.

Topic 6.2.1 Commencement of Compensation--Maximum Compensation for Disability and Death Benefits

Carpenter v. California United Terminals, 37 BRBS 149)(2003).

In a case involving concurrent awards for permanent partial and permanent total disability, the Board found that the Section 6(b)(1) statutory maximum compensation rate was applicable to concurrent awards rather than accepting the Director's position that Section 6(b)(1) should be considered in terms of each separate award of benefits. The Board found that the term "disability" must be construed in section 6(b)(1) such that, in instances of concurrent awards, it means the overall disability resulting from both injuries.

The Board noted that the Director's position, i.e., that the Section 6(b) limit is applicable only on a single award basis would allow for a twice-injured worker to receive compensation in excess of the single injury person, despite the fact that their overall loss in wage-earning capacities are the same. "In contrast, the Board's approach, based on the plain language of Section 6(b) limiting compensation for 'disability,' precludes this would-be inequity since both workers are subject to the same limit. The statute should not be interpreted in a way that results in claimant's receiving from two employers more than he could receive from one employer, pursuant to an explicit statutory provision."

As to how offsets may be taken, the Board once more cites *Hastings v. Earth Satellite Corp*., 628 F.2d 85, 14 BRBS 345 (**D.C. Cir.** 1980), *cert. denied*, 449 **U.S.** 905 (1980) as outlining a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case, rather than setting forth a mechanical rule.

TOPIC 7

Topic 7.1 Medical Benefits--Medical Treatment Never Time Barred

Alexander v. Avondale Industries, Inc., 36 BRBS 142 (2002).

At issue here was whether a subsequent "claim" for temporary disability in conjunction with medical benefits/surgery was timely. Here the claimant's original claim for permanent disability compensation had been denied as the employer had established the availability of suitable alternate employment which the claimant could perform at wages equal to or greater than his AWW. Additionally it should be noted that the claimant was not awarded nominal benefits. Several years later when the claimant underwent disc surgery the Employer denied a request for temporary total disability. The Board did not accept claimant's argument that Section 13 controlled as this was not a "new" claim. The Board then looked to Section 22 and found that while that section controlled, a modification request at this stage was untimely.

Topic 7.1 Medical Benefits--Medical Treatment Never Time Barred

Loew's L'Enfant Plaza v. Director (Baudendistel), (Unpublished) 2003 WL 471917 (D.C. Cir).

The **District of Columbia Circuit Court** upheld Board and ALJ's rulings that where an employer gives a blanket authorization to a claimant to seek proper medical treatment for "any problems" resulting from the 1977 incident, the claimant was entitled to medical compensation for his later discovered ailments. Here the employer gave the broad authorization in 1977 for an electrical shock. In 1988 the claimant suffered from venous stasis ulcerations and sought medical treatment.

Topic 7.3.1 Medical Benefits--Medical Treatment Provided By Employer—Necessary Treatment

Carroll v. M.Cutter Co., 38 BRBS 53 (*En banc*)(July 8, 2004), *deny'g recon. of* 37 BRBS 134 (2003). **[See next entry.]**

The Board, *en banc*, upheld its previous panel decision wherein it found that under Section 7(a) an employer must pay for supervision of a claimant totaling 24 hours per day; family members need not assume some responsibility without pay for watching a claimant for portions of the day when they would be with him anyway. "Once the [ALJ] credited the undisputed evidence that as a result of his work injury claimant needs 24-hour care provided in part by professionals and in part by non-professionals, Section 7 established employer's liability for all of the required care." Section 7(a) bases the extent of liability exclusively on a determination of the care necessitated by the injury. "As the medical experts all agreed that claimant needs 24-hour supervision, the only legal conclusion that may be reached is that employer is fully liable for the prescribed 24-hour care pursuant to Section 7."

Topic 7.3.1 Medical Benefits--Medical Treatment Provided By Employer—Necessary Treatment

Carrol v. M.Cutter Co., ___ BRBS ___ (BRB Nos. 03-0189 and 03-0189A)(Oct. 30, 2003). **[*See* Above.]**

At issue here was whether the employer had to pay for supervision 24 hours per day for a claimant who suffered a head injury resulting in cognitive impairment, especially affecting his short-term memory. (*See* Section 7(a) of the LHWCA noting that an employer shall furnish such medical, surgical, and other attendance or treatment…as the nature of the injury or the process of recovery may require.)

According to the evidence, the claimant is capable of "performing the basic activities of caring for himself, such as eating, dressing, bathing and toileting. He also has the mobility to get around his house and his neighborhood." Nevertheless, the claimant's treating physician and the independent medical examiners all agree that he needs 24-hour supervision for several reasons: he is not always aware of his surroundings; he sometimes gets lost or, he forgets things (e.g., to take his medicine or to exercise). The uncontradicted testimony shows that the claimant sometimes engages in unsafe activities when he wanders around the house at night, such as putting a kettle on the stove, turning on the burner, and then going to sleep. Uncontroverted evidence further revealed that he has used power tools and become distracted, nearly severing his fingers, that he has gotten lost and needed to rely on his five-year-old granddaughter to find his way home from the store, and that he does not remember to take his medications on a regular basis. Additionally, it was noted that the claimant gained over 100 pounds after his injury because he would eat several times a day, having forgotten when he had previously eaten.

The Board held that the ALJ erred in limiting the employer's liability to less than the 24 hours prescribed by the treating physician and recommended without contradiction by the other medical examiners. The Board stated that while the ALJ rationally found that the claimant does not need 24-hour paid licensed attendant care, it was nevertheless undisputed that he could not be left alone. The Board found that family members cannot be commandeered for services for free, regardless of their willingness to serve and that, to the extent that family members are willing to perform the services employer is obliged to provide, they must be paid, albeit at a reduced rate.

Topic 7.3.1 Medical Benefits--Medical Treatment-Necessary Treatment

Weikert v. Universal Maritime Service Corp., 36 BRBS 38 (2002).

The requirements of Section 8 of the LHWCA do not apply to a claim for medical benefits under Section 7 of the LHWCA. The Board held that a claimant need not have a minimum level of hearing loss (i.e., a ratable loss pursuant to the AMA Guides) to be entitled to medical benefits.

The Board also reject the employer's assertion that this case was controlled by *Metro-North Commuter Railroad v. Buckley*, 521 **U.S.** 424 (1997). *Buckley* involved a

railroad employee who had been exposed to asbestos and sought to recover under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), medical monitoring costs he may incur as a result of his exposure. Because *Buckley* had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the **Supreme Court** held that he was not entitled to medical monitoring. Besides coming under another act, the Board specifically noted that in the instant longshore case, the ALJ specifically found that the claimant has trouble hearing and distinguishing sounds and, thus, has symptoms of hearing loss.

Next the Board addressed the ALJ's delegation to the district director the issue as to whether hearing aids were a necessity in this matter. While noting that there are several instances where the district director has authority over certain medical matters, the Board stated that it has "declined to interpret the provisions of Section 7(b) of the [LHWCA], or Section 702.407 of the regulations,..., in such a manner as to exclude the [ALJ] from the administrative process when questions of fact are raised." Thus, the Board found, "the issue of whether treatment is necessary and reasonable, where the parties disagree, is a question of fact for the [ALJ]."

The Board also stated that, "Contrary to employer's contention, the absence of a prescription for hearing aids from a medical doctor, as required by Virginia law, does not make claimant ineligible for hearing aids, or medical benefits, under the [LHWCA]. While claimant must comply with specific provisions under Virginia law before he is able to obtain hearing aids, claimant's compliance or non-compliance with state requirements does not affect the authority of the [ALJ] to adjudicate claimant's entitlement to medical benefits under the [LHWCA]."

Topic 7.3.1 Medical Benefits--Necessary Treatment

[ED. NOTE:** The following is for informational purposes only.**]

Stone Container Corp. v. Castle, Iowa Supreme Court No. 02/01-1291 (February 26, 2003).

The state supreme court found that a lap top computer is a reasonable and necessary appliance that must be provided to a double amputee who must stay in a temperature-controlled environment. In so holding, the court rejected the employer's argument that a covered appliance had to be necessary for medical care. The court ruled that an appliance is covered when it "replaces a function lost by the employee as a result of the employee's work-related injury. The court reasoned that the lap top provided the employee with access to the outside world.

Topic 7.3.2 Medical Benefits--Treatment Required by Injury

Carroll v. M.Cutter Co., 38 BRBS 53 (*En banc*)(July 8, 2004), *deny'g recon. of* 37 BRBS 134 (2003). **[*See* next entry.]**

The Board, *en banc*, upheld its previous panel decision wherein it found that under Section 7(a) an employer must pay for supervision of a claimant totaling 24 hours per day; family members need not assume some responsibility without pay for watching a claimant for portions of the day when they would be with him anyway. "Once the [ALJ] credited the undisputed evidence that as a result of his work injury claimant needs 24-hour care provided in part by professionals and in part by non-professionals, Section 7 established employer's liability for all of the required care." Section 7(a) bases the extent of liability exclusively on a determination of the care necessitated by the injury. "As the medical experts all agreed that claimant needs 24-hour supervision, the only legal conclusion that may be reached is that employer is fully liable for the prescribed 24-hour care pursuant to Section 7."

Topic 7.3.2 Medical Benefits--Treatment Required By Injury

Carrol v. M.Cutter Co., 37 BRBS 134 (2003). **[*See* Above.]**

At issue here was whether the employer had to pay for supervision 24 hours per day for a claimant who suffered a head injury resulting in cognitive impairment, especially affecting his short-term memory. (*See* Section 7(a) of the LHWCA noting that an employer shall furnish such medical, surgical, and other attendance or treatment…as the nature of the injury or the process of recovery may require.)

According to the evidence, the claimant is capable of "performing the basic activities of caring for himself, such as eating, dressing, bathing and toileting. He also has the mobility to get around his house and his neighborhood." Nevertheless, the claimant's treating physician and the independent medical examiners all agree that he needs 24-hour supervision for several reasons: he is not always aware of his surroundings; he sometimes gets lost or, he forgets things (e.g., to take his medicine or to exercise). The uncontradicted testimony shows that the claimant sometimes engages in unsafe activities when he wanders around the house at night, such as putting a kettle on the stove, turning on the burner, and then going to sleep. Uncontroverted evidence further revealed that he has used power tools and become distracted, nearly severing his fingers, that he has gotten lost and needed to rely on his five-year-old granddaughter to find his way home from the store, and that he does not remember to take his medications on a regular basis. Additionally, it was noted that the claimant gained over 100 pounds after his injury because he would eat several times a day, having forgotten when he had previously eaten.

The Board held that the ALJ erred in limiting the employer's liability to less than the 24 hours prescribed by the treating physician and recommended without contradiction by the other medical examiners. The Board stated that while the ALJ rationally found that the claimant does not need 24-hour paid licensed attendant care, it was nevertheless undisputed that he could not be left alone. The Board found that family members cannot

be commandeered for services for free, regardless of their willingness to serve and that, to the extent that family members are willing to perform the services employer is obliged to provide, they must be paid, albeit at a reduced rate.

Topic 7.3.7 Medical Benefits--Attendants

Carroll v. M.Cutter Co., 38 BRBS 53 (*En banc*)(July 8, 2004), *deny'g recon. of* 37 BRBS 134 (2003). **[*See* next entry.]**

The Board, *en banc*, upheld its previous panel decision wherein it found that under Section 7(a) an employer must pay for supervision of a claimant totaling 24 hours per day; family members need not assume some responsibility without pay for watching a claimant for portions of the day when they would be with him anyway. "Once the [ALJ] credited the undisputed evidence that as a result of his work injury claimant needs 24-hour care provided in part by professionals and in part by non-professionals, Section 7 established employer's liability for all of the required care." Section 7(a) bases the extent of liability exclusively on a determination of the care necessitated by the injury. "As the medical experts all agreed that claimant needs 24-hour supervision, the only legal conclusion that may be reached is that employer is fully liable for the prescribed 24-hour care pursuant to Section 7."

Topic 7.3.7 Medical Benefits--Attendants

Carrol v. M.Cutter Co., 37 BRBS 134 (2003). **[*See* Above.]**

At issue here was whether the employer had to pay for supervision 24 hours per day for a claimant who suffered a head injury resulting in cognitive impairment, especially affecting his short-term memory. (*See* Section 7(a) of the LHWCA noting that an employer shall furnish such medical, surgical, and other attendance or treatment…as the nature of the injury or the process of recovery may require.)

According to the evidence, the claimant is capable of "performing the basic activities of caring for himself, such as eating, dressing, bathing and toileting. He also has the mobility to get around his house and his neighborhood." Nevertheless, the claimant's treating physician and the independent medical examiners all agree that he needs 24-hour supervision for several reasons: he is not always aware of his surroundings; he sometimes gets lost or, he forgets things (e.g., to take his medicine or to exercise). The uncontradicted testimony shows that the claimant sometimes engages in unsafe activities when he wanders around the house at night, such as putting a kettle on the stove, turning on the burner, and then going to sleep. Uncontroverted evidence further revealed that he has used power tools and become distracted, nearly severing his fingers, that he has gotten lost and needed to rely on his five-year-old granddaughter to find his way home from the store, and that he does not remember to take his medications on a regular basis.

Additionally, it was noted that the claimant gained over 100 pounds after his injury because he would eat several times a day, having forgotten when he had previously eaten.

The Board held that the ALJ erred in limiting the employer's liability to less than the 24 hours prescribed by the treating physician and recommended without contradiction by the other medical examiners. The Board stated that while the ALJ rationally found that the claimant does not need 24-hour paid licensed attendant care, it was nevertheless undisputed that he could not be left alone. The Board found that family members cannot be commandeered for services for free, regardless of their willingness to serve and that, to the extent that family members are willing to perform the services employer is obliged to provide, they must be paid, albeit at a reduced rate.

Topic 7.6.3 Physician's Report

ERRATA

The second paragraph under this subtopic should read as follows:

> The Secretary may excuse the physician's failure to do so if he finds it to be in the interest of justice. *See* 33 U.S.C. § 907(d)(2). The pre-1985 version of 20 C.F.R. § 702.422 delegated the Secretary's authority to the deputy commissioner [district director] and the the judge. *See Lloyd*, 725 F.2d at 787, 16 BRBS at 54(CRT). In *Roger's Terminal*, 784 F.2d at 694, 18 BRBS at 87(CRT), a finding of no prejudice was affirmed.

Topics 7.7 Medical Benefits--Unreasonable Refusal To Submit To Treatment

Rodriguez v. Columbia Grain, Inc., (Unpublished)(BRB No. 03-0376)(February 23, 2004).

Here the Board vacated an ALJ's Order to compel Appearance at Medical Examination. When the employer replaced a scheduled panel's psychiatrist with a neuropsychologist the claimant refused to attend, arguing that his claim was only for a purely physical injury. When the ALJ issued an Order to Compel, the claimant appealed. While finding that an ALJ has broad discretion, the Board noted that Section 18.14(a) of the OALJ Rules of Practice mandates that matters sought to be discovered be relevant to the subject matter involved in the proceeding. "The [ALJ's] summary conclusion in his Order does not sufficiently explain how the psychological component of the examination is relevant to these proceedings. Moreover, claimant specifically raised this question below, asserting that since his claim for benefits under the Act is based upon a physical injury alone, an employer-sponsored psychological examination is not relevant to his claim of a work-related back injury. The [ALJ] did not discuss claimant's arguments in this regard or explain how the psychological evaluation of claimant is

relevant to his claim. As the [ALJ] did not address claimant's assertions, which go directly to the relevancy of employer's discovery request, the case must be remanded."

Topic 7.7 Medical Benefits--Unreasonable Refusal to Submit to Treatment

Dodd v. Crown Central Petroleum Corp., 36 BRBS 85 (2002).

This remand involved both a traumatic as well as psychological injury. Although finding the claimant to be entitled to total disability benefits, the ALJ ordered the benefits suspended pursuant to Section 7(d)(4), on the ground that the claimant unreasonably refused to submit to medical treatment, i.e., an examination which the ALJ ordered and the employer scheduled. The Board noted that Section 7(d)(4) requires a dual inquiry. Initially, the burden of proof is on the employer to establish that the claimant's refusal to undergo a medical examination is unreasonable; if carried, the burden shifts to the claimant to establish that circumstances justified the refusal. For purposes of this test, reasonableness of refusal has been defined by the Board as an objective inquiry, while justification has been defined as a subjective inquiry focusing narrowly on the individual claimant.

Here the Board supported the ALJ's finding that the claimant's refusal to undergo an evaluation was unreasonable and unjustified, citing the *pro se* claimant's erroneous belief that he has the right to determine the alleged independence and choice of any physician the employer chooses to conduct its examination or can refuse to undergo the examination because the employer did not present him with a list of doctors in a timely manner, and the claimant's abuse of the ALJ by yelling and insulting the integrity of other parties. (The Board described the telephone conference the ALJ had with the parties as "contentious.") The Board held that the ALJ did not abuse his discretion by finding that the claimant's refusal to undergo the employer's scheduled examination was unreasonable and unjustified given the circumstances of this case. However, the Board noted that compensation cannot be suspended retroactively and thus the ALJ was ordered to make a finding as to when the claimant refused to undergo the examination.

The Board further upheld the ALJ's denial of the claimant's request for reimbursement for expenses related to his treatment for pain management. The ALJ rejected the claimant's evidence in support of his request for reimbursement for pain management treatment pursuant to 29 C.F.R. § 18.6(d). That section provides that where a party fails to comply with an order of the ALJ, the ALJ, "for the purpose of permitting resolution of the relevant issues may take such action thereto as is just," including,
(iii) Rule that the non-complying party may not introduce into evidence...documents or other evidence...in support of... any claim....
(v) Rule...that a decision of the proceeding be rendered against the non-complying party.

In a footnote, the Board noted that medical benefits cannot be denied under Section 7(d)(4) for any other reason than to undergo an examination. However, the Board went on to note, "The Act also provides for imposition of sanctions for failure to comply

with an order. Under Section 27(b), the [ALJ] may certify the facts to a district court if a person resists any lawful order. 33 U.S.C. § 927(b). As these provisions are not inconsistent with the regulation at 29 C.F.R. § 18.6(d)(2), the [ALJ] did not err in applying it in this case."

TOPIC 8.1

Topic 8.1.1 Disability--Nature of Disability (Permanent v. Temporary)—Generally

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (**5th Cir.** Nov. 1, 2004). ***[ED.NOTE:** This case was changed from Unpublished status to Published on December 27, 2004.**]***

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's $3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by § 921©.

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn.*, 40 F.3d at 126 (**5th Cir.** 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 percent or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the

claimant have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn… had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

Topic 8.1.7 Doubt Should Be Resolved in Favor of the Claimant

This subtopic should be modified to read as follows:

Historically, any doubt as to whether an employee has recovered, was resolved in favor of the claimant's entitlement to benefits. *Fabijanski v. Maher Terminals*, 3 BRBS 421, 424 (1976), *aff'd mem. Sub nom. Maher Terminals, Inc. v. Director, OWCP*, 551 F.2d 307 (**4th Cir.** 1977). However, *see Director, OWCP v. Greenwich Colleries*, 512 **U.S.** 267 (1994)(There is no true doubt rule under the LHWCA).

TOPIC 8.2

Topic 8.2 Extent of Disability--Partial Disability/Suitable Alternate Employment

McAfee v. Bath Iron Works Corp., (Unpublished)(BRB No. 03-0611)(Oct. 8, 2004).

The Board upheld the ALJ's denial of temporary partial disability compensation for the period during which the claimant would not cross a picket line during a strike to work at his light duty job. The Board stated that it agreed with the ALJ's statement that the LHWCA cannot "be stretched to provide compensation to a worker whose loss of wages was attributable not to his injury but rather due to a decision to participate in a strike against the worker's employer."

Topic 8.2 Extent of Disability

[ED. NOTE**: The following case is included for informational value only.**]

Cranfield v. Commissioner of Social Security, (Unpublished), 79 Fed. Appx. 852; 2003 U.S. App. LEXIS 22696 (**6th Cir.** Nov. 3, 2003).

In this Social Security disability case wherein the claimant filed a claim for disability benefits based on back, foot, hand and leg problems, the claimant appealed

arguing that the ALJ had failed to consider the claimant's obesity. In her appeal, the claimant cited the LHWCA case of *Morehead Marine Services v. Washnock*, 135 F.3d 366 (**6th Cir.** 1998) where the circuit court had held that the APA required an ALJ's decision to "include a discussion of 'findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record.'" In the instant case, the court found that the ALJ had included specific and accurate references to evidence that supported his decision and that he addressed all of the issues that the claimant relied on in her claim for benefits - back, foot, hand, and leg problems. "The ALJ did nothing more than mention [the claimant's] obesity because neither [the claimant] nor her doctors offered any evidence to suggest that her weight was a significant impairment. Since [the claimant's] claims did not indicate that obesity was a significant impairment, the ALJ was not required to give the issue any more attention than he did." (The claimant was five foot four and a half inches tall and has weighed between 214 and 276 ½ pounds.)

Topic 8.2.1 Extent of Disability—No Loss of Wage-Earning Capacity

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had

argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.2.2 Extent of Disability—*De Minimis* Awards

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

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The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.2.2 Extent of Disability--*De Minimis Awards*

Newport News Shipbuilding & Dry Dock Co., (Unpublished)(No. 03-1989) (**4th Cir.** January 5, 2004).

The **Fourth Circuit** affirmed an award of *de minimis* in relation to an award of temporary partial disability benefits. The court noted that Section 8©, dealing with permanent partial disability was not applicable here, rather Section 8(e) was applicable and thus the ALJ was correct in considering the claimant's future earnings capacity in issuing the award.

Topic 8.2.2 Extent of Disability–*De Minimis* Awards

[ED. NOTE:** The following June 2003 decision is included in this digest news letter because it was received in July.**]

Gillus v. Newport News Shipbuilding & Dry Dock Company, 37 BRBS 93 (June 12, 2003).

The Board found that when a claimant in temporary partial disability status filed a motion for modification seeking *de minimis* benefits, it was not, per se, invalid as an "anticipatory" claim. Specifically, here the claimant filed the motion after her doctor noted her increasing difficulty in performing her job and that she had progressive arthritis and probably would need knee replacement surgery in the future. Thus the claim was not "anticipatory" according to the Board.

Further more, the Board found that simply because the claimant's injury was to her leg, a body part covered by the schedule, does not mean that the claimant cannot receive a *de minimis* award. The board noted that the claimant had not claimed or been compensated for any permanent disability to her leg, nor has her condition been termed "permanent" by her physician. Thus, her modification claim for *de minimis* benefits was appropriately viewed as based upon an award for temporary partial disability benefits pursuant to Section 8(e). A Section 8(e) award is not precluded to a claimant who sustains an injury to a member listed in the Schedule at Section 8(c), but whose injury has not yet been found permanent. A claimant is limited to the schedule only where the claimant is permanently partially disabled.

Topic 8.2.3.1 Extent of Disability--Total disability while working–Beneficent employer/ sheltered employment and extraordinary effort

[ED. NOTE:** Although the following ADA decision is not a LHWCA case, it is nevertheless noteworthy for LHWCA purposes. In this case the **Court** sets a new rebutable presumption standard that an accommodation requested by a disabled employee under the ADA is unreasonable if it conflicts with seniority rules for job assignments. This was a 5-4 decision by J. Breyer, with two concurrences (J. Stevens and J. O'Connor) and two dissents (J. Scalia with J. Thomas joining, and J. Souter with J. Ginsburg joining).**]

U.S. Airways, Inc., v. Barnett, 535 **U.S.** 391; 122 S.Ct. 1516 (2002).

Held, an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an accommodation is not reasonable. However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case. The **Court** took a middle ground here rejecting both the positions of the airline and its employee. The airline had argued that a proposed accommodation that conflicts with an employer-established seniority system should be automatically unreasonable. The employee had argued that the employer should have the burden to show the accommodation's conflict with seniority rules constitutes an undue hardship.

Justice Breyer noted that various courts have properly reconciled "reasonable accommodation" and "undue hardship" in a practical way that does not create a dilemma for employees. The justice explained that those courts have held that an employee "need only show that an accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases," while the employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." He went on to state that the "the seniority system will prevail in the run of cases" because "the typical seniority system provides important employee benefits by creating, and fulfilling employee expectations of fair, uniform treatment."

Topic 8.2.3.1 Extent of Disability--Total disability while working–Beneficent employer/sheltered employment and extraordinary effort

Chevron U.S.A, Inc. v. Echazabal, 536 **U.S.** 73; 122 S.Ct. 2045 (2002).

[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.**]

In a 9-0 ruling, the **Court** held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the **Supreme Court** stated that on remand the **Ninth Circuit** could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

Topic 8.2.3.1 Extent of Disability--Total disability while working--Extraordinary Effort

Newport News Shipbuilding & Dry Dock Co. v. Vinson, (Unpublished) (**4th Cir.** No. 00-1204) (June 20, 2002).

Here the employer challenged the ALJ's finding that the claimant was entitled to disability benefits for the period during which he returned to his employment as a welder despite his injury. In upholding the ALJ and the Board, the **Fourth Circuit** noted that the claimant's return to work after his injury did not preclude a disability award as a matter of law. The statutory standard for disability "turns on the claimant's capacity for work, not actual employment. Thus, when a claimant, as here, continues employment after an injury only through "extraordinary effort to keep working" and despite the attendant "excruciating pain" and substantial risk of further injury, he may nevertheless qualify for a disability award. The court noted that a disability award under the LHWCA is predicated on an employee's diminished capacity for work due to injury rather than actual wage-loss.

Topic 8.2.3.1 Extent of Disability--Total disability while working--Beneficent employer/sheltered employment and extraordinary effort

Ward v. Holt Cargo Systems, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

Topic 8.2.3.2 Extent of Disability--Disability While Undergoing Vocational Rehabilitation

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled

to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The Board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

Topic 8.2.3.2 Extent of Disabiolity--Disability While Undergoing Vocational Rehabilitation

Newport News Shipbuilding & Dry Dock v. Director, OWCP, (Brickhouse), 315 F.3d 286 (**4th Cir.** 2002).

Here the **Fourth Circuit** adopted the **Fifth Circuit's** rationale in *Abbott v. Louisiana Insurance Guaranty Assoc.*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122 (**5th Cir.**

1994), that suitable alternate employment is reasonably unavailable due to the claimant's participation in an approved rehabilitation program even though the employer's offer of alternate employment would have resulted in an immediate increase in wage earning capacity. In the instant case, after OWCP approved a vocational rehab program for the claimant, and placed a two year completion timetable on it, Newport News sought to hire the claimant in a newly created desk position. At the time of the offer, the claimant lacked completing the program by two classes and it was doubtful as to whether he could enroll in night school to timely complete the program. Additionally, the job offer from Newport News came with the condition that the claimant could be "terminated with or without notice, at any time at the option of the Company or yourself."

Topic 8.2.3.2 Extent of Disability--Disability While Undergoing Vocational Rehabilitation

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The Board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

Topic 8.2.4. Extent of Disability—Partial Disability/Suitable Alternate Employment

Opiopio v. United States Marine Corps, (Unpublished) (BRB No. 04-0340)(December 7, 2004).

In this suitable alternate employment case, the Board found that the ALJ exceeded her authority by ordering the employer to provide the claimant with a job that complies with the doctor's work restrictions and to enforce the restrictions. Additionally, the Board held that, contrary to the ALJ's suggestion that the employer provide the claimant with vocational rehabilitation assistance if it was unable to provide a suitable light duty position, the employer is not obligated under the LHWCA to offer the claimant vocational rehabilitation. Since Section 39©(1)-(2) and the implementing regulations, 20 C.F.R. § 702.501 *et seq.*, authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees in certain circumstances, ALJs do not have the authority to provide vocational rehabilitation.

Topic 8.2.4 Extent of Disability--Partial Disability/Suitable Alternate Employment

Pope v. Ham Industries, Inc. (Unpublished)(BRB NO. 03-0476)(April 2, 2004).

A claimant suffering a loss in wage-earning capacity, who is terminated for misfeasance, from a light-duty suitable alternate employment position is nevertheless still entitled to the continuation of any partial disability benefits to which she was entitled prior to her termination. The Board held that the claimant's termination did not sever the

employer's liability for continuing partial disability benefits based on the loss in earning capacity existing at the time of termination.

Topic 8.2.4 Extent of Disability--Partial Disability/Suitable Alternate Employment

***[ED. NOTE**: The following announcements by federal agencies may eventually affect the administration of the LHWCA on issues of suitable alternate employment and Section 8(f).]*

Study of Hearing-Impaired Employees

The National Institute for Occupational Safety and Health (NIOSH) plans to study methods of accommodation for hearing-impaired workers. The proposed study will look at an evaluation and intervention protocol used to accommodate noise exposed, hearing-impaired workers so they can continue to perform their jobs without further hearing loss. Results from the proposed study will be used to make recommendations to hearing health professionals and hearing conservation program managers on the auditory management of hearing-impaired workers. (69 Fed. Reg. 44537). Comments on the study were due within 30 days of the request's publication and can be sent to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, D.C., 20503.

Obesity

While not directly calling obesity a disease, Medicare has nevertheless adopted a new policy by abandoning its previous position that "obesity itself cannot be considered an illness." The new policy will not have an immediate impact on Medicare coverage and does not affect existing coverage of treatments of diseases resulting in or made worse by obesity. However, as requests for coverage of obesity treatments are made by the public, Medicare will review the scientific evidence about their effectiveness.

Topic 8.2.4 Extent of Disability--Partial Disability/Suitable Alternate Employment

Chevron U.S.A., Inc. v. Echazabal, 536 **U.S.** 73; 122 S.Ct. 2045 (2002).

***[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.]*

In a 9-0 ruling, the **Court** held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined

that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the **Supreme Court** stated that on remand the **Ninth Circuit** could consider whether the employer engaged in the type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

Topic 8.2.4 Extent of Disability--Partial disability/Suitable Alternate Employment

Ward v. Holt Cargo Systems, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

Topic 8.2.4.1 Extent of Disability—Burdens of Proof

Fortier v. Electric Boat Corp., ___ BRBS ___ (BRB No. 04-0351)(Dec. 14, 2004).

In this suitable alternate employment case, the ALJ determined that only the security guard positions listed in the employer's labor market survey might constitute suitable alternate employment. Nevertheless, he determined that as the claimant, despite the exercise of due diligence, has been unsuccessful in obtaining any form of suitable alternate employment, she was totally disabled. The Board upheld the ALJ's determinations, finding that although he did not mention *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(**2nd Cir.** 1991) by name, he had adhered to the appropriate standards in addressing the issue of suitable alternate employment set down by the **Second Circuit** for this claim which was within that circuit. The ALJ had noted that there was evidence not only that the claimant had sought employment at some of the places noted on the employer's job market survey, but that she had also sought employment on her own, including on two occasions, obtaining employment through a temporary agency only to find in each instance that after one day, the work was too physically demanding for her post-injury condition.

Topic 8.2.4.3 Extent of Disability--Suitable alternate employment: location of jobs

Patterson v. Omniplex World Services, 36 BRBS 149 (2003).

This Defense Base Act case has issues concerning the admission of evidence and the scope of the relevant labor market for suitable employment purposes. Here, the claimant from Missouri was injured while employed as a security guard in Moscow as an embassy construction site. He had previously worked for this same employer for approximately six years before this injury in various locations.

After the close of the record in this matter, the employer requested that the record be reopened for the submission of "new and material" evidence which became available only after the close of the record. Specifically, the employer asserted that in a state court filing dated subsequent to the LHWCA record closing, the claimant stated that he had previously been offered and had accepted a security guard job in Tanzania.

The claimant argued that this evidence should not be admitted as it was outside the relevent Trenton, Missouria, labor market. The ALJ issued an Order Denying Motion to Reopen Record, stating that his decision would be based upon the existing record "due to the fact that the record was complete as of the date of the hearing together with the permitted post-hearing submissions, the complexity of the matters being raised post-hearing, the delays that would be encountered if further evidence is admitted, and the provisions of Section 22 of the Act which provide for modification of the award, if any."

In overturning the ALJ on this issue, the Board found the evidence to be relevant and material, and not readily available prior to the closing of the record. The evidence was found to be "properly admissible under Section 18.54(c) of the general rules of practice for the Office of Administrative Law Judges, as well as under the specific regulations applicable to proceedings under the Act. 20 C.F.R. §§ 702.338, 702.339. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The Board further noted that Sections 18.54(a) of the Rules of Practice and 20 C.F.R. § 702.338 explicitly permit an ALJ to reopen the record, at any time prior to the filing of the compensation order in order to receive newly discovered relevant and material evidence.

While the Board affirmed the ALJ's conclusion that Missouri is the claimant's permanent residence, and thus his local labor market in the case, the Board opined that the ALJ should have considered the significance of the claimant's overseas employment in evaluating the relevant labor market. The Board concluded that, given the claimant's employment history, the labor market cannot be limited solely to the Trenton, Missouri, area. Additionally, the Board noted that, in fact, the claimant has continued to perform post-injury security guard work in the worldwide market.

Topic 8.2.4.7 Suitable Alternate Employemnt—Factors affecting/not affecting employer's burden

Spooner v. ADM/Growmark River System, Inc., (Unpublished)(BRB No. 04-0165)(Oct. 20, 2004).

When a claimant, who resumed suitable alternate employment at his employer's facility was later discharged from that position due to his own misfeasance (violating company policy regarding alcohol abuse), the employer was not required to establish the availability of suitable alternate employment on the open market. The Board distinguished this case from *Brown v. Rriver Rentals Stevedoring, Inc*., (Unpublished) (BRB No. 01-0770)(June 17, 2002)(Where a worker is discharged from an unsuitable job at the employer's facility due to his own misfeasance, employer must show suitable alternate employment.)

Topic 8.2.4.8 Extent of Disability—Jobs in employer's facility

McAfee v. Bath Iron Works Corp., (Unpublished)(BRB No. 03-0611)(Oct. 8, 2004).

The Board upheld the ALJ's denial of temporary partial disability compensation for the period during which the claimant would not cross a picket line during a strike to work at his light duty job. The Board stated that it agreed with the ALJ's statement that the LHWCA cannot "be stretched to provide compensation to a worker whose loss of wages was attributable not to his injury but rather due to a decision to participate in a strike against the worker's employer."

Topic 8.2.4.9 Extent of Disability—Diligent search and willingness to work

Fortier v. Electric Boat Corp., ___ BRBS ___ (BRB No. 04-0351)(Dec. 14, 2004).

In this suitable alternate employment case, the ALJ determined that only the security guard positions listed in the employer's labor market survey might constitute suitable alternate employment. Nevertheless, he determined that as the claimant, despite the exercise of due diligence, has been unsuccessful in obtaining any form of suitable alternate employment, she was totally disabled. The Board upheld the ALJ's determinations, finding that although he did not mention *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(**2nd Cir.** 1991) by name, he had adhered to the appropriate standards in addressing the issue of suitable alternate employment set down by the **Second Circuit** for this claim which was within that circuit. The ALJ had noted that there was evidence not only that the claimant had sought employment at some of the places noted on the employer's job market survey, but that she had also sought employment on her own, including on two occasions, obtaining employment through a temporary agency only to find in each instance that after one day, the work was too physically demanding for her post-injury condition.

TOPIC 8.3

Topic 8.3.1 Permanent Partial Disability—Scheduled Awards—Some General Concepts

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.3.1 Permanent Partial Disability--Scheduled Awards--Some General Concepts

Carpenter v. California United Terminals, 37 BRBS 149 (2003).

In a case involving concurrent awards for permanent partial and permanent total disability, the Board found that the Section 6(b)(1) statutory maximum compensation rate was applicable to concurrent awards rather than accepting the Director's position that Section 6(b)(1) should be considered in terms of each separate award of benefits. The

Board found that the term "disability" must be construed in section 6(b)(1) such that, in instances of concurrent awards, it means the overall disability resulting from both injuries.

The Board noted that the Director's position, i.e., that the Section 6(b) limit is applicable only on a single award basis would allow for a twice-injured worker to receive compensation in excess of the single injury person, despite the fact that their overall loss in wage-earning capacities are the same. "In contrast, the Board's approach, based on the plain language of Section 6(b) limiting compensation for 'disability,' precludes this would-be inequity since both workers are subject to the same limit. The statute should not be interpreted in a way that results in claimant's receiving from two employers more than he could receive from one employer, pursuant to an explicit statutory provision."

As to how offsets may be taken, the Board once more cites *Hastings v. Earth Satellite Corp*., 628 F.2d 85, 14 BRBS 345 (**D.C. Cir.** 1980), *cert. denied*, 449 **U.S.** 905 (1980) as outlining a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case, rather than setting forth a mechanical rule.

Topic 8.3.1 Permanent Partial DEisability--Scheduled Awards–Some General Concepts

[ED. NOTE: *The following June 2003 decision is included in this digest news letter because it was received in July.**]***

Gillus v. Newport News Shipbuilding & Dry Dock Company, 37 BRBS 93 (2003).

The Board found that when a claimant in temporary partial disability status filed a motion for modification seeking *de minimis* benefits, it was not, per se, invalid as an "anticipatory" claim. Specifically, here the claimant filed the motion after her doctor noted her increasing difficulty in performing her job and that she had progressive arthritis and probably would need knee replacement surgery in the future. Thus the claim was not "anticipatory" according to the Board.

Further more, the Board found that simply because the claimant's injury was to her leg, a body part covered by the schedule, does not mean that the claimant cannot receive a *de minimis* award. The board noted that the claimant had not claimed or been compensated for any permanent disability to her leg, nor has her condition been termed "permanent" by her physician. Thus, her modification claim for *de minimis* benefits was appropriately viewed as based upon an award for temporary partial disability benefits pursuant to Section 8(e). A Section 8(e) award is not precluded to a claimant who sustains an injury to a member listed in the Schedule at Section 8(c), but whose injury has not yet been found permanent. A claimant is limited to the schedule only where the claimant is permanently partially disabled.

Topic 8.3.3 Permanent Partial Disability—Section 8©(1) Loss of Use of Arm

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.3.4 Permanent Partial Disability--Sections 8(c)(1) and 8.4 Conflicts Between Applicable Sections

Carpenter v. California United Terminals, 37 BRBS 149 (2003).

In a case involving concurrent awards for permanent partial and permanent total disability, the Board found that the Section 6(b)(1) statutory maximum compensation rate was applicable to concurrent awards rather than accepting the Director's position that Section 6(b)(1) should be considered in terms of each separate award of benefits. The

Board found that the term "disability" must be construed in section 6(b)(1) such that, in instances of concurrent awards, it means the overall disability resulting from both injuries.

The Board noted that the Director's position, i.e., that the Section 6(b) limit is applicable only on a single award basis would allow for a twice-injured worker to receive compensation in excess of the single injury person, despite the fact that their overall loss in wage-earning capacities are the same. "In contrast, the Board's approach, based on the plain language of Section 6(b) limiting compensation for 'disability,' precludes this would-be inequity since both workers are subject to the same limit. The statute should not be interpreted in a way that results in claimant's receiving from two employers more than he could receive from one employer, pursuant to an explicit statutory provision."

As to how offsets may be taken, the Board once more cites *Hastings v. Earth Satellite Corp*., 628 F.2d 85, 14 BRBS 345 (**D.C. Cir.** 1980), *cert. denied*, 449 **U.S.** 905 (1980) as outlining a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case, rather than setting forth a mechanical rule.

Topic 8.3.26 Section 8©(22) Multiple Scheduled Injuries

ERRATA

The reference to "Section 22" should be corrected to read "Section 8©(22)."

TOPIC 8.4

Topic 8.4.1 Conflicts Between Applicable Sections—Unscheduled Injuries and Total Disability

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de*

minimis award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.4.4 Conflict Between Applicable Sections--Multiple Scheduled Injuries/Successive Injuries

ERRATA

The reference to "Section 22" should be corrected to read "Section 8©(22)."

Topic 8.4.4 Conflict Between Applicable Sections--Multiple Scheduled Injuries/Successive Injuries

Matson Terminals, Inc. v. Berg, 279 F.3d 694 (**9th Cir.** 2002).

When both of a claimant's knees are injured in one accident, Section 8(c)(22) indicates that there should be two liability periods. Since the claimant's two knees were discrete injuries under Section 8(f), the **Ninth Circuit** found that the Board and ALJ were correct in imposing two 104-week liability periods on the employer. "It is irrelevant that the injuries arose from the same working conditions or that they arose from a single cause or trauma. What is relevant is that the working conditions caused two injuries, each separately compensable under Section 8(f)."

TOPIC 8.5

TOPIC 8.6

Topic 8.6.1 Section 8(e)--Temporary Partial Disability—Generally

Newport News Shipbuilding & Dry Dock Co., (Unpublished)(No. 03-1989) (**4th Cir.** January 5, 2004).

The **Fourth Circuit** affirmed an award of de minimis in relation to an award of temporary partial disability benefits. The court noted that Section 8©, dealing with permanent partial disability was not applicable here, rather Section 8(e) was applicable and thus the ALJ was correct in considering the claimant's future earnings capacity in issuing the award.

TOPIC 8.7 Special Fund Relief

***[ED. NOTE**: The following announcement by a federal agency may eventually affect the administration of the LHWCA on issues of suitable alternate employment and Section 8(f).]*

Study of Hearing-Impaired Employees

The National Institute for Occupational Safety and Health (NIOSH) plans to study methods of accommodation for hearing-impaired workers. The proposed study will look at an evaluation and intervention protocol used to accommodate noise exposed, hearing-impaired workers so they can continue to perform their jobs without further hearing loss. Results from the proposed study will be used to make recommendations to hearing health professionals and hearing conservation program managers on the auditory management of hearing-impaired workers. (69 Fed. Reg. 44537). Comments on the study were due within 30 days of the request's publication and can be sent to CDC Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, D.C., 20503.

***[ED. NOTE**: The following announcement by a federal agency may eventually affect the administration of the LHWCA on issues of suitable alternate employment and Section 8(f).]*

Obesity

While not directly calling obesity a disease, Medicare has nevertheless adopted a new policy by abandoning its previous position that "obesity itself cannot be considered

an illness." The new policy will not have an immediate impact on Medicare coverage and does not affect existing coverage of treatments of diseases resulting in or made worse by obesity. However, as requests for coverage of obesity treatments are made by the public, Medicare will review the scientific evidence about their effectiveness.

Topic 8.7.1 Special Fund Relief—Applicability and Purpose of Section 8(f)

Newport News Shipbuilding & Dry Dock Co. v. Harris-Smallwood, (Unpublished)(No. 02-1590) (**4th Cir** July 12, 2004).

In this unpublished matter involving Sections 12 and 13, the **Fourth Circuit** provides a good discussion dealing with crediting testimony of witnesses and weighing contradictory evidence and Section 8(f).

Topic 8.7.1 Special Fund Relief--Applicability and Purpose of Section 8(f)

Weber v. S.C. Loveland Co. (Weber III), 35 BRBS 190 (2002).

Previously in *Weber I*, 28 BRBS 321 (1994), and *Weber II*, 35 BRBS 75 (2001), the Board held that a worker (with status) injured in the Port of Kingston, Jamaica, had situs and therefore, was covered by the LHWCA. The now-insolvent employer had two insurance policies with different carriers. One policy insured the employer for LHWCA coverage within the U.S. and the other policy insured the employer in foreign territories, but did not include an LHWCA endorsement. Besides the issue of jurisdiction, at issue previously had been which of the two, if any, insurers was on the risk for longshore benefits at the time of the claimant's injury and is therefore liable for benefits.

Of significance in *Weber III* are: (1) the issues of scope of authority to decide carrier issues and (2) whether the employer is entitled to Section 8(f) relief.

In finding that it had authority to decide the matter, the Board distinguished *Weber III* from *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI),* 261 F.3d 456, 35 BRBS 92 (CRT) (**5th Cir.** 2001) (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.). The Board noted that *Weber III* does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of the employer's carriers is liable.

The Board also found that the employer was not in violation of Section 32 (failure to secure LHWCA insurance coverage) and thus could assert a Section 8(f) claim. The Director had argued that the employer was not entitled to Section 8(f) relief because the employer did not have longshore coverage in Jamaica. The Director cited the Board's decision in *Lewis v. Sunnen Crane Services, Inc.*, 34 BRBS 57, 61 (2000), in which the

Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, and argued that *Lewis* is dispositive of this issue.

Employer disagreed and countered that it had sufficient coverage for all work-related injuries as of the date of the claimant's injury, because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the LHWCA. Accordingly, the employer argued that it complied with Section 32. The Board found that *Lewis* was distinguishable from *Weber III* and therefore, does not control. The Board found that in *Weber III*, the employer purchased insurance appropriate for covering the claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the LHWCA. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." Thus, the Board held that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar the employer's entitlement to Section 8(f) relief.

Topic 8.7.6 Special Fund Relief–In Cases of Permanent Partial Disability, the Disability Must Be Materially and Substantially Greater than that Which Would Have Resulted from the Subsequent Injury Alone

Newport News Shipbuilding & Dry Dock Co. v. Ward, 326 F.3d 434 (**4th Cir.** 2003).

Newport News Shipbuilding & Dry Dock Co. v. Winn, 326 F.3d 427 (**4th Cir.** 2003).

Newport News Shipbuilding & Dry Dock Co. v. Pounders, 326 F.3d 455 (**4th Cir**. 2003).

Newport News Shipbuilding & Dry Dock Co. v. Cherry, 326 F.3d 449 (**4th Cir.** 2003).

In these Section 8(f) claims, the employer failed to satisfy the contribution element and, therefore, the employer was not entitled to Section 8(f) relief.

In *Ward*, the **Fourth Circuit** defined the "contribution element" of Section 8(f) criteria as follows:

> "...Third, [the employer must affirmatively establish] that the ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone in the absence of the pre-existing condition."

The **Fourth Circuit** noted that an employer can satisfy the contribution element only if it can quantify the type and extent of disability the employee would have suffered absent the pre-existing disability. (In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury.) "The quantification aspect of the

contribution element provides an ALJ with 'a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater' than the disability the employee would have suffered from the second injury alone. Citing *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Harcum)* 8 F.3d 175 at 185-86 (**4th Cir.** 1993), *aff'd on other grounds*, 514 U.S. 122 (1995).

The court noted, "Importantly, in assessing whether the contribution element has been met, an ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Citing *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Carmines)* 138 F.3d 134 at 140 (**4th Cir.** 1998).

In *Ward*, the doctor's assertions were generalized and his overall conclusions lacked any supporting explanation. The court found that in particular, his statement that the claimant would have been able to "return to light duty Shipyard work" if he had suffered only one of his back injuries "is conclusory and lacks evidentiary support." Simply noting that an earlier injury rates a minimum 5 percent permanent disability rating under the AMA Guides, fails to assess the level of the claimant's disability that would have resulted from the later injury alone.

In *Winn*, the **Fourth Circuit** again found that merely subtracting the extent of disability from the extent of the current disability is "legally insufficient under *Carmines* to establish that a claimant's preexisting disability is materially and substantially greater than the disability due to the final injury alone. (The **Fourth Circuit** took a similar tact in *Cherry*.) Also, the **Fourth Circuit** noted that another medical opinion which merely states that if the claimant had not been a smoker, his disability would have been "much less" is also legally insufficient since this opinion does not attempt to quantify the level of impairment that would result from the work-related injury alone, as is required by *Harcum*.

In *Ponders*, the **Fourth Circuit** noted that the competing policy goals problem of Section 8(f) "is exacerbated by the fact that the adversarial system breaks down to a degree with regard to Section 8(f) claims." The court noted that, "The evidentiary hearing in such cases may involve only the employer and the claimant...It is only after the initial hearing is concluded that the Director,...--the person with the interest in protecting the integrity of the special fund–enters the picture. The record made at the original hearing may as a consequence be tilted in favor of Section 8(f) relief." In *Ponders*, the court acknowledged the difficulty which confronts a doctor called upon to make the assessment required by *Carmines* in a case involving successive lung diseases." The difficulty of making the assessment in isolated cases, however, does not compel us to adopt a different rule." n. 2.

Topic 8.7.9.1 Special Fund Relief--Section 8(f)--Procedural Issues--Standing

Terrell v. Washington Metropolitan Area Transit Authority (WMATA), 36 BRBS 69 (2002).

The issue here is whether an employer who is granted Section 8(f) relief, is dismissed from a subsequent modification proceeding by the ALJ on the claimant's motion, and who did not participate in the appeal of the modification before the Board, is responsible for the claimant's attorney fee at the Board level. (The employer did not participate in the Director's appeal before the Board, and the claimant argued in response to the Director's appeal for the employer's continued exclusion from the case.) The Board found that such an employer is not liable for an attorney fee. Furthermore, the Board found that, "The fact that employer had an economic interest in the outcome (due to the increased assessment under Section 44... .), is not sufficient for employer to be held for claimant's attorney's fee for work performed before the Board under the facts of this case." Thus, the Board found that since the claimant's attorney obtained an award of permanent total disability, an attorney's fee for his counsel can be made a lien on the claimant's compensation.

Topic 8.7.9.2 Special Fund Relief--Section 8(f) Relief—Timeliness of Employer's Claim for Relief

Woodmansee v. Newport News Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 03-0614)(May 7, 2004).

[ED. NOTE:** Might not consideration be given to limiting the "judicial economy" rule to issues where the claimant has an interest? Claimants have no standing concerning the application of Section 8(f). If employers are forced to "litigate" all issues, they may be reluctant to enter into agreements to pay compensation until the Section 8(f) issue is resolved. And, would such a scenario impact attorney fees at the OALJ level?**]

Despite the fact that there was no specific statute of limitations regarding when a party should request a hearing of the district director's recommendation that Section 8(f) relief be denied, the Board upheld the ALJ's determination that the employer waived the Section 8(f) issue by allowing compensation orders awarding claimants permanent disability benefits to become final without disposing of the Section 8(f) issue. The Board found the employer's actions to be an impermissible attempt to bifurcate issues. "The policy of judicial economy dictates that all claims relating to a specific injury, including affirmative defenses such as Section 8(f), be raised and litigated at the same time, especially as the Director is not bound by stipulations into which the private parties enter without his agreement."

Topic 8.7.9.2 Special Fund Relief—Timeliness of Employer's Claim for Relief

Newport News Shipbuilding & Dry Dock Co. v. Firth, 364 F.3d 311 (**4th Cir.** 2004).

The **Fourth Circuit** held that an employer cannot obtain Section 8(f) relief if it does not comply with mandatory procedural requirements. When the claimant filed a request for an informal conference to determine his eligibility for permanent partial disability benefits, the district director scheduled the conference. However, Newport News responded by requesting that the conference be cancelled and that the matter be transferred to OALJ for a formal hearing "since this is not a matter which can be resolved at [OWCP]."

Once before the ALJ, Newport News informed the judge that the only remaining issue to be determined was Newport's entitlement to relief from continuing liability under Section 8(f). In that regard, the Director did not contest that the employer qualified on the merits for Section 8(f) relief. However, the Director argued that the absolute defense contained in Section 8(f)(3) should be invoked since the employer, knowing of the permanency of the claimant's condition, failed to present its Section 8(f) claim to the Director while the claim was before the Director and prior to the time the Director transferred the case to OALJ.

The **Fourth Circuit** found that it must adhere to the plain and unambiguous language of the statute which "provides an explicit scheme for obtaining a benefit… ."

Topic 8.7.9.2 Special Fund Relief—Timeliness of Employer's Claim for Relief

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer's signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bi-furcating an appeal.

The Board, denying the employer's motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer's continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer's liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board…

Topic 8.7.9.6 Special Fund Relief--The Effect of Settlements and Stipulations

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer's signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bi-furcating an appeal.

The Board, denying the employer's motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer's continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer's liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board…

TOPIC 8.8

TOPIC 8.9

Topic 8.9 Wage-Earning Capacity

Chevron U.S.A. Inc., v. Echazbal, 536 **U.S.** 73; 122 S.Ct. 2045 (2002).

[ED. NOTE:** While this ADA disability case is not a longshore case, it is included in the materials for general information.**]

In a 9-0 ruling, the **Court** held that an employer may refuse to hire a job applicant who has an illness/disability (hepatitis C here) that poses a direct threat to the worker's own health or safety; that the ADA does not protect such a worker. Here the employer refused to hire the applicant to work at an oil refinery because company doctors opined that the applicant's hepatitis C would be aggravated by the toxins at the workplace. The applicant had unsuccessfully argued that he should be able to decide for himself whether to take the risk of working in an oil refinery where chemicals might aggravate his liver ailment. Since the applicant disputed the doctors' assessment, the **Supreme Court** stated that on remand the **Ninth Circuit** could consider whether the employer engaged in the

type of individualized medical assessment required by the Equal Employment Opportunity Commission regulation.

Topic 8.9 Wage-Earning Capacity

Sestich v. Long Beach Container Terminal, 289 F.3d 1157 (**9th Cir.** 2002).

Where a longshoreman's post-injury "wage-earning capacity" exceeds his pre-injury "average weekly wages," he is not entitled to benefits under the LHWCA. Specifically, the court held that an employee is not entitled to a loss of earnings capacity benefits where his actual post-injury earnings adjusted for inflation exceeded his pre-injury wages, absent evidence that the employee's actual post-injury earnings did not fairly represent employee's earnings capacity in his injured condition.

Here the employee contended that he had lost "wage-earning capacity," within the meaning of the LHWCA, to the extent that he could not earn what he would have been able to earn absent his injury, and that he should have been awarded benefits equal to two-thirds of that loss. His contention is that, but for, his industrial accident, he would be earning about $134,000 annually as a crane operator, about $25,000 more than his current annual earnings of about $109,000 as a marine clerk. This contention rests in part on the factual assumption that, absent his back injury, he would be able to obtain certification as a crane operator and to find sufficient work in that job to earn about $134,000. The court also noted that his contention additionally rests in part on a legal assumption that compensation under the LHWCA is based on the method of calculation employed for ordinary torts.

Assuming that claimant's factual contentions were correct, the court found his legal conclusions to be wrong:

> Benefits under the Act are not calculated in the same way as compensation under the tort system. The Act provides benefits based on "disability," which is defined as "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.... That is, disability is not defined, as it would be under the tort system, as the inability to earn hypothetical future wages that the worker could have earned if he had not been injured. Rather, disability is defined under the Act as the difference between the employee's pre-injury "average weekly wages" and his post-injury "wage-earning capacity."

The claimant additionally argued that the proviso of Section 8(h) instructs the ALJ to allow benefits equal to the difference between his actual earnings and the wage-earning capacity he would have had if he had not been injured. However, the **Ninth Circuit** found that this argument is based on a misreading of Section 8(h) and that the section, including its proviso, is designed only to specify the method by which to

determine post-injury "wage-earning capacity" within the meaning of the LHWCA. Once "wage-earning capacity" is determined, Section8(c)(21) instructs the ALJ to compare "wage-earning capacity" with pre-injury "average weekly wages" to determine the level of benefits, according to the court.

Topic 8.9.1 Wage-Earning Capacity—Generally

Tahara v. Matson Terminals, Inc., (Unpublished)(BRB No. 03-0860)(September 28, 2004).

The Board affirmed, albeit on other grounds, the ALJ's compensation award during the period the claimant was in the state and federal witness protection programs. The Board found that the employer did not establish that the claimant was able to perform suitable alternate employment while the claimant was enrolled in the witness protection program. The claimant's testimony was uncontradicted that he was not allowed to work by the state and federal authorities during his time in the programs. Further, it was uncontested that his enrollment in the programs was related to the circumstances surrounding his work injury. Under these circumstances, the claimant was found to be entitled to compensation for total disability as the employer could not meet its renewed burden of proof after claimant was forced to leave suitable alternate employment through no fault of his own. The Board found that the facts in this case were analogous to those cases where a claimant is entitled to total disability compensation while participating in a Department of Labor-sponsored vocational rehabilitation program that precludes him from working. *See, e.g. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994); *Castro v. General Constr. Co*., 37 BRBS 65 (2003).

Citing *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (**9th Cir.** 1988), 21 BRBS 122(CRT), the Board found that this holding, that the claimant was entitled to total disability benefits due to his inability to work while he was in the witness protection programs, is consistent with **Ninth Circuit** case law. In *Hairston*, the court held that suitable alternate employment was not established by a position at a bank that the claimant physically could perform, as the job was not realistically available because the claimant had a criminal record. "In this case, no jobs were realistically available to claimant while he was in the witness protection programs."

The Board also affirmed the ALJ's finding that the state stipend the claimant received during his participation in the state witness protection program does not establish that he had a post-injury wage-earning capacity. The ALJ correctly rejected the employer's contention that the $1,200 to $1,400 per month stipend was a wage. "The [ALJ] correctly reasoned that the stipend was paid by the state and not an employer and that the stipend was not received pursuant to a contract for hire; these conditions are required for sums to constitute wages under the plain language of Section 2(13). The

[ALJ] found that the stipend is analogous to unemployment compensation, which also is not a wage under Section 2(13). Moreover, there is no evidence that the state stipend was subject to tax withholding." (Citations omitted.)

Topic 8.9.1 Wage-earning Capacity--Generally

Johnston v. Director, OWCP, 280 F.3d. 1272 (**9th Cir.** 2002).

In this case interpreting Section 8(c)(21), the court considered whether, in a situation where actual wages have remained constant, a claimant's post-injury earnings must be adjusted for inflation in order to be considered on equal footing with wages at the time of injury. The **Ninth Circuit** held that the actual wages without adjustments for inflation"fairly and reasonably represent [the claimant's] wage-earning capacity" as required by Section 8(h). The court agreed with the Board that "the fact that the wages claimant earned in his post-injury job may not have kept pace with inflation is not due in any part to claimant's injury." Here the claimant had resumed the same job he had prior to the injury, albeit in a part-time capacity. As a result of a collective bargaining agreement, claimant's wage rate as a dock supervisor remained unchanged between the time of his injury and the period during which he worked part-time.

Topic 8.9.2 Wage-Earning Capacity—Factors for Calculation

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

Topic 8.9.2 Wage-Earning Capacity--Factors for Calculation

Ward v. Holt Cargo Systems, (Unreported) (BRB No. 01-0649) (May 6, 2002).

In instances where a claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity despite the fact that a claimant's actual earnings may have increased.

Topic 8.9.3.1 Wage-Earning Capacity--What constitute "actual wages"

Keenan v. Director, OWCP, ___ F.3d ___ (No 03-70442)(**9th Cir.** Dec. 21, 2004).

While the main focus of this case is on *de minimis* awards, the court, in a two to one decision, also decided to adopt Board and other circuit court precedent that a shoulder injury is unscheduled. As to the *de minimis* issue, the court opined, "if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a 'significant potential' of future depressed earning capacity, then the claimant is entitled to the possibility of a future modified award under *Rambo II*." *See Metropolitan Stevedore Co v. Rambo*, 521 **U.S.** 121 (1997)("*Rambo II*").

Here the claimant had remained at work for several years in a clerical position rather than his prior longshoring position and was making more than he had at the time of injury. The ALJ had found that the passage of time had outweighed the need for a *de minimis* award. The court stated that unless the passage of time has directly removed one of the relevant factors—for example, if some of the claimant's work restrictions were removed, or if market conditions changed for the better—the logic of the *Rambo II* test dictates that the mere fact that the claimant is earning above pre-injury levels cannot obviate the basis of the *de minimis* award. The court found, "the absence of economic loss thus far does not reflect an underlying absence of loss in physical function. The significance of the injury is a substantial factor in the 'significant potential of diminished

capacity' test articulated by *Rambo II*." Judge Tallman dissented on the *de minimis* portion of this opinion.

The **Ninth Circuit** also took the opportunity to note it's recently explicit opinion in *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, at 1160 (**9th Cir.** 2002), ratifying the rule expressed previously in Board decisions that the statutory formula for wages contemplates wages at the time of injury, rather than projected present wages as the relevant baseline for comparison to actual present earning capacity. Claimant had argued that he should collect benefits according to a hypothetical damages formula, under which the employer must compensate him for the difference between his actual economic position and his hypothetical economic position, which he would have enjoyed but for the injury.

TOPIC 8.10

Topic 8.10.1 Section 8(i) Settlements—Generally

Announcemnt—Settlement Judge Notice

OALJ continues to experience a high success rate (75 percent) of cases settling through the Settlement Judge process in Longshore cases. Requests for Settlement Judge Appointments in Longshore cases should be addressed to the Associate Chief Judge for Longshore or to the appropriate district Chief Judge. While reasonable efforts will be made to accommodate requests for specific dates, there can be no guarantee that requests for specific judges will be granted.

Topic 8.10.1 Section 8(i) Settlements—Generally

Announcement--Proposed Amendment to Medicare Secondary Payer Act

Two sections of the American Bar Association—Tort Trial and Insurance Practice Section and Section of State and Local Government Law--have issued a report to the ABA's House of Delegates recommending that the Medicare Secondary Payer Act correct problems which exist in the implementation of settlements in Longshore and other workers compensation cases. The recommendation will be considered by the House of Delegates next month [February 2005] at the ABA's Mid-Winter Meeting

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Topic 8.10.1 Section 8(i) Settlements—Generally

[ED. NOTE:** The following case is included for informational value only.**]

Petition of RJF International Corp. for Exoneration from or Limitation of Liability, Civil and Maritime, (Unpublished)(C.A. No. 01-588S)(D.C. R.I. Aug. 2004).

A yacht liability insurance policy is the primary payer for medical bills for a seaman. Under the Medicare secondary payer provisions of the Omnibus Budget Reconciliation Act of 1980, the responsibility of the seaman's "maintenance and cure" can not be shifted to Medicare. *Cf. Moran Towing & Transp. Co. v. Lombas*, 58 F.3d 24 (**2d Cir.** 1995)(*Held*, injured seaman's eligibility for free medical treatment under Medicare satisfies a vessel owner's obligation to furnish cure.).

Topic 8.10.1 Section 8(i) Settlements—Generally

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer's signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bifurcating an appeal.

The Board, denying the employer's motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer's continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer's liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board…

Topic 8.10.1 Section 8(i) Settlements--Generally

Jeschke v. Jones Stevedoring Co., 36 BRBS 35 (2002).

Here the claimant was prescribed binaural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i) settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for

all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA.

Topic 8.10.2 Section 8(i) Settlements—Persons Authorized

Mobley v. MONTCO, Inc., (Unpubished), 2004 WL 307478 (E.D. La. February 17, 2004).

Here the federal district court judge held that the court had the power to force the plaintiff in a Jones Act case to sign a "Receipt and Release" even though the settlement agreement was not reduced to writing.

[ED. NOTE:** The reader may want to keep in mind that the settlement of a related non-longshore action will not bar a later claim brought under the LHWCA, unless the settlement meets the requirements of Section 8(i). Ryan v. Alaska Constructors, 24 BRBS 65 (1990) (Claimant's claim under LHWCA was not barred by a previous settlement of a Jones Act claim entered into with his employer, involving the same injury); see also Harms v. Stevedoring Servs. Of America, 25 BRBS 375 (1992).**]

Topic 8.10.2 Section 8(i) Settlements--Persons Authorized

O'Neil v. Bunge Corp., 365 F.3d 820 (**9th Cir.** 2004). **[*See* next entry.]**

The **Ninth Circuit** held that when a claimant enters into an "agreement" with his employer to settle a case, but passes away prior to signing the settlement agreement, there is no enforceable Section 8(i) settlement agreement. The **Ninth Circuit** found that the Section 8(i) implementing regulations, 20 C.F.R. §§ 702.241 to 702.243, are clear on their face: a settlement is contingent upon the submission of a **signed** settlement application.

Topic 8.10.2 Section 8(i) Settlements--Persons Authorized

O'Neil v. Bunge Corp., 36 BRBS 25 (2002). **[*See* Above.]**

For this matter geographically within the **Ninth Circuit** (but without pertinent **Ninth Circuit** case law), the Board relied on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15 (CRT) (**5th Cir.** 2000), *aff'g* 32 BRBS 29 (1998). To hold that where a decedent dies without having signed a proposed settlement agreement, and

the agreement had not been submitted for administrative approval prior to death, it is not an enforceable settlement agreement under Section 8(i).

Additionally, the Board noted that the ALJ had not erred in refusing to enforce the proposed agreement under common law contract principles since Section 8(i) provides the only basis for settlement of claims under the LHWCA and Sections 15(b) and 16 of the LHWCA prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations.

Topic 8.10.3 Section 8(i) Settlements—Structure of Settlement

O'Neil v. Bunge Corp., 365 F.3d 820 (**9th Cir.** 2004). **[*See* next entry.]**

The **Ninth Circuit** held that when a claimant enters into an "agreement" with his employer to settle a case, but passes away prior to signing the settlement agreement, there is no enforceable Section 8(i) settlement agreement. The **Ninth Circuit** found that the Section 8(i) implementing regulations, 20 C.F.R. §§ 702.241 to 702.243, are clear on their face: a settlement is contingent upon the submission of a **signed** settlement application.

Topic 8.10.3 Section 8(i) Settlements--Structure of Settlement; Withdrawal of Claim/Settlement Agreement

O'Neil v. Bunge Corp., 36 BRBS 25 (2002). **[*See* Above.]**

For this matter geographically within the **Ninth Circuit** (but without pertinent **Ninth Circuit** case law), the Board relied on *Henry v. Coordinated Caribbean Transport*, 204 F.3d 609, 34 BRBS 15 (CRT) (**5th Cir.** 2000), *aff'g* 32 BRBS 29 (1998). To hold that where a decedent dies without having signed a proposed settlement agreement, and the agreement had not been submitted for administrative approval prior to death, it is not an enforceable settlement agreement under Section 8(i).

Additionally, the Board noted that the ALJ had not erred in refusing to enforce the proposed agreement under common law contract principles since Section 8(i) provides the only basis for settlement of claims under the LHWCA and Sections 15(b) and 16 of the LHWCA prohibit the settlement of claims except in accordance with Section 8(i) and its implementing regulations.

Topic 8.10.4 Section 8(i) Settlements--Time Frame

Jenkins v. Puerto Rico Marine, Inc., 36 BRBS 1(2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the **Eleventh Circuit** and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. §§ 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

Topic 8.10.6 Section 8(i) Settlements--Withdrawal of Claim/Settlement Agreement

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer’s signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bi-furcating an appeal.

The Board, denying the employer’s motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer’s continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer’s liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then

employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board…

Topic 8.10.6 Section 8(i) Settlements–Withdrawal of Claim/Settlement Agreement

Thomas v. Raytheon Range Systems, (Unpublished) (BRB No. 01-0891) (August 13, 2002).

The claimant herein, without aide of counsel, now challenges a Section 8(i) settlement on the grounds that: (1) she signed the agreement because she would otherwise have to wait to have her claim adjudicated and (2) she did not know that by signing the agreement she would not get to testify about her post injury employment and termination. In upholding the settlement, the Board stated that waiting for a hearing is not duress and reflects no more than a choice faced by any claimant in deciding whether to proceed with, or settle, a pending case. "Moreover, the fact that claimant did not get to testify before the [ALJ] concerning her post-injury employment and termination does not establish grounds for negating or modifying the settlement."

Topic 8.10.6 Section 8(i) Settlements--Withdrawal of Claim/Settlement Agreement

Hansen v. Matson Terminals, Inc., 37 BRBS 40 (2003).

This is the "Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement." Prior to the submission of the settlement agreement to the claimant and his counsel, the employer received a "rumor" that the claimant was being considered for longshore employment. The employer subsequently contacted the claimant's counsel who, after consulting with the claimant, informed the employer that the claimant might return to longshore employment upon a release from his physician. (The claimant did return to longshore employment on March 25, 2002 as a wharf gang member.) The settlement agreement was thereafter faxed to the claimant's counsel, was signed and returned to employer. The employer's Human Resources Department was unable to verify the claimant's employment status. Subsequently, the employer's two carriers executed the settlement agreement and forwarded it along with the appropriate attachments to the ALJ who issued an Order approving the executed settlement agreement on April 23, 2002.

Later the employer asserted that it became aware, on April 25, 2002, of the claimant's re-employment and on April 26, 2002, filed a "Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement." The ALJ denied relief. On appeal, the employer challenged the ALJ's approval of the parties' executed settlement agreement, asserting that the settlement should be set aside as the claimant returned to longshore employment in violation of a term of the agreement.

However, as the Board pointed out, the parties' settlement agreement addresses only the remedy available to the employer should the claimant "return to work as a laborer in the longshore industry after the settlement is approved," and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. The Board noted that "Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interest should a specific contingency arise....The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the [ALJ]." Citing *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (**5th Cir.** 1988), *aff'g* 20 BRBS 18 (1987). The Board further stated, "Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the [ALJ] erred in not setting aside the agreement." However, the reader is cautioned that this last statement by the Board may be somewhat misleading. *Nordahl*, which the Board repeatedly cited as authority in this area of the law, specifically addressed an employer's ability to include a provision allowing its escape from an agreement during the pre-approval period, not post approval. The Board even notes this distinction in its footnote 6. There is no case law which holds that the parties can contract to rescind a settlement agreement if an event occurs after the settlement has become effective.

Employer also argued that the claimant's return to work was a material breach of the agreement since he represented that he could not return to work as a laborer. However, the Board noted that the agreement provided additional reasons for settlement. Furthermore, the Board noted that the claimant returned to work as a member of a wharf gang, not as a laborer and the employer knew of the claimant's intention to return to work prior to its execution of the agreement. "Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the **Fifth Circuit** in *Nordahl*, settlements are essentially a gamble: claimants gamble, inter alia, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, inter alia, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights."

Topic 8.10.6 Section 8(i) Settlements--Withdrawal of Claim/Settlement Agreement

Rogers v. Hawaii Stevedores, Inc., 37 BRBS 33 (2003).

In an issue of first impression, the Board held that a claimant may withdraw from a settlement agreement prior to its approval. Citing *Oceanic Butler, Inc., v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (**5th Cir.** 1988), the Board noted that while the LHWCA and the regulations do not explicitly state that the claimant may rescind a settlement agreement prior to its approval, the reasoning of the **Fifth Circuit** in *Nordahl* that a claimant has such a right is compelling. "The holding that a claimant's agreement to

waive his compensation is not binding upon him unless it is administratively approved, either through the settlement process or pursuant to a withdrawal under Section 702.225, is supported by the structure of the Act. Consistent with Sections 15(b) and 16, no agreement by a claimant to waive or compromise his right to compensation is valid until it is administratively approved pursuant to Section 8(i). Thus, claimant may withdraw his agreement at any time prior to approval of the agreement by the [ALJ]."

Topic 8.10.7 Section 8(i) Settlements--Attorney Fees

Jenkins v. Puerto Rico Marine, Inc., 36 BRBS 1(2002).

Here the claimant argues that the district director erred in denying his request for penalties and interest on Section 8(i) settlement proceeds. When the district director received the parties' application for settlement, the case was on appeal before the **Eleventh Circuit** and thus the district director did not have jurisdiction. He therefore concluded that the 30-day time limit for automatic approval of the settlement was tolled and instructed the parties to request remand of the case so that he could fully consider the agreement. The crux of the claimant's contention is that, contrary to the district director's findings, the 30 day time limit for consideration of the settlement could not be tolled and, therefore, the settlement was "automatically" approved and as a result, the employer was liable for interest and penalties which accrued from the date of the 30th day until payment to the claimant of the agreed upon amounts.

Citing Section 702.241(b), 20 C.F.R.. §§ 702.241(d) ("... The thirty day period as described in paragraph (f) of this section begins when the remanded case is received by the adjudicator."), the Board held that the 30-day period had properly been tolled. The Board further noted that the 30-day period would have been tolled in any event since the parties had not provided a complete application as needed to comply with Section 702.242 of the regulations.

Claimant also alleged that in approving the settlement, the district director in effect nullified the Board's prior attorney fee award and that award should be considered separate and apart from the attorney's fee agreed upon in the parties' settlement agreement. However, based on the wording in the settlement agreement, the Board found that the district director rationally construed the settlement agreement as conclusively deciding the issue of all attorney's fees due in this case.

Topic 8.10.8 Section 8(i) Settlements—Finality of Settlement

Schultz v. United States Marine Corps/MWR, (Unpublished)(BRB No. 03-0473)(March 17, 2004).

A motion to correct clerical errors in a settlement order, such as where an ALJ merely recited the wrong monetary figures to which the parties had agreed, does not toll the time for filling a notice of appeal of the underlying compensation order.

Topic 8.10.8.2 Section 8(i) Settlements–Setting Aside Settlements

Thomas v. Raytheon Range Systems, (Unpublished) (BRB No. 01-0891) (August 13, 2002).

The claimant herein, without aide of counsel, now challenges a Section 8(i) settlement on the grounds that: (1) she signed the agreement because she would otherwise have to wait to have her claim adjudicated and (2) she did not know that by signing the agreement she would not get to testify about her post injury employment and termination. In upholding the settlement, the Board stated that waiting for a hearing is not duress and reflects no more than a choice faced by any claimant in deciding whether to proceed with, or settle, a pending case. "Moreover, the fact that claimant did not get to testify before the [ALJ] concerning her post-injury employment and termination does not establish grounds for negating or modifying the settlement."

Topic 8.10.8.2 Section 8(i) Settlements--Setting Aside Settlements

Hansen v. Matson Terminals, Inc., 37 BRBS 40 (2003).

This is the "Appeal of the Order Approving Settlement and the Order Denying Motion to Reconsider Approval of Settlement." Prior to the submission of the settlement agreement to the claimant and his counsel, the employer received a "rumor" that the claimant was being considered for longshore employment. The employer subsequently contacted the claimant's counsel who, after consulting with the claimant, informed the employer that the claimant might return to longshore employment upon a release from his physician. (The claimant did return to longshore employment on March 25, 2002 as a wharf gang member.) The settlement agreement was thereafter faxed to the claimant's counsel, was signed and returned to employer. The employer's Human Resources Department was unable to verify the claimant's employment status. Subsequently, the employer's two carriers executed the settlement agreement and forwarded it along with the appropriate attachments to the ALJ who issued an Order approving the executed settlement agreement on April 23, 2002.

Later the employer asserted that it became aware, on April 25, 2002, of the claimant's re-employment and on April 26, 2002, filed a "Motion to Disapprove Settlement Agreement and/or to Reconsider Approval of Settlement." The ALJ denied relief. On appeal, the employer challenged the ALJ's approval of the parties' executed settlement agreement, asserting that the settlement should be set aside as the claimant returned to longshore employment in violation of a term of the agreement.

However, as the Board pointed out, the parties' settlement agreement addresses only the remedy available to the employer should the claimant "return to work as a laborer in the longshore industry after the settlement is approved," and the remedy it provides is not rescission of the agreement but a credit to be applied to any future claim for benefits. The Board noted that "Contrary to employer's position on appeal, the presence of an express right of rescission in a settlement agreement is required in order for employer to protect its interest should a specific contingency arise....The settlement agreement in this case, however, does not specifically provide employer with a right of rescission should some specific event occur prior to approval by the [ALJ]." Citing *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (**5th Cir.** 1988), *aff'g* 20 BRBS 18 (1987). The Board further stated, "Accordingly, as the executed settlement agreement sets forth no express right of rescission for employer and contains no express provision allowing employer to escape from its agreement to pay if claimant were to return to work, we reject employer's contention that the [ALJ] erred in not setting aside the agreement." However, the reader is cautioned that this last statement by the Board may be somewhat misleading. *Nordahl*, which the Board repeatedly cited as authority in this area of the law, specifically addressed an employer's ability to include a provision allowing its escape from an agreement during the pre-approval period, not post approval. The Board even notes this distinction in its footnote 6. There is no case law which holds that the parties can contract to rescind a settlement agreement if an event occurs after the settlement has become effective.

Employer also argued that the claimant's return to work was a material breach of the agreement since he represented that he could not return to work as a laborer. However, the Board noted that the agreement provided additional reasons for settlement. Furthermore, the Board noted that the claimant returned to work as a member of a wharf gang, not as a laborer and the employer knew of the claimant's intention to return to work prior to its execution of the agreement. "Finally, employer's argument that claimant's return to work denied it the benefit of the bargain is misplaced since, as noted by the **Fifth Circuit** in *Nordahl*, settlements are essentially a gamble: claimants gamble, inter alia, that the injury will not be as debilitating as the carrier expects, while the carrier gambles, inter alia, that claimant will have less earning capacity on the open labor market than they expect or that claimant has applied an overly optimistic discount rate in evaluating his future rights."

Topic 8.10.9 Section 8(i) Settlements--Section 8(f) Relief

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer's signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bi-furcating an appeal.

The Board, denying the employer's motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer's continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer's liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board…

Topic 8.10.12 Section 8(i) Settlements—Alternative Dispute Resolution

ERRATA

The OALJ Internet Home Page address should read: http://www.oalj.dol.gov.

Topic 8.10.12 Section 8(i) Settlements—Alternative Dispute Resolution

Autin v. Nabors Offshore Corp., (Unpublished)(Civ. No. 0203704)(E.D. of La. March 5, 2004), 2004 U.S. Dist. LEXIS 3507.

Here a worker's status as either a Jones Act seaman or as a maritime worker covered by the LHWCA was at issue. The employer contended that in evaluating seaman status, the court must consider only the plaintiff's work on a fixed platform. In contrast, the plaintiff argued that his career with the employer did not involve a termination and re-hire, but rather a transfer, and thus the status question must be resolved in the context of his entire two-plus years employment at employer, largely in a seaman's capacity.

The employer filed a Motion to Compel Arbitration and Alternatively, for Summary Judgment. The judge denied both motions noting that the matter was not subject to arbitration:

> Plaintiff's claim is either under the Jones Act or the LHWCA. By law, Jones Act claims are not subject to arbitration. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391 (**5th Cir.** 2003). Moreover, LHWCA claims are specifically excluded from arbitration by the very terms of the [employer's] DRP ("notwithstanding anything to the contrary in this Program, the Program does not apply to claims for workers' compensation benefits.") Accordingly, there is no possible scenario under which plaintiff's claims are subject to arbitration.

[ED. NOTE: *Although it has not been litigated as to whether a contractual agreement can specifically exclude a longshore claim from ADR as a public policy, the question is mooted nevertheless since all parties to a claim must request the appointment of a settlement judge at OALJ.****]***

Summary judgment was denied since there remain outstanding fact issues.

TOPIC 8.11

TOPIC 8.12

[Topic 8.12.1 Obligation To Report Work—Generally]

Cheetham v. Bath Iron Works Corp., ___ BRBS ___ (BRB No. 04-0338)(Dec. 20, 2004).

The Board found that the ALJ acted properly in finding that the employer's failure to request earnings information on the specified form precluded application of Section 8(j) although the ALJ also found that the claimant intentionally and willfully misrepresented his earnings. In this case the employer had used a State of Maine form, which a state workers compensation claimant is required to fill out every 90 days. The Board compared the LS-200 form prescribed by the Director with the State of Maine form and found them dissimilar in material respects. The LS-200 requires separate reporting of earnings from employment and self-employment; it requires specific information about each type of earnings, and defines earnings to include revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested. The Maine form is silent as to the definition of "pay or other benefit." More importantly, the Maine form states that the claimant's benefits may be "discontinued," whereas the longshore form states that benefits may be forfeited." Finally, the longshore form warns of criminal penalties for fraudulent representations concerning earnings, and the Maine form does not contain any similar provisions. The Board found it significant that the Maine form did not warn the claimant that his longshore benefits were at risk for failure to comply with the reporting requirement, the result which the employer sought .

Topic 8.12.1 Obligation To Report Work--Generally

Briskie v. Weeks Marine, Inc., ___ BRBS ___ (BRB No. 03-0796)(August 25, 2004).

The Board held that, pursuant to 20 C.F.R. § 702.285(a), in order for an employer to require the claimant to submit an earnings report pursuant to Section 8(j), the employer or the Special Fund must be paying compensation to the claimant, either voluntarily or pursuant to an award, at the time the request for information is made. If the employer or

the special fund is not paying compensation, the forfeiture provision of Section 8(j) cannot be applied to a claimant who fails to respond timely or accurately to the information request. The Board went on to hold that by the explicit terms of the regulation at Section 702.285(a), the claimant was not a "disabled employee" who was legally obligated to comply with the employer's request or risk forfeiting his benefits under the LHWCA.

In reaching its decision, the Board had noted that where the statute contains a "somewhat ambiguous phrase, ‘disabled employee,' the agency's interpretation of the statute through a regulation must be ‘given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" To this end, the Board noted that, "The legislative history of Section 8(j) explains that congress intended to limit the reporting obligation and the forfeiture penalty to employees who are receiving compensation concurrently with the request for earning information." *Slip opin. at* 7 citing H.R. Rep. No. 98-570(I) at 18 (1984) reprinted in 1984 U.S.C.C.A.N. § 2751. *See also* H. Conf. Rept. No. 1027, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.N. § 2783.

The Board also noted that where a claim is being adjudicated, an employer has the means to obtain wage information through the discovery process. 33 U.S.C. § 927(a); *see Maine v. Bray-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

Topic 8.12.1 Obligation To Report Work--Generally

Floyd v. Penn Terminals, Inc., 37 BRBS 141 (2003).

At issue here is the application of Section 8(j) forfeiture. The claimant has questioned the ALJ's authority to initiate consideration of forfeiture. The Board has previously held that an ALJ has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). In the instant case the Board found that Section 8(j) itself provides no direction on the procedures for adjudicating forfeiture proceedings. The Board also noted that the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures.

After examining the regulations, the Board noted that Section 702.286(b) provides that an employer may initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the regulation authorizes an ALJ to consider "any issue" pertaining to the forfeiture. The Board explained that for this reason, despite the statutory reference to the deputy commissioner, the Board has previously held that an ALJ has the authority to adjudicate a forfeiture charge.

In holding that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the ALJ, the Board used the following logic:

> Section 702.286(b) makes the subpart C rules for [ALJ] hearings (20 C.F.R 702.331-702.351) applicable to forfeiture disputes. Section 702.336, in turn, authorizes an [ALJ] to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 maybe construed harmoniously because section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing.

Further, the Board rejected the claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges and noted that ALJ hearings include protective procedural safeguards.

The Board declined to review the ALJ's certification of the facts of this case to the federal district court, pursuant to Section 27(b) regarding alleged misstatements on an LS-200 form and also regarding a pre-existing back condition. The Board cited *A-Z Int'l v. Phillips [Phillips I*], 179 F.3d 1187, 33 BRBS 59(CRT) (**9th Cir.** 1999).

TOPIC 8.13

Topic 8.13.1 Hearing loss--Section 8(c)(13) Introduction and General Concepts

Avondale Industries v. Craig, (Unpublished)(**5th Cir.** No. 02-60470) (**5th Cir.** Dec. 1, 2003); 2003 U.S. App. LEXIS 24187. ***[ED. Note:*** *However, since the Craig case has been removed on Dec. 29, 2003 (see below) from the trio of consolidated cases that the* ***Fifth Circuit*** *addressed in this litigation, the holdings noted below should be cited as Avondale Indus., Inc. v. Alario, 355 F.3d 848)(****5th Cir.*** *Dec. 29, 2003).]*

For attorney's fee purposes, a hearing loss case is to be treated like any other case. There is not requirement that there be presumptive evidence before a hearing loss claim can be considered filed under Section 28(a). "Section 28(a) makes it clear that the operative date for avoiding the potential shifting of attorney's fees is thirty days after the employer receives formal notice of the claim' section 28(a) makes no mention of the term ‘evidence,' let alone require that certain evidence be provided when a claim is filed." "Although section 8(c)(13)(C) states that an audiogram accompanied by an interpretive report is ‘presumptive evidence of the amount of hearing loss,' the Act nowhere states that such evidence is required for a claim to be considered filed for the purposes of section 28(a)." Thus, it is significant that the **Fifth Circuit** is holding that a hearing loss claim can be made without a presumptive audiogram.

[ED. NOTE: *On December 29, 2003, the* ***Fifth Circuit*** *issued Avondale Indus., Inc. v. Alario, 355 F.3d 848 (****5th Cir.*** *Dec. 29, 2003). In a footnote, the* ***Fifth Circuit*** *noted that*

*Avondale also challenged the Board's decision awarding attorney's fees to Eugene Craig (see above). The **Fifth Circuit** notes that the instant opinion was originally issued referencing Craig's case along with the cases of Alario and Howard. "But the BRB's decision of these three consolidated cases actually remanded Craig's case to the district director for further proceedings. Thus, there was no final order of the Board with respect to Craig, and Craig was dismissed from this appeal on September 18, 2002. The Director of the office of Workers' compensation Programs filed a motion to amend the judgment requesting that the original opinion be revised to remove the references to Craig's case. The Director's motion is granted, and this opinion has been revised to reflect that only the cases of Alario and Howard are before this court."]*

Topic 8.13.1 Hearing Loss–General Concepts–Determining the Extent of Loss

Giacalone v. Matson Terminals, Inc., 37 BRBS 87 (2003).

In this consolidated hearing loss claim involving two employers, with two separate audiograms, the Board applied the reasoning of the **Ninth Circuit** in *Stevedoring Services of America v. director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (**9th Cir.** 2002). The Board found that *Benjamin* does not disturb the basic principles of determining Claimant's entitlement under the aggravation rule, which provides that the employer at the time of the aggravation injury is liable for the entire disability at the average weekly wage (AWW) in effect at the time of the aggravating injury. Thus, each claim against an employer for consecutive hearing loss must be adjudicated. Where a prior employer is liable for a portion of the claimant's hearing loss, the credit doctrine works with the aggravation rule to provided the most recent employer with a credit for amounts paid by the prior employer for the same injury.

Here, Claimant filed a claim against Matson Terminals for a binaural hearing loss after receipt of an audiogram in 1995. That claim had not been resolved by the time Claimant filed his second claim against Marine Terminals for an increased hearing loss. The Board found that Matson was liable for the binaural hearing loss at Claimant's 1995 AWW as a matter of law, as well as for medical treatment from that date until the date of the 1998 audiogram. Marine Terminals is liable for Claimant's binaural hearing impairment based on claimant's AWW at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount Claimant receives for his prior hearing loss injuries. Additionally, the Board found that the most recent responsible employer is liable for a claimant's continuing medical treatment.

Topic 8.13.1 Hearing Loss-Introduction and General Concepts

Jeschke v. Jones Stevedoring Co., 36 BRBS 35 (2002).

Here the claimant was prescribed binaural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a

hearing-loss claim against two employers and entered into a Section 8(i)settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA.

Topic 8.13.1 Hearing Loss-Introduction and General Concepts

Weikert v. Universal Maritime Service Corp., 36 BRBS 38 (2002).

The requirements of Section 8 of the LHWCA do not apply to a claim for medical benefits under Section 7 of the LHWCA. The Board held that a claimant need not have a minimum level of hearing loss (i.e., a ratable loss pursuant to the AMA Guides) to be entitled to medical benefits.

The Board also reject the employer's assertion that this case was controlled by *Metro-North Commuter Railroad v. Buckley*, 521 **U.S.** 424 (1997). Buckley involved a railroad employee who had been exposed to asbestos and sought to recover under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (FELA), medical monitoring costs he may incur as a result of his exposure. Because *Buckley* had not been diagnosed with any asbestos-related disease and was not experiencing any symptoms, the **Supreme Court** held that he was not entitled to medical monitoring. Besides coming under another act, the Board specifically noted that in the instant longshore case, the ALJ specifically found that the claimant has trouble hearing and distinguishing sounds and, thus, has symptoms of hearing loss.

Next the Board addressed the ALJ's delegation to the district director the issue as to whether hearing aids were a necessity in this matter. While noting that there are several instances where the district director has authority over certain medical matters, the Board stated that it has "declined to interpret the provisions of Section 7(b) of the [LHWCA], or Section 702.407 of the regulations,..., in such a manner as to exclude the [ALJ] from the administrative process when questions of fact are raised." Thus, the Board found, "the issue of whether treatment is necessary and reasonable, where the parties disagree, is a question of fact for the [ALJ]."

The Board also stated that, "Contrary to employer's contention, the absence of a prescription for hearing aids from a medical doctor, as required by Virginia law, does not make claimant ineligible for hearing aids, or medical benefits, under the [LHWCA]. While claimant must comply with specific provisions under Virginia law before he is

able to obtain hearing aids, claimant's compliance or non-compliance with state requirements does not affect the authority of the [ALJ] to adjudicate claimant's entitlement to medical benefits under the [LHWCA]."

Topic 8.13.4 Hearing Loss-Responsible Employer and Injurious Stimuli

Jeschke v. Jones Stevedoring Co., 36 BRBS 35 (2002).

Here the claimant was prescribed binaural analog hearing aids, and began wearing completely-in-the-canal hearing aids to reduce wind noise. Subsequently he filed a hearing-loss claim against two employers and entered into a Section 8(i) settlement with one who accepted responsibility and agreed to be responsible for all future medical expenses. Sometime after, the district director issued a compensation order approving the settlement which she stated effected a final disposition of the claim. After that, the claimant obtained state-of-the-art digital hearing aids. The Board found that the ALJ was within reason in finding that the responsible employer who had settled this claim was liable for the new hearing aids as the settlement had indicated it would remain liable for all future reasonable and necessary medical expenses for treatment of the claimant's work-related hearing loss. The ALJ had determined that this was a work-related hearing loss and that this employer had accepted liability in the settlement agreement as the responsible party under the LHWCA.

Topic 8.13.5 Hearing Loss–Sections 8(c)(13) and 8(f)(1)

Nival v. Electric Boat Corp., (Unreported)(Case Nos. 2002-LHC-362; 2002-LHC-1720) (July 25, 2002).

This is a Section 8(f) hearing loss claim. At issue is who receives the credit (Employer or Special Fund) for a previously paid compensation award. Previously the claimant was awarded benefits for a 53.75 percent hearing loss. As the employee demonstrated a pre-existing hearing loss of 42.50 percent, the employer was awarded the limiting provision of Section 8(f) and was only responsible for 11.25 percent of the hearing loss. The claimant was retained in employment and continued to be exposed to loud noises. In the present case, the parties stipulated that the claimant presently suffers from a 68.92 percent binaural hearing loss. The ALJ found that the employer was responsible to the claimant for his 68.92 percent hearing loss to the extent of 15.17 (68.92 - 53.75). As noted, the sole remaining issue was whether the Employer or the Special Fund is entitled to take a credit for all or a portion of the money that the claimant had already received as a result of the prior compensation award. Section 8(c)(13)(B).

The jurisprudence notes both an "Employer-First" rule, *Krotis v. General Dynamics Corp*., 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp*., 900 F.2d 506 (**2d Cir.** 1990), and a "Fund-First" rule, *Blanchette v. OWCP, United States Dept. of Labor*, 998 F. 2d 109, 27 BRBS (CRT) (**2d Cir.** 1993).

Under both rules the credit offsets the compensation due to the claimant for the second injury so that a double recovery does not occur. These cases, and others, note varying fact situations (i.e. voluntary payments; no pre-existing, pre-employment hearing loss).

While noting that *Krotis* applied an "Employer-First" rule, the ALJ judged it inequitable to apply *Krotis* since the employer herein "clearly has caused most of Claimant's current hearing loss during his maritime employment" and "would escape any liability herein." Agreeing with the District Director, the ALJ found *Blanchette* (Congress intended the employer to compensate the disabled employee for the entire second (work-related) injury.) to be controlling. Thus, the ALJ concluded that the "Special Fund-First" rule applied and the Special Fund was entitled to take a credit for the money paid to the claimant as a result of his first hearing loss claim.

Topic 8.13.6 Hearing Loss–Duplicative Claims and Section 8(f)

Nival v. Electric Boat Corp., (Unreported)(Case Nos. 2002-LHC-362; 2002-LHC-1720) (July 25, 2002).

This is a Section 8(f) hearing loss claim. At issue is who receives the credit (Employer or Special Fund) for a previously paid compensation award. Previously the claimant was awarded benefits for a 53.75 percent hearing loss. As the employee demonstrated a pre-existing hearing loss of 42.50 percent, the employer was awarded the limiting provision of Section 8(f) and was only responsible for 11.25 percent of the hearing loss. The claimant was retained in employment and continued to be exposed to loud noises. In the present case, the parties stipulated that the claimant presently suffers from a 68.92 percent binaural hearing loss. The ALJ found that the employer was responsible to the claimant for his 68.92 percent hearing loss to the extent of 15.17 (68.92 - 53.75). As noted, the sole remaining issue was whether the Employer or the Special Fund is entitled to take a credit for all or a portion of the money that the claimant had already received as a result of the prior compensation award. Section 8(c)(13)(B).

The jurisprudence notes both an "Employer-First" rule, *Krotis v. General Dynamics Corp*., 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506 (**2d Cir.** 1990), and a "Fund-First" rule, *Blanchette v. OWCP, United States Dept. of Labor*, 998 F. 2d 109, 27 BRBS (CRT) (**2d Cir.** 1993). Under both rules the credit offsets the compensation due to the claimant for the second injury so that a double recovery does not occur. These cases, and others, note varying fact situations (i.e. voluntary payments; no pre-existing, pre-employment hearing loss).

While noting that *Krotis* applied an "Employer-First" rule, the ALJ judged it inequitable to apply *Krotis* since the employer herein "clearly has caused most of Claimant's current hearing loss during his maritime employment" and "would escape any liability herein." Agreeing with the District Director, the ALJ found *Blanchette* (Congress intended the employer to compensate the disabled employee for the entire second (work-related) injury.) to be controlling. Thus, the ALJ concluded that the "Special Fund-First"

rule applied and the Special Fund was entitled to take a credit for the money paid to the claimant as a result of his first hearing loss claim.

Topic 8.13.11 Multiple Hearing Loss Claims and Date of Injury

Giacalone v. Matson Terminals, Inc., 37 BRBS 87 (2003).

In this consolidated hearing loss claim involving two employers, with two separate audiograms, the Board applied the reasoning of the **Ninth Circuit** in *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (**9th Cir.** 2002). The Board found that *Benjamin* does not disturb the basic principles of determining Claimant's entitlement under the aggravation rule, which provides that the employer at the time of the aggravation injury is liable for the entire disability at the average weekly wage (AWW) in effect at the time of the aggravating injury. Thus, each claim against an employer for consecutive hearing loss must be adjudicated. Where a prior employer is liable for a portion of the claimant's hearing loss, the credit doctrine works with the aggravation rule to provided the most recent employer with a credit for amounts paid by the prior employer for the same injury.

Here, Claimant filed a claim against Matson Terminals for a binaural hearing loss after receipt of an audiogram in 1995. That claim had not been resolved by the time Claimant filed his second claim against Marine Terminals for an increased hearing loss. The Board found that Matson was liable for the binaural hearing loss at Claimant's 1995 AWW as a matter of law, as well as for medical treatment from that date until the date of the 1998 audiogram. Marine Terminals is liable for Claimant's binaural hearing impairment based on claimant's AWW at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount Claimant receives for his prior hearing loss injuries. Additionally, the Board found that the most recent responsible employer is liable for a claimant's continuing medical treatment.

Topic 8.13.11 Multiple Hearing Loss Claims and Date of Injury

Stevedoring Services of America v. Director, OWCP, 297 F.3d 797 (**9th Cir.** 2002).

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate reliable audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The **Ninth Circuit**, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The **Ninth Circuit** explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It

was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the ‘‘last employer doctrine' is a rule of convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. In hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ‘‘determinative' and hand off the burden of primary liability."

Topic 8.13.12 Hearing Loss and Average Weekly Wage

Giacalone v. Matson Terminals, Inc., 37 BRBS 87 (2003).

In this consolidated hearing loss claim involving two employers, with two separate audiograms, the Board applied the reasoning of the **Ninth Circuit** in *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (**9th Cir.** 2002). The Board found that *Benjamin* does not disturb the basic principles of determining Claimant's entitlement under the aggravation rule, which provides that the employer at the time of the aggravation injury is liable for the entire disability at the average weekly wage (AWW) in effect at the time of the aggravating injury. Thus, each claim against an employer for consecutive hearing loss must be adjudicated. Where a prior employer is liable for a portion of the claimant's hearing loss, the credit doctrine works with the aggravation rule to provided the most recent employer with a credit for amounts paid by the prior employer for the same injury.

Here, Claimant filed a claim against Matson Terminals for a binaural hearing loss after receipt of an audiogram in 1995. That claim had not been resolved by the time Claimant filed his second claim against Marine Terminals for an increased hearing loss. The Board found that Matson was liable for the binaural hearing loss at Claimant's 1995 AWW as a matter of law, as well as for medical treatment from that date until the date of the 1998 audiogram. Marine Terminals is liable for Claimant's binaural hearing impairment based on claimant's AWW at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount Claimant receives for his prior hearing loss injuries. Additionally, the Board found that the most recent responsible employer is liable for a claimant's continuing medical treatment.

TOPIC 9

Topic 9.1 Compensation for Death–Application of Section 9

Cooper/T. Smith Stevedoring Co. v. Liuzza, 293 F.3d 741 (**5th Cir.** 2002).

The **Fifth Circuit** held that in view of the language of Section 14 and Congressional intent, the court's precedent addressing similar issues, and the deference owed the Director's interpretation, Section 14(j) does not provide a basis for an employer to be reimbursed for its overpayment of a deceased employee's disability payments by collecting out of unpaid installments of the widow's death benefits. In reaching this holding, the court referenced *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (**5th Cir.** 1988) (An employer and insurer were not entitled to offset the disability settlement amount against liability to the employee's widow for death benefits.)

Topic 9.3 Compensation for Death--Death Benefits--Survivors—Spouse and Child

Duck v. Fluid Crane & Construction, 36 BRBS 120 (2002).

Here the Board upheld the ALJ's finding that Sections 2(14) and 9 of the LHWCA provide that a legitimate or adopted child is eligible for benefits without requiring proof of dependency but that an illegitimate child is eligible for death benefits only if she is acknowledged and dependent on the decedent.

The Board first noted that it has held that it possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction. *Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 194 (1985); *see also Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (**6th Cir.** 1984).

The Board found that the instant case was akin to *Mathews v. Lucas*, 427 **U.S.** 495 (1976). In *Lucas*, the **Supreme Court** sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits, observing that one of the statutory conditions of eligibility was dependency upon the deceased wage earner. Although the Social Security Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The **Court** held that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Lucas*, 427 **U.S.** at 513. The presumption of dependency, observed the **Court**, is withheld only in the absence of any significant indication of the likelihood of actual dependency and where the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency. In identifying these factors, the Court relied predominantly on the Congressional purpose in adopting the statutory presumptions of dependency, i.e., to serve administrative convenience.

Applying the court's holding in *Lucas*, Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but rather is "carefully tuned to alternative considerations" by withholding a presumption of dependency to illegitimate children "only in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 **U.S.** at 513. The Board found that the LHWCA's distinction between legitimate and illegitimate children is reasonable, for as the Court stated in *Lucas*, "[i]t is clearly rational to presume [that] the overwhelming number of legitimate children are actually dependent upon their parents for support, " *Lucas*, 427 **U.S.** at 513, while, in contrast, illegitimate children are not generally expected to be actually dependent on their fathers for support.

TOPIC 10

Topic 10.1.3 Determination of Pay—Average Weekly Wage--Definition of Wages

Custom Ship Interiors v. Roberts, 300 F.3d 510(**4th Cir.** 2002), *cert. denied*, ___ **U.S.** ___, 123 **S.Ct.** 1255 (Mem.)(2003).

Regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were includable as "wages" under the LHWCA.

The claimant was injured while remodeling a Carnival Cruise Line Ship for Custom Ship Interiors. Custom Ship's employment contract entitled the claimant to per diem payments without any restrictions. Carnival provided free room and board to its remodelers and Custom Ship knew this. Custom Ship argued that the per diem was a non-taxable advantage.

The court noted Custom Ship's argument that payments must be subject to withholding to be viewed as wages, but did not accept it: "However Custom Ship misconstrues the Act's definition of a ‘wage.' Whether or not a payment is subject to withholding is not the exclusive test of a ‘wage.’" Monetary compensation paid pursuant to an employment contract is most often subject to tax withholding, but the LHWCA does not make tax withholding an absolute prerequisite of wage treatment.

The court explained that because the payments were included as wages under the first clause of Section 2(13), Custom Ship's invocation of the second clause of Section 2(13) is unavailing. "This second clause enlarges the definition of ‘wages' to include meals and lodging provided in kind by the employer, but only when the in kind compensation is subject to employment tax withholding. The second clause, however, does not purport to speak to the basic money rate of compensation for service rendered by an employee under which the case payments in this case fall." Finally, the two member plurality summed up, "The so-called per diem in this case was nothing more than a disguised wage."

The Dissent noted that the definition of "wages" found at Section 2(13) requires that a wage be compensation for "service," not a reimbursement for expenses. *See Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319 (**4th Cir.** 1998).

Topic 10.2.1 Determination of Pay—Average Weekly Wage in General—Section 10(a)

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (**5th Cir.** Nov. 1, 2004). ***[ED. NOTE:** This case was changed from Unpublished status to Published on December 27, 2004.**]***

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's $3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by Section 921©.

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn.*, 40 F.3d at 126 (**5th Cir.** 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than Section 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 percent or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the claimant have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position

in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn… had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

Topic 10.2.4 Determination of Pay--"Substantially the Whole of the Year"

Stevedoring Services of America v. Guthrie, (Unpublished)(No. 03-72204)(**9th Cir.** Dec. 16, 2004).

In a memorandum opinion the court found that the ALJ and the Board had correctly applied Section 10(a) to calculate the claimant's AWW. There was no evidence of record that the claimant's employment was seasonal or intermittent. It was undisputed that the claimant had worked 228 days in the 53 weeks preceding his injury, or 87.7 percent of the total working days.

Topic 10.2.4 Determination of Pay—Average Weekly Wage in General—"Substantially the Whole of the Year"

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (**5th Cir.** Nov. 1, 2004). ***[ED. NOTE:** This case was changed from Unpublished status to Published on December 27, 2005.**]***

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's $3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by Section 921©.

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a

patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn*., 40 F.3d at 126 (**5th Cir.** 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than Section 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 percent or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the claimant have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn… had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

Topic 10.2.4 Determination of Pay—Section 10(a)—"Substantially the Whole of the Year"

Stevedoring Servs. Of Am. v. Price, 366 F.3d 1045 (**9th Cir.** 2004).

When a longshoreman has worked more than 75 percent of the workdays in the year preceding injury, the **Ninth Circuit** found that Section 10(a) does not excessively over-compensate the claimant.

The court also found that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, not from all awards combined. In situations of multiple awards, the court stated that it recognized that the amount of adjustments needed, if any, depended on the factual determination of the cause of the employee's increase in earnings between the time of his first and second injury:

> "If an employee's increase in earnings is not caused by a change in his wage-earning capacity, allowing the employee to retain the full amount of both awards does not result in any double dipping. The reason is that the prior partial disability award compensates the employee for the reduction in his wage-earning capacity from the first accident, and the subsequent permanent total disability award compensates the employee for what remains of his earning capacity after that accident. [Citation omitted.] Taken together, the awards do not compensate the employee for more earning capacity than he has actually lost. In comparison, a double dipping problem would arise if a change in conditions since the first accident has mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. In that case, because the first award

overestimated the effect of the first injury on the employee's wage end up compensating the employee for more wage-earning capacity than he has actually lost."

The **Ninth Circuit** stated that its holding as to Section 6(b)(1) is consistent with the plain language of the LHWCA and effectuates the underlying policy of the Act by shielding employers from high compensation payments for injuries to highly paid workers while providing employers an incentive to prevent future injuries to formerly injured employees.

Topic 10.4.4 Determination of Pay--Calculation of Annual Earning Capacity Under Section 10©

Volks Constructors v. Melancon, (Unpublished) No. 04-60443 Summary Calendar)(**5th Cir.** Nov. 24, 2004).

In this Section 10 case, the employer objected not to the standard [Section 10©] applied, but rather to the particular historical earnings figures and sectors of the economy that the ALJ chose to use in his calculation. The **Fifth Circuit** found that, "When viewed in the perspective of the policy of the lHWCA and the plethora of discrete facts in evidence here, we agree with the BRB's characterization of the ALJ's handling of this case. We cannot credit respondents' charge of bias; there is more than substantial evidence to support the facts found and law applied by the ALJ; in the context of § 910©, the weekly wage calculations are reasonable—not unreasonable—estimates of Melacon's earning capacity when he was injured; and, candidly, petitioners' contention that this pile driver operator cum auto mechanic should have his annual earning capacity calculated solely on the basis of his own, subjective profit during a two-season entrepreneurial deviation into crawfish farming, with all of its variables, vicissitudes, and vagaries, borders on the ludicrous."

TOPIC 12

TOPIC 13

Topics 13.1 Time for Filing of Claims--Generally

Reed v. Bath Iron Works, 38 BRBS 1 (20004).

In a case of first impression, the Board held that the phrase "without an award," contained within Section 13(a) refers to payments without an award under the LHWCA. Therefore, where an employer makes any payments without an award under the

LHWCA, the Section 13(a) limitations period is tolled until one year after the employer's last payment. Here an employer who had made payments pursuant to a state act, argued that the LHWCA claim was untimely since it came more than one year after the employee knew he had a work-related injury. However, the Board stated:

> It follows that employer's payment pursuant to the state compensation award constitutes a payment without an award under the Act, and that therefore the statute of limitations was tolled until one year after employer's last payment… . As employer's liability under the Longshore Act had not been determined at the time employer made its payments to claimant under the state award, those payments are considered advanced payments of compensation with regard to employer's potential liability under the Act. Therefore, they are payments without an award for purposes of Section 13(a). Section 14(j) of the Act, 33 U.S.C. § 914(j), has been construed so that any payments by employer intended as compensation may be considered "voluntary" so as to permit employer a credit under the Act….Thus, whether paid purely voluntarily or as a result of an award under another compensation system, the status of payments made without a Longshore award is the same. Where no award under the Act has yet been entered, a payment by an employer intended as compensation for claimant's injury must be considered an advance, i.e. voluntary payment of compensation under the Act.

Topic 13.1 Time for Filing of Claims--Starting the Statute of Limitations; Modification--*De Minimis* Awards

Hodges v. Caliper, Inc., (Unpublished) (BRB No. 01-0742) (June 17, 2002).

At issue here was whether the claimant timely filed his claim under Section 13(a) in lieu of *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 **U.S.** 121, 31 BRBS 54 (CRT) (1997). In 1995 the claimant's right eye was injured by a welding spark. Upon medical examination the claimant exhibited mild inflamation of the eye with an area of superficial corneal scar tissue of unknown etiology and was diagnosed with post-traumatic iritis. Subsequently a few months later the claimant's vision tested at 20/20. He continued working and in 1999 noticed a cloud in his field of vision while welding. Upon examination the doctor attributed the claimant's vision problem to a corneal scar that could be removed or reduced by laser surgery and this procedure was authorized by the employer.

The Board upheld the ALJ's finding that the claimant had not been aware that his eye injury would affect his wage-earning capacity until the onset of his vision clouding in 1999 and therefore, the claim was timely filed. At the OALJ hearing, the employer had also contended that *Rambo II* required that the claimant file a claim for a *de minimis* award within one year from the 1995 date of the claimant's eye accident. The ALJ had found it to be unclear whether Rambo II imposes such a requirement and that, in any

case, the claimant had no reason to believe before 1999 that his eye injury had a significant potential to diminish his future wage-earning capacity.

The Board noted that in *Rambo II*, the **Court** had declined to determine how high the potential for disability needed to be to qualify as "nominal," since that issue was not addressed by the parties and that instead, the **Court** had adopted the standard of the circuit courts which had addressed this issue by requiring the claimant to establish a "significant possibility" of a future loss of wage-earning capacity in order to be entitled to a *de minimis* award. The Board further noted that pertinent to the employer's argument in the instant case, the **Court** in *Rambo II* relied in part on the limitations period for traumatic injuries in Section 13(a) as grounds for its approving *de minimis* awards. The **Court** had stated that Section 13(a) "bars an injured worker from waiting for adverse economic effects to occur in the future before bringing his disability claim, which generally must be filed within a year of injury." *Rambo II*, 521 **U.S.** at 129, 31 BRBS at 57 (CRT). However, the Board found that "statements by the *Rambo II* **Court** regarding Section 13(a) were not directly material to the actual Section 22 issue before the Court and, consequently are dicta. Accordingly, the [ALJ] was not required to apply *Rambo II* to determine whether the claim herein was time-barred.

Topic 13.1.1 Time for Filing of Claims--Voluntary Payments

Reed v. Bath Iron Works, 38 BRBS 1 (20004).

In a case of first impression, the Board held that the phrase “without an award,” contained within Section 13(a) refers to payments without an award under the LHWCA. Therefore, where an employer makes any payments without an award under the LHWCA, the Section 13(a) limitations period is tolled until one year after the employer’s last payment. Here an employer who had made payments pursuant to a state act, argued that the LHWCA claim was untimely since it came more than one year after the employee knew he had a work-related injury. However, the Board stated:

> It follows that employer’s payment pursuant to the state compensation award constitutes a payment without an award under the Act, and that therefore the statute of limitations was tolled until one year after employer’s last payment… . As employer’s liability under the Longshore Act had not been determined at the time employer made its payments to claimant under the state award, those payments are considered advanced payments of compensation with regard to employer’s potential liability under the Act. Therefore, they are payments without an award for purposes of Section 13(a). Section 14(j) of the Act, 33 U.S.C. § 914(j), has been construed so that any payments by employer intended as compensation may be considered “voluntary” so as to permit employer a credit under the Act….Thus, whether paid purely voluntarily or as a result of an award under another compensation system, the status of payments made without a Longshore award is the same. Where no award under the Act has yet been entered, a payment by an employer intended as compensation for claimant’s

injury must be considered an advance, i.e. voluntary payment of compensation under the Act.

Topic 13.1.2 Time for Filing of Claims--Section 13(b) Occupational Disease

Bath Iron Works Corp. v. U.S. Labor, [Onebeacon f/k/a Commercial Union York Insurance Co. v Knight], 336 F.3d 51 (**1st Cir.** 2003).

The **First Circuit** upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3 mos."duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband's asbestos exposure in the workplace.

In upholding the ALJ, the **First Circuit** found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. " An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The **First Circuit** also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

Topic 13.1.2 Time for Filing of Claims--Section 13(b) Occupational Diseases

Norfolk & Western Railway Co. v. Ayers, 538 **U.S.** 135, 123 **S.Ct**. 1210 (2003).

The **Court** held that former employees can recover damages for mental anguish caused by the "genuine and serious" fear of developing cancer where they had already been diagnosed with asbestosis caused by work-related exposure to asbestos. This adheres to the line of cases previously set in motion by the **Court**. *See Metro-North Commuter R. Co. v. Buckley*, 521 **U.S.** 424 (1997)(When the fear of cancer "accompanies a physical injury," pain and suffering damages may include compensation for that fear.) The **Court** noted that the railroad's expert acknowledged that asbestosis puts a worker in a heightened risk category for asbestos-related lung cancer, as well as the undisputed testimony of the claimants' expert that some ten percent of asbestosis suffers have died of

mesothelioma. Thus, the **Court** found that claimants such as these would have good cause for increased apprehension about their vulnerability. The **Court** further noted that the claimants must still prove that their asserted cancer fears are genuine and serious.

[ED. NOTE:** Mesothelioma is not necessarily preceded by asbestosis.**]

Topic 13.2 Time for Filing of Claims--Defining a Claim

Stevedoring Services of America v. Director, OWCP, 297 F.3d 797 (**9th Cir.** 2002).

The "last employer doctrine" does not contemplate merging two separate hearing loss claims into one. Here the claimant had filed two separate hearing loss claims based on two separate reliable audiograms. There was no dispute that the claimant's jobs at both employers were both injurious. The **Ninth Circuit**, in overruling both the ALJ and the Board, noted that, "[n]o case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability."

The **Ninth Circuit** explained that, "[I]t is clear that had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury....It was only fortuitous that the case was delayed to the point that the second claim became part of the same dispute. It is true that the "'last employer doctrine' is a rule of convenience and involves a certain amount of arbitrariness. However, the arbitrariness does not extend to an employer being liable for a claim supported by a determinative audiogram filed previously against a separate employer that simply has not been resolved."

The court opined that, "[T]reating the two claims separately is supported by sound public policy principles. n hearing loss cases, a claimant is likely to continue working even after the onset of disability. If a later audiogram is conducted--something the claimant will undoubtedly undergo in the hope of getting compensated for any additional injury--the first employer can simply point to the later audiogram as ''determinative' and hand off the burden of primary liability."

Topic 13.3 Time For Filing Claims--Awareness Standard

Bath Iron Works Corp. v. U.S. Labor, [Onebeacon f/k/a Commercial Union York Insurance Co. v Knight], 336 F.3d 51 (**1st Cir.** 2003).

The **First Circuit** upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3

mos." duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband's asbestos exposure in the workplace.

In upholding the ALJ, the **First Circuit** found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. " An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The **First Circuit** also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

Topic 13.3 Time for Filing of Claims--Awareness Standard

Newport News Shipbuilding & Dry Dock Co. v. Williams, (Unpublished) (No. 01-2072) (2002 WL 1579570) (July 11, 2002) (**4th Cir.** 2002).

In this matter the ALJ found that the claimant's filing a claim four years after an injury was not timely. The Board reversed, finding that the claimant had no reason to be aware of a likely impairment of his earning power until almost four years after the injury when he underwent a nerve block. The employer appealed contending that the Board had substituted its own finding of fact for that of the ALJ. The **Fourth Circuit** upheld the Board, noting that *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (**4th Cir.** 1991) was controlling. The court held that the question of whether the claim was timely filed related to when the claimant knew, or had reason to know, that his injury was likely to impair his earning capacity and that seeking ongoing treatment, experiencing pain, or knowing of a possible future need for surgery, are legally insufficient to trigger the running of the one-year limitations period.

Topic 13.3.1 Time for Filing of Claims--Effect of Diagnosis/Report

Newport News Shipbuilding & Dry Dock Co. v. Williams, (Unpublished) (No. 01-2072) (2002 WL1579570) (July 11, 2002) (**4th Cir.**2002).

In this matter the ALJ found that the claimant's filing a claim four years after an injury was not timely. The Board reversed, finding that the claimant had no reason to be aware of a likely impairment of his earning power until almost four years after the injury when he underwent a nerve block. The employer appealed contending that the Board had substituted its own finding of fact for that of the ALJ. The **Fourth Circuit** upheld the

Board, noting that *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (**4th Cir.** 1991) was controlling. The court held that the question of whether the claim was timely filed related to when the claimant knew, or had reason to know, that his injury was likely to impair his earning capacity and that seeking ongoing treatment, experiencing pain, or knowing of a possible future need for surgery, are legally insufficient to trigger the running of the one-year limitations period.

Topic 13.3.2 Time For Filing Claims--Occupational Diseases

Bath Iron Works Corp. v. U.S. Labor, [Onebeacon f/k/a Commercial Union York Insurance Co. v Knight], 336 F.3d 51 (**1st Cir.** 2003).

The **First Circuit** upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3 mos."duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband’s asbestos exposure in the workplace.

In upholding the ALJ, the **First Circuit** found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. " An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The **First Circuit** also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

Topic 13.4.5 Time for Filing Claims—Laches

Kirkpatrick v. B.B.I, Inc., 38 BRBS 27 (2004).

The Board affirmed the ALJ's finding that the claimant was covered by the OCSLA although the claimant was not directly involved in the physical construction of an offshore platform. The parties had stipulated that the worker's "primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured." As the claimant's purpose

for being on the platform was to procure supplies necessary to construct the platform, and his injury occurred during the course of his duties, his work satisfies the OCSLA status test.

The Board also found that Sections 12 and 13 apply to a claimant's notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits. The Board stated, "There is, in fact, no statutory provision requiring a carrier seeking reimbursement from another carrier to do so within a specified period."

Here INA claimed that it relied on Houston General's 12 year acceptance of this claim and, to its detriment, "is now facing a claim for reimbursement approaching three-quarters of a million dollars, without the opportunity to investigate contemporaneously, manage medical treatment, engage in vocational rehabilitation, monitor disability status, etc." The Board rejected this argument "as there was no representation or action of any detrimental reliance, there can be no application of the doctrine of equitable estoppel."

Further, the Board noted that the doctrine of laches precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. Additionally the Board noted that because the LHWCA contains specific statutory periods of limitation, the doctrine of laches is not available to defend against the filing of claims there under. "As the claim for reimbursement is related to claimant's claim under the Act by extension of OCSLA, and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case.

The Board found that neither judicial estoppel nor equitable estoppel applied and noted that "jurisdictional estoppel" is a fictitious doctrine.

The Board vacated the ALJ's ruling that he did not have jurisdiction to address the issue of reimbursement between the two insurance carriers. "Because INA's liability evolved from claimant's active claim for continuing benefits, and because its responsibility for those benefits is based entirely on the provisions of the Act, as extended by the OCSLA, we vacate the [ALJ's] determination that he does not have jurisdiction to address the reimbursement issue, and we remand the case to him…."

Topic 13.4 Time For Filing Of Claims--Section 13(d): Tolling The Statute

Lewis v. SSA Gulf Terminals, Inc., (Unpublished) (BRB No. 03-0523)(April 22, 2004).

When the claimant moved to stay the longshore proceeding until his Jones Act suit was complete, the Board found that the ALJ was within his authority to stay the LHWCA claim. The Board noted that the ALJ had based his reasoning on the case law applicable in the **Fifth Circuit**. *Sharp v. Johnson Brothers Corp*., 973 F.2d 423, 26

BRBS 59(CRT) (**5th Cir.** 1992), *cert. denied*, 508 **U.S.** 907 (1993)(If a formal award under the LHWCA is issued after the ALJ makes findings of fact and conclusions of law, the claimant is precluded from pursuing a Jones Act suit, because he had the *opportunity* to litigate the coverage issue, even if it was not actually litigated.); *contra, Figueroa v. Campbell Industries*, 45 F.3d 311 (**9th Cir.** 1995). "As the [ALJ] provided a rational basis for canceling the hearing and holding the case in abeyance, and as employer has not demonstrated an abuse [of] the {ALJ]'s discretion in this regard, we affirm …the action." The Board however, did not affirm the ALJ's decision to remand the case to the district director. Rather, the ALJ must retain the case on his docket and award or deny benefits after a formal hearing is held.

TOPIC 14

Topic 14.2.1 Payment of Compensation--Contoversion—Notice of Controversion

Hitt v. Newport News Shipbuilding & Dry Dock Co., 38 BRBS 47 (2004).

Overturning the ALJ, the Board found that when determining the validity of a notice of controversion, the document must be examined on its face. "[T]he information required and provided in the four corners of the document, standing alone, determined the validity of the filing…. Resort to other documents in order to divine employer's true intentions unnecessarily clouds the inquiry into employer's liability for a Section 14(e) assessment. Compliance with Section 14(d) in a timely manner is all that the statute requires of employer in order to avoid an additional 10 percent assessment." The Board held that as the employer filed a notice of controversion stating the reason for its controverting the claim, the employer complied with the requirements of Section 14(d).

Noting the employer had tried to persuade the claimant to enter into a settlement on the same day that it controverted the claim, and for the degree of disability for which it was controverting the claim, the ALJ had concluded that the employer obviously did not dispute the extent of the claimant's impairment and controverted the claim only as a pretext to avoid the claimant's right to seek modification absent the issuance of an order.

The Board noted that this matter occurred within the jurisdiction of the **Fourth Circuit** and that that court has stated that the validity of a motion for modification must come from the content and context of the [request for modification] itself… in order to ascertain whether the motion expresses an actual intent to seek compensation for a particular loss. The Board further noted that within the **Fourth Circuit**, the Board has held that consideration must be given to the circumstances surrounding the filing of a motion for modification, as well as to the content of the actual filing itself, in order to establish whether a valid motion for modification has been filed. However, the Board declined to extent this line of cases and require an ALJ to look beyond the four corners of a notice of controversion under Section 14(d) in order to determine its validity.

Topic 14.4 Payment of Compensation--Compensation Paid Under Award

Newport News Shipbuilding & Dry Dock Co. v. Brown, 376 F.3d 245(**4th Cir.** 2004).

An award under Section 14(f) for an employer's late payment of compensation is a successful prosecution of a claim for compensation for purposes of awarding attorney fees. The **Fourth Circuit** reasoned that the amount due for late payment satisfies the definition of "compensation" because it is a "money allowance payable" to the employee who is due the basic compensation award. "[W]hen the language of Sec. 14(f) is read together with the LHWCA's definition of compensation, and the Act's structural distinction between compensation and penalties is taken into account, it is plain that an award for late payment under Sec. 14(f) is compensation."

Topic 14.4 Payment of Compensation--Compensation Paid Under Award

Hanson v. Marine Terminals Corporation, 307 F.3d 1139 (**9th Cir.** 2002).

The **Ninth Circuit** reversed federal district court decision which had denied Section 14(f) relief for overdue compensation on "equitable grounds." (Claimant had provided incorrect addresses on two occasions—at time of filing claim and when he submitted settlement for approval.) Agreeing with other circuits, the **Ninth** concluded that equitable factors have no place in the district court's consideration of a Section 14(f) penalty. The court noted that it need not decide whether fraud or physical impossibility would constitute a defense to a Section 14(f) penalty because neither fraud nor physical impossibility were at issue. The court simply stated that the statute limits the district court's inquiry solely to the question of whether the order was in accordance with law.

Topic 14.5 Payment of Compensation--Employer Credit for Prior Payments

Cooper/T. Smith Stevedoring Co. v. Liuzza, 293 F.3d 741 (**5th Cir.** 2002).

The **Fifth Circuit** held that in view of the language of Section 14 and Congressional intent, the court's precedent addressing similar issues, and the deference owed the Director's interpretation, Section 14(j) does not provide a basis for an employer to be reimbursed for its overpayment of a deceased employee's disability payments by collecting out of unpaid installments of the widow's death benefits. In reaching this holding, the court referenced *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773 (**5th Cir.** 1988). (An employer and insurer were not entitled to offset the disability settlement amount against liability to the employee's widow for death benefits.)

TOPIC 15

Topic 15.2 Invalid Agreements--Agreement to Waive Compensation Invalid

In Re Kellog Brown & Root, Tex. Ct. App., No. 01-01-01177-CV (April 25, 2002).

[ED. NOTE:** While not a LHWCA case, this matter is nevertheless of interest due to its wrongful discharge issue.**]

The Texas Court of Appeals held that a pipefitter helper must arbitrate his claim that he was wrongfully discharge by Kellogg, Brown & Root for filing a workers' compensation claim. Here the worker had signed two documents acknowledging "in consideration of my employment" that he was an at-will employee and that he was bound by the terms of the "Haliburton Dispute Resolution Program." That program required binding arbitration of all employment claims, including workers compensation retaliation claims. The Federal Arbitration Act applied to arbitrations held under the program. When the worker brought suit for wrongful discharge, the trial court denied employer's motion to compel arbitration, finding that there was no consideration and thus, no contract to arbitrate. However, the appellant court found that both sides to the agreement were bound to perform certain requirements, and thus the agreement to arbitrate was binding and enforceable.

TOPIC 16

Topic 16.1 Assignment and Exemption from Claims of Creditors—Generally

CIGNA Property & Casualty v. Ruiz, 834 So. 2d 234 (Fla. App. 3 Dist. 2002), 2002 WL 31373875 (Fla. App. 3rd Cir. October 23, 2002); 254 F. Supp. 2d 1262 (S.D. Fla. 2003); 2003 WL 1571898 (Jan. 21, 2003)(Interpleader Complaint Dismissed without prejudice), 85 Fed Appx 726 (table) (Oct. 15, 2003), *cert. denied*, ___ **U.S.** ___.124 **S.Ct.** 433 (Mem.)(Oct 20, 2003), *see also* 124 **S.Ct.** 1659 (Mem.) *cert. denied,* (March 22, 2004).

[ED. NOTE:** As of October 30, 2002 this opinion had not yet been released for publication in the permanent law reports and until released, it is subject to revision or withdrawal.**]

Here the Florida State Appeals Court upheld a state district court which held that an ex-wife's claim for on-going child support was neither a claim of a creditor nor an attachment or execution for the collection of a debt; and thus, the anti-alienation provision of the LHWCA [33 U.S.C. § 916] did not apply so as to preclude the longshore insurer from withholding certain sums from the ex-husband's benefits and paying this for on-going child support. In reaching this conclusion, the Florida Court of Appeals noted prior state case law. Previous case law in Florida had found that a claim for child support is not the claim of a creditor. *Department of Revenue v. Springer*, 800 So. 2d 700 (Fla. 5th DCA 2001). The exemption of worker's compensation claims from claims of creditors does not extend to a claim based on an award of child support. *Bryant v. Bryant*, 621 So. 2d 574 (Fla.2d DCA 1993). Moreover, a child support obligation is not a debt.

Gibson v. Bennett, 561 So. 2d 565 (Fla. 1990). The Florida Court of Appeals also acknowledged the 1996 amendment to the non-alienation provisions of the Social Security Act (*see* 42 U.S.C. § 659) which, it noted, had been held to have impliedly repealed the non-alienation provision of the LHWCA with regard to delinquent support obligations. *See Moyle v. Director, OWCP*, 147 F.3d 1116 (**9th Cir.** 1998), 32 BRBS 107(CRT).

Topic 16.2 Assignment and Exemption from Claims of Creditors--Compensation Cannot be Assigned

CIGNA Property & Casualty v. Ruiz, 834 So. 2d 234 (Fla. App. 3 Dist. 2002), 2002 WL 31373875.

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Topic 16.3 Assignment and Exemption from Claims of Creditors--Compensation is Exempt from Creditor Claims

CIGNA Property & Casualty v. Ruiz, 254 So. 2d 1262 (Fla. App. 3 Dist. 2002), 2002 WL 31373875.

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Topic 16.4 Assignment and Exemption from Claims of Creditors--Garnishment

CIGNA Property & Casualty v. Ruiz, 254 So. 2d 1262 (Fla. App. 3 Dist. 2002), 2002 WL 31373875.

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TOPIC 17

TOPIC 18

Topic 18.1 Default Payments–Generally

[ED. NOTE:** The Following Black Lung case is included since the Black Lung Act draws on the LHWCA procedural provisions. 30 U.S.C. § 932(a).**]

Nowlin v. Eastern Associated Coal Corp, 266 F. Supp. 2d 502 (N.D. W. Va. May 13, 2003) [Order on Motion], *see also* 331 F. Supp. 2d 465 (Aug. 12, 2004).

In this enforcement issue case, the federal district court addressed the enforceability of awards under both Section 18(a) and Section 21(d). It found that an award order may be enforced under either section. The court noted that while Section 18 requires a supplementary order to declare the amount in default and has an express statute of limitations, a claimant could still utilize Section 21(d) for enforcement. The court noted that while a **Ninth Circuit** case, *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381 (**9th Cir.** 1985), concluded that enforcement of a 20 percent penalty under Section 18 is more "logical" and "far better meets the Congressional purpose" than enforcement pursuant to Section 21, it did not expressly foreclose that section as an avenue of recovery for claimants. *See also, Reid v. Universal Maritime Service Corp*., 41 F.3d 200 (**4th Cir.** 1994); *Kinder v. Coleman & Yates Coal Co.*, 974 F. Supp. 868 (W.D. Va. 1997).

The court found that under Section 21, the claimant did not have to secure a supplemental order. Additionally, since Section 21 does not state a statute of limitations time period, the court allowed the adoption of the one used within that state, which happened to be two years.

Topics 18.1 Default Payments—Generally

Millet v. Avondale Industries, (Unreported)(E.D. La. 2003), 2003 WL 548879 (Feb. 24,2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences.

That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If Millet must bear the cost of enforcement of that final fee award then he cannot receive ‘‘the full value of the fees to which [he is] entitled under the Act.'"

Topic 18.1 Default Payments–Generally

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Topic 18.2 Default Payments--Supplemental Order Declaring Default

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TOPIC 19.01

TOPIC 19.02

TOPIC 19

Topic 19.1 Procedure--The Claim: Generally

Floyd v. Penn Terminals, Inc., 37 BRBS 141 (2003).

At issue here is the application of Section 8(j) forfeiture. The claimant has questioned the ALJ's authority to initiate consideration of forfeiture. The Board has previously held that an ALJ has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). In the instant case the Board found that Section 8(j) itself provides no direction on the procedures for adjudicating forfeiture proceedings. The Board also noted that the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures.

After examining the regulations, the Board noted that Section 702.286(b) provides that an employer may initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the regulation authorizes an ALJ to consider "any issue" pertaining to the forfeiture. The Board explained that for this reason, despite the statutory reference to the deputy commissioner, the Board has previously held that an ALJ has the authority to adjudicate a forfeiture charge.

In holding that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the ALJ, the Board used the following logic:

> Section 702.286(b) makes the subpart C rules for [ALJ] hearings (20 C.F.R 702.331-702.351) applicable to forfeiture disputes. Section 702.336, in turn, authorizes an [ALJ] to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 maybe construed harmoniously because section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing.

Further, the Board rejected the claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges and noted that ALJ hearings include protective procedural safeguards.

The Board declined to review the ALJ's certification of the facts of this case to the federal district court, pursuant to Section 27(b) regarding alleged misstatements on an LS-200 form and also regarding a pre-existing back condition. The Board cited *A-Z Int'l v. Phillips [Phillips I*], 179 F.3d 1187, 33 BRBS 59(CRT) (**9th Cir.** 1999).

Topic 19.1 Procedure--The Claim: Generally

Hymel v. McDermott, Inc., 37 BRBS 160 (2003).

Here the claimant sued his employer under the LHWCA as well as in state court against his employer and others, for negligence and intentional exposure to toxic substances in the work place. Executive officers of the employer during the claimant's employment (who were named as defendants in the state court suit) moved to intervene in the LHWCA claim. The ALJ denied the motion to intervene, finding that the issue raised by the interveners was not "in respect of "a compensation claim pursuant to Section 19(a) of the LHWCA. In a subsequent Decision and Order, the ALJ granted the claimant's motion to dismiss the claimant's claim with prejudice, pursuant to Section 33(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval. The interveners filed an appeal with the Board. The Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the interveners were not adversely or aggrieved by the denial of their motion to intervene. Interveners then filed a motion for reconsideration of the Board's dismissal.

The Board granted the motion for reconsideration, finding that the interveners are adversely affected or aggrieved by the ALJ's denial of their petition. The Board noted that Section 21(b)(3) of the LHWCA states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the LHWCA. However, turning to the merits of the appeal, the Board found that the ALJ's decision was legally correct. The Board noted **Fifth Circuit** case law to support the ALJ's determination that he was without jurisdiction to rule on interveners' entitlement to tort immunity in a state court suit, as that issue was not essential to resolving issues related to the claimant's claim for compensation under the LHWCA. The Board went on to note that even if the claimant's claim had still been pending, the interveners' claim, while based on Section 33(i) of the LHWCA, is independent of any issue concerning the claimant's entitlement to compensation and/or medical benefits and the party liable for such. Section 33(i) does not provide the right of intervention.

Topic 19.3 Procedure—Adjudicatory Powers

Opiopio v. United States Marine Corps, (Unpublished) (BRB No. 04-0340)(December 7, 2004).

In this suitable alternate employment case, the Board found that the ALJ exceeded her authority by ordering the employer to provide the claimant with a job that complies with the doctor's work restrictions and to enforce the restrictions. Additionally, the Board held that, contrary to the ALJ's suggestion that the employer provide the claimant with vocational rehabilitation assistance if it was unable to provide a suitable light duty position, the employer is not obligated under the LHWCA to offer the claimant vocational rehabilitation. Since Section 39©(1)-(2) and the implementing regulations, 20 C.F.R. § 702.501 *et seq.*, authorize the Secretary of Labor to provide for the vocational rehabilitation of permanently disabled employees in certain circumstances, ALJs do not have the authority to provide vocational rehabilitation.

Topic 19.3 Procedure--Adjudicatory Powers

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Topic 19.3 Procedure--Adjudicatory Powers

Vinson v. Resolve Marine Services, 37 BRBS 103 (2003).

In this matter the employer appealed the ALJ's Decision wherein an expedited final hearing had been held, alleging that its procedural due process rights had been violated since the hearing was held on October 15, 2001, shortly after the carrier's offices in the New York World Trade Tower had been destroyed in the September 11, 2001 terrorist attach. Employer had alleged that all of its carrier's records, and in particular those relevant to the instant case, were destroyed in that disaster and that it would be "unduly prejudiced in attempting to recreate a file, conduct discovery and proceed to trial in this case in only a three week period." At the hearing, both parties submitted evidence, presented witnesses and argued their respective cases, and the record was held open for a period of time thereafter for the submission of depositions and post-hearing briefs.

The ALJ had relied on 29 C.F.R. § 18.42(e) which deals with motions to expedite. Although the Board found that the Section 19(c) of LHWCA (10 days notice of hearing) and regulation 20 C.F.R. § 702.335 (notification of place and time of formal hearing must be not less than 30 days in advance) were more specific and therefore controlling, it nevertheless upheld the ALJ's decision. The Board found, "[T]he facts presented, allowing employer less than the time specified by Section 702.335 is insufficient to warrant a conclusion that employer's right to procedural due process has been abridged. First, the [ALJ's] decision complies with the time limit of Section 19(c) of the Act....Second, and more importantly, employer has not provided any substance to its allegation of prejudice, or any indication that the expedited hearing impeded its defense of this case."

Topic 19.3 Procedure--Adjudicatory Powers

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty*

Ass'n, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

Topic 19.3 Procedure--Adjudicatory Powers

Burley v. Tidewater Temps, Inc., 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. § 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the administrative law judge's use of permissive rather than mandatory language in his pre-hearing order, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros.*, 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished Smith as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in Burley, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

Topic 19.3 Procedure--Adjudicatory Powers

McCracken v. Spearin, Preston and Burrows, Inc., 36 BRBS 136 (2002).

This matter involves a bankrupt carrier wherein the ALJ allowed the Carrier/Employer's attorney to withdraw and found that the Employer's motion for a stay of proceedings had been withdrawn since no one was present to argue the motion to

withdraw. Employer's motion for a continuance was also denied and Employer was declared in default. The ALJ issued a default judgment against the Employer, ordering it to pay Claimant permanent total disability benefits, medical benefits and an attorney's fee. Employer, now represented, moves for reconsideration.

The Board noted that the ALJ had based his declaration of default and his award of permanent total disability benefits solely on Employer's absence from the proceedings. In vacating the award, the Board stated that "Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits."

Noting the similarities between 29 C.F.R. § 18.39(b) and Rule 55(c) of the Federal Rules of Civil Procedure (FRCP), the Board agreed with the Employer that the failure to send a company representative to the hearing on the facts presented was insufficient to warrant a declaration of default against Employer and was "a overly harsh sanction" in light of the circumstances presented. The Board noted that 29 C.F.R. § 18.39(b) has a "good cause" standard similar to FRCP 55(c) and applied the good faith standard articulated in *Enron Oil Corp. v. Diakuhara* 10 F.3d 90 (**2d Cir.** 1993).

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Topic 19.3 Procedure–Adjudicatory Powers

Stevens v. General Container Services, (Unpublished) (BRB No. 01-0677A)(April 30, 2003).

Here the ALJ's authority to obtain answers to his own interrogatories and thereby discredit the claimant was upheld by the Board. At the hearing, the ALJ had observed that the claimant's demeanor while testifying on direct for an hour indicated severe back pain. However, after a 30 minute break and upon resuming the witness stand, the claimant acted as though he were free of pain. The ALJ later sent the claimant interrogatories to elicit whether he had taken pain medication during the break. The claimant answered that he had taken pain medication six hours earlier. From this response the ALJ concluded, in part because of the changed demeanor on the stand that the claimant was not credible about having severe back pain. The ALJ had concluded that the claimant had "simply forgot to resume the demeanor he had earlier employed for the purpose of conveying that he was in severe back pain." The Board found that the claimant's disagreement with the ALJ's weighing of the evidence is not sufficient reason for the Board to overturn it.

Topic 19.3 Procedure--Adjudicatory Powers

Lewis v. SSA Gulf Terminals, Inc., (Unpublished) (BRB No. 03-0523)(April 22, 2004).

When the claimant moved to stay the longshore proceeding until his Jones Act suit was complete, the Board found that the ALJ was within his authority to stay the LHWCA claim. The Board noted that the ALJ had based his reasoning on the case law applicable in the **Fifth Circuit**. *Sharp v. Johnson Brothers Corp*., 973 F.2d 423, 26 BRBS 59(CRT) (**5th Cir.** 1992), *cert. denied*, 508 **U.S.** 907 (1993)(If a formal award under the LHWCA is issued after the ALJ makes findings of fact and conclusions of law, the claimant is precluded from pursuing a Jones Act suit, because he had the *opportunity* to litigate the coverage issue, even if it was not actually litigated.); *contra, Figueroa v. Campbell Industries*, 45 F.3d 311 (**9th Cir.** 1995). "As the [ALJ] provided a rational basis for canceling the hearing and holding the case in abeyance, and as employer has not demonstrated an abuse [of] the {ALJ]'s discretion in this regard, we affirm …the action." The Board however, did not affirm the ALJ's decision to remand the case to the district director. Rather, the ALJ must retain the case on his docket and award or deny benefits after a formal hearing is held.

Topic 19.3.1 Procedure—Adjudicatory Powers--ALJ Cannot Review Discretionary Acts of District Director

Castro v. General Construction Company, 37 BRBS 65 (2003).

In this total disability award case geographically in the **Ninth Circuit**, the employer argued that the Board should not have awarded total disability benefits during

the claimant's DOL retraining program and that *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994) (Although claimant could physically perform the jobs identified by the employer's expert, he could not realistically secure any of them because his participation in the rehab program prevented him from working.) The Board noted that it has consistently applied *Abbott* both inside and outside the **Fifth Circuit** and that the **Fourth Circuit** recently came to a similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002)(ALJ was entitled to conclude it was unreasonable for the employer to compel claimant to choose between the job and completing his training).

In the instant case, the employer challenged the application of *Abbott* on the grounds that there is no specific provision in the LHWCA allowing for an award of total disability benefits merely because a claimant is participating in a vocational rehabilitation program. The Board found that *Abbott* rest, not on any novel legal concept, but on the well-established principle that, once a claimant established a prima facie case of total disability, the employer bears the burden of demonstrating the availability of suitable alternate employment. If the employer makes this showing, the claimant may nevertheless be entitled to total disability if he shows he was unable to secure employment although he diligently tried. "The decision in *Abbott* preserves these principles in the context of enrollment in a vocational rehabilitation program which precludes employment." Additionally the Board noted that while Congress enacted a statute that dealt with "total" and "partial" disability, it was left to the courts to develop criteria for demonstrating these concepts, and the tests created establish that the degree of disability is measured by considering economic factors in addition to an injured employee's physical condition.

The Employer here also argued that its due process rights were violated when it was not given a hearing on the question of whether the claimant was entitled to vocational rehabilitation and whether it was liable for total disability benefits for that period. The Board found that "Because Section 39(c)(2) and its implementing regulation grant authority for directing vocational rehabilitation to the Secretary and her designees, the district directors, and such determinations are within their discretion, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation. ...Thus, in the case at bar, as the question of whether the claimant was entitled to vocational rehabilitation is a discretionary one afforded the district director, and, as discretionary decisions of the district director are not within the jurisdiction of the OALJ, it was appropriate for OWCP to retain the case until it received a request for a hearing on the merits."

The board also rejected the employer's contention that its constitutional rights to due process were violated by the taking of its assets without a chance to be heard on the issue. "Whether claimant is entitled to total disability benefits during his enrollment in vocational rehabilitation is a question of fact, and employer received a full hearing on this issue before being held liable for benefits."

Topic 19.3.3 Procedure--Adjudicatory Powers--Dismissal of Claim

Somerson v. Mail Contractors of America, DOL ARB Nos. 02-057, 03-055 (Nov. 25, 2003).

The U.S. Department of Labor's Administrative Review Board has upheld the dismissal of two complaints brought by a party who engaged in egregious conduct (obstructing hearings and intimidating witnesses). The Board found that ALJs have "inherent power" to dismiss such complaints wherein the complainant engages in misconduct. While neither the pertinent statute (Surface Transportation Assistance Act) nor its regulations specifically authorize dismissal, the Board held that the ALJ has the same inherent power as federal judges to take necessary steps to deter abuse of the judicial process.

Before the complainant's cases were assigned to an ALJ he made abusive calls to OALJ. Later he made repeated outbursts during the hearing resulting in the ALJ ordering his removal from the room. Subsequently he left a message with the judge's law clerk calling the ALJ an "asshole." At that point the ALJ referred the case to the U.S. District Court. The court, in turn, issued a consent order stipulating that he "shall conduct himself within the bounds of appropriate respect and decorum albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matter related thereto, held under the authority of the [OALJ]." After the company received anonymous e-mails insulting and threatening its counsel and management witnesses, the company sought a protective order from the ALJ. The ALJ issued a show cause order. The complainant then "conspicuously" ignored concerns about the implicitly threatening nature of the e-mails.

Topic 19.3.3 Procedure–Adjudicatory Powers–Dismissal of Claim

Goicochea v. Wards Cove Packing Co., 37 BRBS 4 (2003).

The Board held that an ALJ cannot rely upon the Federal Rules of Civil Procedure to dismiss a claim based upon the claimant's failure to comply with the multiple orders issued by an ALJ. The ALJ must consider the applicability of Section 27(b) to the facts before him/her. "As claimant's failure to execute and deliver an authorization releasing his INS records to employer was in direct noncompliance with [the judge's] orders, it constitutes conduct which should be addressed under the procedural mechanism of Section 27(b). Rather than dismissing claimant's claim, the [ALJ] must follow the procedures provided for in Section 27(b) of the Act." The employer had cited Section 18.29(a)(8) of the OALJ regulations, 29 C.F.R. § 18.29(a)(8), as a source of authority for the ALJ's decision to dismiss the claimant's claim. An ALJ's authority in general to dismiss a claim with prejudice stems from 29 C.F.R. § 18.29(a), which affords the ALJ all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. *See Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989). "As Section 27(b) of the Act is a 'rule of special application' which

addresses the issue presented on appeal, however, the OALJ regulations do not apply." 29 C.F.R. § 18.1(a).

Topic 19.3.5 Procedure—Adjudicatory Powers—ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon

[ED. NOTE:** The following case is included for informational value only.**]

Hardman v. Barnhart, Commissioner, Social Security Administration, 362 F.3d 676(**10th Cir.** 2004).

In this Social Security case, the ALJ was reversed for relying on standard boilerplate language in accessing the claimant's credibility. In addressing the claimant's allegations of disabling pain, the ALJ had recited boilerplate language stating that full consideration had been given to the claimant's subjective complaints. Then the ALJ rejected the claimant's allegations of pain and limitation using more boilerplate language that:

> Claimant's allegations are not fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing.

The **Tenth Circuit** noted that it had previously held that this boilerplate was insufficient in the absence of a more thorough analysis, to support the ALJ's credibility determination as required by case law. "The boilerplate language fails to inform us in a meaningful, reviewable way of specific evidence the ALJ considered in determining the claimant's complaints were not credible….More troubling, it appears that the Commissioner has repeatedly been using this same boilerplate paragraph to reject the testimony of numerous claimants, without linking the conclusory statements contained therein to evidence in the record or even tailoring the paragraph to the facts at hand almost without regard to whether the boilerplate paragraph has any relevancy to the case….As is the risk with boilerplate language, we are unable to determine in this case the specific evidence that led the ALJ to reject claimant's testimony." The court went on to note that it was error for the ALJ to fail to expressly consider the claimant's personal attempts to find relief from his pain, his willingness to try various treatments for his pain, and his frequent contact with physicians concerning his pain-related complaints.

Topic 19.3.5 Procedure–Adjudicatory Powers--ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon

***[ED. NOTE:** The following Social Security case is included since its holding may be applied in a Longshore context as well.]*

Connett v. Jo Anne B. Barnhart, Commissioner, 340 F.3d 871 (**9th Cir.** 2003).

At issue here was the ALJ's acceptance/rejection of medical evidence. The **Ninth Circuit** noted that the ALJ who holds a hearing in the commissioner's stead, is responsible for determining credibility and resolving conflicts in medical testimony, and that when rejecting a claimant's testimony, the ALJ must be specific. An ALJ may reject pain testimony, but must justify his/her decision with specific findings. In the instant case, the court noted that the ALJ's rejection of certain claims regarding the claimant's limitations was based on clear and convincing reasons supported by specific facts in the record that demonstrated an objective basis for his finding. "The ALJ stated which testimony he found not credible and what evidence suggested that the particular testimony was not credible." Therefore, the decision was supported by substantial evidence.

As to other claims where the ALJ did not assert specific facts or reasons to reject the claimant's testimony, the matter was reversed. In addressing the treating physician's opinion, the **Ninth Circuit** noted that where a treating physician's opinion is not contradicted by another doctor, it may be rejected only for clear and convincing reasons. The ALJ can reject the opinion of a treating physician in favor of the conflicting opinion of another examining physician "if the ALJ makes 'findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" In the instant case the **Ninth Circuit** found that the treating physician's extensive conclusions were not supported by his own treatment notes.

The claimant also alleged that the "crediting as true" doctrine is mandatory in the **Ninth Circuit**. The "crediting as true" doctrine holds that an award of benefits is mandatory where the ALJ's reasons for rejecting the claimant's testimony are legally insufficient and it is clear from the record that the ALJ would be required to determine the claimant disabled if he had credited the claimant's testimony. However, the **Ninth Circuit** specifically stated that it is not convinced that the doctrine is mandatory in that circuit. In finding that there is no other way to reconcile the case law of the circuit, the court stated, "Instead of being a mandatory rule, we have some flexibility in applying the 'crediting as true' theory."

Topic 19.3.6.2 Procedure—Adjudicatory Powers—Discovery

Expert Witness Fees

In setting an expert witness fee, the LHWCA, at Section 25 provides that "Witnesses summoned in a proceeding before a deputy commissioner or whose deposition are taken shall receive the same fees and mileage as witnesses in courts of the United States." Further, 20 C.F.R. § 702.342 provides "Witnesses summoned in a formal hearing before an administrative law judge or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States."

The U.S. district courts set expert witnesses fees pursuant to the Federal Rules of Civil Procedure, Rule 26 (b)(4)(C)(i), which requires the deposing party to pay the responding party's expert a reasonable hourly fee for time spent by the expert in deposition, time spent by the expert traveling to and from the deposition, and time spent in gathering documents responsive to the deposition subpoena. *In re Shell Oil Refinery, Robert Adams, Sr., v. Shell Oil Company*, 1992 WL 31867 (E.D. La. 1992) citing *United States v. City of Twin Falls, Idaho*, 806 F. 2d 862, 879 (**9th Cir.** 1986); *Goldwater v. Postmaster General of the United States*, 136 F.R.D. 37 (D. Conn. 1991). The deposing party is not responsible to pay the expert for time spent reviewing documents prior to deposition and in preparation for the deposition. The expert's compensation shall be limited to a reasonable amount even if it is less than his customary fee.

In *Shell Oil*, the district court noted the following factors to be considered in determining the reasonableness of a fee:

> (1) the witness's area of expertise; (2) the education and training that is required to provide the expert insight which is sought; the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area, and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Failure to comply with a deposition request may subject one to appropriate sanctions pursuant to Section 27 of the LHWCA. *See* Topics 27.1.2 ALJ Can Compel Attendance at Deposition; 27.1.3 ALJ Issues Subpoenas, Gives Oaths; and 27.3 Federal District Court Enforcement.

Topic 19.3.6.1 Procedure—Adjudicatory Powers—Issues at Hearing

Hallman v. CSX Transportation, Inc., (Unpublished Order)(BRB No. 04-0731)(November 23, 2004).

This bifurcated coverage issue claim involves the employer's appeal of an ALJ's finding that there was situs and status, and that there would be a subsequent decision and order on other issues. The Board first noted the Supreme Court's three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 **U.S.** 271 (1988) ('collateral order doctrine"). The Board then granted the claimant's motion to dismiss the employer's appeal, noting that the issues of status and situs were not collateral to the merits of the action and could be addressed once a final decision and order granting or denying benefits was issued. Additionally the Board was not persuaded by the employer's argument that the issues presented are important and should be decided now, because the ALJ's decisions have created uncertainty for its risk management procedures, i.e. liability under the LHWCA versus under the FELA. Finally, the Board rejected the employer's contention that it should decide this appeal because the Board has previously

decided interlocutory appeals of coverage issues. "The fact that the Board has the authority to decide interlocutory appeals does not require that we do so as it is desirable to avoid piecemeal review."

Topic 19.3.6.1 Procedure—Adjudicatory Powers—Issues at Hearing

Woodmansee v. Newport News Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 03-0614)(May 7, 2004).

[ED. NOTE:** Might not consideration be given to limiting the "judicial economy" rule to issues where the claimant has an interest? Claimants have no standing concerning the application of Section 8(f). If employers are forced to "litigate" all issues, they may be reluctant to enter into agreements to pay compensation until the Section 8(f) issue is resolved. And, would such a scenario impact attorney fees at the OALJ level?**]

Despite the fact that there was no specific statute of limitations regarding when a party should request a hearing of the district director's recommendation that Section 8(f) relief be denied, the Board upheld the ALJ's determination that the employer waived the Section 8(f) issue by allowing compensation orders awarding claimants permanent disability benefits to become final without disposing of the Section 8(f) issue. The Board found the employer's actions to be an impermissible attempt to bifurcate issues. "The policy of judicial economy dictates that all claims relating to a specific injury, including affirmative defenses such as Section 8(f), be raised and litigated at the same time, especially as the Director is not bound by stipulations into which the private parties enter without his agreement."

Topic 19.3.6.2 Procedure—Adjudicatory Powers—Discovery

P & O Ports Louisiana, Inc. v. Newton, (Dismissal of Petition for Review)(No. 04-60403)(**5th Cir.** July 30, 2004).

The **Fifth Circuit** dismissed the employer's motion for lack of jurisdiction. Previously, while the matter was before OWCP the claimant had filed a Motion to Compel Discovery, seeking enforcement of an OALJ subpoena pursuant to *Maine v. Bray-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). The claimant had sought to discover information about potential employers identified by P & O's vocational expert regarding suitable alternate employment. P & O filed a Motion to Quash Subpoena Ducem Tucem and a Motion for Protective Order. The ALJ denied P & O's motions, finding that its vocational evidence is discoverable, relevant and not privileged. P & O appealed to the Board and the claimant moved to dismiss the employer's appeal. The Board recognized that the employer was appealing a non-final order of an ALJ and noted that it "generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued." The Board further found that the case did not involve due process

considerations, that the employer did not contend the documents were privileged, and that the employer would not suffer undue hardship by complying with the ALJ's subpoena since the evidence was already in existence. Thus the Board dismissed the employer's appeal. The employer then petitioned the **Fifth Circuit**.

Topic 19.3.6.2 Procedure—Adjudicatory Powers--Discovery

Rodriguez v. Columbia Grain, Inc., (Unpublished)(BRB No. 03-0376)(February 23, 2004).

Here the Board vacated an ALJ's Order to compel Appearance at Medical Examination. When the employer replaced a scheduled panel's psychiatrist with a neuropsychologist the claimant refused to attend, arguing that his claim was only for a purely physical injury. When the ALJ issued an Order to Compel,, the claimant appealed. While finding that an ALJ has broad discretion, the Board noted that Section 18.14(a) of the OALJ Rules of Practice mandates that matters sought to be discovered be relevant to the subject matter involved in the proceeding. "The [ALJ's] summary conclusion in his Order does not sufficiently explain how the psychological component of the examination is relevant to these proceedings. Moreover, claimant specifically raised this question below, asserting that since his claim for benefits under the Act is based upon a physical injury alone, an employer-sponsored psychological examination is not relevant to his claim of a work-related back injury. The [ALJ] did not discuss claimant's arguments in this regard or explain how the psychological evaluation of claimant is relevant to his claim. As the [ALJ] did not address claimant's assertions, which go directly to the relevancy of employer's discovery request, the case must be remanded."

Topic 19.3.6.2 Procedure—Adjudicatory Powers—Discovery

P&O Ports Louisiana, Inc. v. Newton, (**Fifth Circuit** No. 04-60403)(Petition for Review).

Recently P & O Ports filed a Petition for Review with the **Fifth Circuit**, asking that the court review the Board's interlocutory Order in this matter. *See Newton v. P & O Ports Louisiana, Inc*., 38 BRBS 23 (2004), reported in the March/April Digest. In response to the Petition for Review, the Director has filed a Motion in Opposition urging that the issues are not final. Interestingly, in a foot note in the motion, the Director questions the scope of *Maine v. Brady-Hamilton Stevedore Co*., 18 BRBS 129 (1986)(*en banc*) which limits the powers of district directors to issue subpoenas. In *Maine*, the Board held that only ALJs have authority to issue subpoenas, even in cases pending before the Director.

Topic 19.3.6.2 Procedure—Adjudicatory Powers—Discovery

Newton v. P & O Ports Louisiana, Inc., 38 BRBS 23 (2004).

Here the Board granted the claimant's Motion to Dismiss the employer's appeal of the ALJ's interlocutory order since (1) the case does not raise any due process considerations; (2) the employer did not allege that the documents the claimant sought to discover constituted privileged materials; (3) there was no undue hardship since the evidence the claimant sought to recover was already in existence; and (4) the ALJ is afforded broad discretion in authorizing discovery and the interlocutory order will be reviewable after a final decision is issued in this matter.

In this matter, the claimant's claim for benefits is pending before the district director. The claimant had filed a motion with the ALJ seeking enforcement of a subpoena that the ALJ had issued. The subpoena had called for the employer to disclose the names and addresses of the companies identified as potential suitable alternate employment by the employer's vocational expert." The employer had resisted on the ground that it is not required to disclose this information, and it filed motions to quash the subpoena and for a protective order.

The ALJ had found that the employer was confusing the standard for establishing suitable alternate employment with the standard for what is discoverable material. The ALJ had found that under 29 C.F.R. § 18.14, the parties may obtain discovery regarding any matter which is not privileged and which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. The ALJ found that while the employer is not obligated to produce its evidence of suitable alternate employment at the hearing, its vocational evidence is nonetheless discoverable in that the claimant is entitled "to test the quality of the employer's vocational evidence." Thus, the ALJ found that the information sought by the claimant is relevant notwithstanding that the claimant's attorney is familiar with the vohab person's qualifications and methodology. The ALJ had further found that the information was not privileged and therefore denied the employer's motions to quash and for a protective order; and granted the claimant's motion to compel.

It is noteworthy that the Board did not find it necessary to refer to the ALJ's inherent authority to enforce discovery while a claim is pending with the district director. *See Maine v. Brady-Hamilton Stevedore Co*., 18 BRBS 129 (1986)(*en banc*).

Topic 19.3.6.2 Procedure—Adjudicatory Powers--Formal Hearing--Discovery

[ED. NOTE: *The following is an Order to Compel Vocational Information Discovery issued by an ALJ in a matter still pending before OWCP. Pursuant to Maine v. Brady-Hamilton, 18 BRBS 129 (1986)(en banc), since the 1972 amendments, only OALJ has authority to issue subpoenas and process other discovery matters even though the claim is pending before the Director.)**]***

Newton v. P & O Ports, Inc., (OWCP No. 07-163948) (Oct. 7, 2003).

Here the claimant filed a Motion to Compel Discovery with OALJ seeking enforcement of a subpoena issued by OALJ for the names and addresses of the companies identified as suitable alternative employment by the employer's vocational expert. The employer resisted the subpoena on the grounds that, based on case law, an employer need not produce to a claimant the identity of suitable alternative jobs located by the employer. Maintaining that position the employer filed a Motion to Quash Subpoena Duces Tecum and a Motion for Protective Order.

In addressing this matter, the ALJ first noted that pursuant to *Maine*, it is manifest that OALJ possesses the authority in LHWCA cases not only to issue subpoenas, but also to decide matters arising from the subpoenas it has issued. Second, the ALJ found that the Employer "conflates the substantive standards for proving suitable alternative employment with the standards for discovery. The former involves a determination on the merits, while the latter is procedural in nature."

The ALJ noted that as to the substantive standards of suitable alternative employment, an employer does not need to identify actual, specific employment openings to prove that a claimant has a work capacity. *See e.g., New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1041-43, 14 BRBS 156, 163-65 (**5th Cir.** 1981); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430-31, 24 BRBS 116, 120-21 (CRT) (**5th Cir.** 1991). Similarly, an employer can prevail on the merits with respect to suitable alternative employment without producing to the claimant the jobs its vocational expert has identified. *See e.g. P & M Crane Co.*, 930 F.2d at 429 n. 9, 24 BRBS at 120 n. 9 (CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 74, 25 BRBS 1, 7 (CRT) (**2d Cir.** 1991).

However, the ALJ went on to explain that the substantive correctness of the case law cited by *P & O*, namely *Turner* and its progeny, are not at issue in a discovery matter. Under discovery rules, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. 18 C.F.R. § 18.14.

The ALJ found that to grant the employer's motions would be to convert the substantive suitable alternative employment standards of *Turner* and its progeny into the standard for discovery. As the two standards are discrete, the ALJ refused to grant the motion. He reasoned that there is a distinction between the necessity of procuring certain evidence in the first place and the necessity of producing the evidence one has already procured. *Turner* and its progeny pertain to the former; the rules of discovery pertain to the latter.

The ALJ specifically noted, "Evidence that is not required to prevail on the merits may nonetheless be evidence that is admissible. Information that need not be divulged voluntarily to prevail on the merits may nonetheless be information that reasonably may lead to the discovery of admissible evidence. Handcuffing discovery with substantive

standards would disqualify from discovery all information that is helpful yet substantively unnecessary."

Next, the ALJ addressed the employer's reliance on policy concerns to support its position and noted that such reliance is misplaced. Citing language from *Turner*, *P & M Crane*, and *Palombo*, the employer had asserted that employers are not meant under the LHWCA to be employment agencies for claimants and that requiring employers to identify specific employment openings would provide a disincentive for claimants to independently seek alternate employment. The ALJ reasoned, "Those policy concerns are important in the reasoning of *Turner* and its progeny. However, those policy concerns do not warrant heavy consideration here because the dispute before the Court is not about the employer's hardship in satisfying its burden for suitable alternate employment nor the quality of the claimant's job search. Rather, this dispute is about the claimant's ability to test the quality of the employer's vocational evidence."

The ALJ next determined that the information at issue was not privileged and that good cause existed to compel its production. The ALJ found that vocational information in dispute is still relevant for discovery purposes post-*Turner*. He explained that while the case law relied upon by the employer indicated that a showing of specific openings was not necessary to meet the employers' burden regarding suitable alternative employment, those cases did not indicate that specific job openings were irrelevant altogether.

The judge found that the information is relevant based on the claimant's right to challenge the employer's vocational evidence. The employer argued that the claimant's attorney was already familiar with its vocational expert through first-hand experience and therefore had no reason to question the expert's competency or credibility. The employer further argued that the claimant's attorney did not need the identity of the suitable alternate employers to challenge the expert's qualifications or methodology.

However, the ALJ found these arguments flawed. First, the claimant's right to challenge vocational evidence is not limited to the expert's credentials and methods. The claimant has a right to challenge the substance of the expert's findings. The findings in this case were based in part upon information from actual, specific employers. The ALJ explained, when a vocational report is formulated based on information from actual employers, the claimant would be at a disadvantage to challenge the accuracy of the report if the claimant were deprived of the identities of those employers. The judge concluded that for each of the positions identified by the expert, the claimant should have the opportunity to verify from the source of the information that the job description, including the physical duties and wage information, was reported accurately by the expert.

In addition, the ALJ found that furnishing the claimant with the names and addresses of employers identified for suitable alternative employment would allow the claimant to fully exercise his right to challenge the suitability, not only of the type of work, but also of the specific employers and work locations referenced by the vocational expert. He specifically noted that, although the claimant's attorney has been familiar with

the expert's methods in the past, the claimant is not limited under the law to presuming that the expert, in the present case, used the same methods and used those methods properly.

Finally the ALJ noted that there is a distinction between the needs of a claimant in discovery and the entitlement of a claimant in discovery. "Even if Claimant ultimately did not use the information in dispute to prepare his case, Claimant would nonetheless be entitled to obtain the information because the information is relevant."

Topic 19.3.6.2 Procedure--Adjudicatory Powers—Discovery

***[ED. NOTE:** The following is a Discovery Order issued by an ALJ while this case was pending before OWCP, pursuant to Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129 (1986) (en banc).]*

Newton v. P &O Ports, Inc. (OWCP No. 07-163948) (Oct. 2003).

This "Order Granting Claimant's Motion To Compel Discovery, Denying Employer's Motion To Quash Subpoena Duces Tecum, and Denying Employer's Motion For Protective Order" involves vocational information. Here the claimant filed a Motion to Compel Discovery, seeking enforcement of a subpoena issued by OALJ for the names and addresses of the companies identified as suitable alternate employment by employer's vocational expert. The employer resisted the subpoena arguing that an employer need not produce to a claimant the identity of suitable alternative jobs located by the employer.

The ALJ found that the employer "conflates the substantive standards for proving suitable alternative employment with the standards for discovery." He explained that the former involves a determination on the merits, while the latter is procedural in nature. The ALJ noted that the substantive standards for suitable alternative employment, as noted in *New Orleans (Gulfwide) Stevedores v. Turner [Turner]*, 661 F.2d 1031, 14 BRBS 156 (**5th Cir.** 1981), do not govern the discovery dispute before OALJ.

According to 18 C.F.R. § 18.14, under the rules of discovery, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. In distinguishing between the substantive suitable alternative employment standard of *Turner* and the standard for discovery, the ALJ explained that evidence that is not required to prevail on the merits may nonetheless be evidence that is admissible. "Information that need not be divulged voluntarily to prevail on the merits may nonetheless be information that reasonably may lead to the discovery of admissible evidence. Handcuffing discovery with substantive standards would disqualify from discovery all information that is helpful yet substantively unnecessary." The ALJ also found that employer's reliance on policy concerns was misplaced and that the sought after information was not privileged.

Topic 19.3.6.2 Procedure—Adjudicatory Powers--Discovery

[ED. NOTE:** Since the following Black Lung case involves the OALJ regulation, 29 C.F.R. § 18.20, it is mentioned here. For a thorough discussion of this case, see the Black Lung Act portion of this Digest.**]

Johnson v. Royal Coal Co., 326 F.3d 421 (**4th Cir.** 2003).

In this matter, the **Fourth Circuit** found that the Board incorrectly upheld the ALJ's failure to address admissions and erred in finding that 29 C.F.R. § 18.20 (Failure to respond appropriately to an outstanding admission request constitutes admissions) does not apply to the Black Lung Act. The **Fourth Circuit** further found that, based on a consideration of the analogous Fed. R.Civ. P. 36, an opposing party's introduction of evidence on a matter admitted [via failure to respond to requests for admissions] does not constitute either a waiver by the party possessing the admissions, nor as a constructive motion for withdrawal or amendment of admissions.

Topic 19.3.7 Procedure—Adjudicatory Powers—ALJ Disqualifying Attorney

LAWYER SUSPENDED FOR ACTIONS THAT INCLUDE MISCONDUCT BEFORE ALJ IN A LONGSHORE CASE

In Re: Joseph W. Thomas (Disciplinary Proceedings) (2003-B-2738)(February 25, 2004).

Attorney Joseph W. Thomas's three year suspension resulted after the Louisiana Supreme Court found that he incompetently handled civil cases, insulted an ALJ and disrupted another judge by shoving a lawyer against a wall. Thomas showed up more than an hour late for a hearing before Judge James Kerr, without apologizing and with what was described as a belligerent attitude. He lacked preparation to represent the family of a longshoreman killed on the job. Judge Kerr had determined that Thomas had never met with his clients before the hearing and failed to file a witness list. The Louisiana Supreme Court found that during the trial, Thomas demonstrated a complete lack of familiarity with the procedural rules of the administrative proceeding. Thomas objected to Judge Kerr questioning witnesses, calling the judge "biased" and the hearing "a joke." In its 19-page decision, the Louisiana Supreme Court found that Thomas' "insulting and abusive language toward Judge Kerr and his utter lack of preparation for this case is frankly shocking to this court."

Topic 19.4 Procedure—Formal Hearings Comply with APA

[ED. NOTE:** The following case is included for informational value only.**]

Hardman v. Barnhart, Commissioner, Social Security Administration, 362 F.3d 676 (**10th Cir.** 2004).

In this Social Security case, the ALJ was reversed for relying on standard boilerplate language in accessing the claimant's credibility. In addressing the claimant's allegations of disabling pain, the ALJ had recited boilerplate language stating that full consideration had been given to the claimant's subjective complaints. Then the ALJ rejected the claimant's allegations of pain and limitation using more boilerplate language that:

> Claimant's allegations are not fully credible because, but not limited to, the objective findings, or the lack thereof, by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians and the lack of discomfort shown by the claimant at the hearing.

The **Tenth Circuit** noted that it had previously held that this boilerplate was insufficient in the absence of a more thorough analysis, to support the ALJ's credibility determination as required by case law. "The boilerplate language fails to inform us in a meaningful, reviewable way of specific evidence the ALJ considered in determining the claimant's complaints were not credible….More troubling, it appears that the Commissioner has repeatedly been using this same boilerplate paragraph to reject the testimony of numerous claimants, without linking the conclusory statements contained therein to evidence in the record or even tailoring the paragraph to the facts at hand almost without regard to whether the boilerplate paragraph has any relevancy to the case….As is the risk with boilerplate language, we are unable to determine in this case the specific evidence that led the ALJ to reject claimant's testimony." The court went on to note that it was error for the ALJ to fail to expressly consider the claimant's personal attempts to find relief from his pain, his willingness to try various treatments for his pain, and his frequent contact with physicians concerning his pain-related complaints.

Topic 19.4 Procedure--Formal Hearings Comply With APA

[ED. NOTE:** While the following is not a LHWCA case, it is included because it is applicable to all administrative hearings.**]

Bunnell v. Barnhart, 336 F.3d 1112 (**9th Cir.** 2003).

In this Social Security disability case, the **Ninth Circuit** found that the ALJ did not have to recuse himself from hearing a claimant's case due to the "appearance of impropriety" standard of 28 U.S.C. § 455(a). The **Ninth Circuit** found that 28 U.S.C. § 455(a) does not apply to an ALJ. The claimant had claimed that the alleged "appearance of impropriety" arose from a suit brought by her attorney against the Commissioner as well as three ALJs, including the ALJ assigned to her case.

Topic 19.4.2 Procedure—Summary Decision

Hooker v. Westinghouse Savannah River, Co., ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004).

Here the ARB over-turned an ALJ decision (granting a summary motion) on the procedural grounds of lack of notice to a *pro se* complainant. The ARB based its holding on *Roseboro v. Garrison*, 528 F.2d 309 (**4th Cir.** 1975)(Before entering summary judgment against a *pro se* litigant, the district court must advise the litigant 'of his right to file counter-affidavits or other responsive material and alert the litigant to the fact that his failure to so respond might result in the entry of summary judgment against him). Notably, the complainant here did file a response to the motion and asked for additional time to further answer the motion. The ALJ granted the request and subsequently advised the complainant twice of the need to respond further and twice extended the time for the complainant to do so. The complainant did not respond further and the ALJ granted summary judgment because the complainant did not produce sufficient evidence that the respondent constructively discharged or blacklisted him. The ARB reversed, reasoning that the complainant "was *pro se* and the ALJ did not notify him pursuant to *Roseboro*."

Topic 19.4.2 Procedure--Summary Decision

Seguro v. Universal Maritime Service Corp., 36 BRBS 28 (2002).

There is no provision under the LHWCA or the regulations for a "voluntary order" unless the parties agreement is embodied in a formal order issued by the district director or ALJ. Moreover, voluntary payments by an employer do not equate to a final order.

In the original claim in the instant case, the parties stipulated to all issues, including permanent disability, with the exception of Section 8(f) Trust Fund relief. In the original Decision and Order, the ALJ noted the parties stipulations, but did not incorporate an award of benefits to the claimant into his order. He stated that the only disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

Subsequently, the employer filed a Motion for Modification alleging that claimant had become capable of suitable alternate employment and the employer also filed a Motion for Partial Summary Decision, seeking a ruling that there was no final compensation award contained in the original Decision and Order. A second ALJ granted the partial Motion for Summary Decision, holding that there was no compensation award in place. The employer then stopped making payments. A third ALJ heard the employer's

request for modification and found that there had been a "voluntary compensation order." Both the second and third ALJ decisions are the subject of this appeal.

On appeal, the Board found that the original Decision did not constitute a final compensation order and thus, Section 22 was not applicable as the initial claim for benefits had never been the subject of a final formal compensation order prior to the adjudication by the third ALJ hearing the modification. Therefore, the claim before the third ALJ must be viewed as an initial claim for compensation.

Topic 19.6 Procedure—Formal Order Filed With District Director

ERRATA

"Ledet v. Phillips Petroleum Co., 163 F.3d 901 (**5th Cir.** 1998)" is the correct cite for this case.

Topic 19.6 Procedure—Formal Order Filed With District Director

Ferro v. Holt Cargo Systems, (Unpublished)(BRB Nos. 04-0226 and 0400226A)(May 28, 2004).

The Board held that the Director was essentially estopped from contending that he is not bound by an underlying award where the Director's brief did not challenge the award of permanent total benefits. *See Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131 (CRT)(**9th Cir.** 1998). However, the Board did find that there was no effective award in-as-much-as there was no proof that a copy had been sent by registered or certified mail. *See* Section 19(e), 21(a): 20 C.F.R. §§ 702.349, 702.350; *see generally Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT)(**7th Cir.** 1989).

Topic 19.6 Procedure--Formal Order Filed with District Director

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disputed issue was Section 8(f) relief and he found that as the employer did not establish that the claimant's pre-existing permanent partial disability contributed to the claimant's total disability, Section 8(f) relief was denied. This Decision neither awarded nor denied benefits.

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Topic 19.10 Procedure--Bankruptcy

McCracken v. Spearin, Preston and Burrows, Inc., 36 BRBS 136 (2002).

This matter involves a bankrupt carrier wherein the ALJ allowed the Carrier/Employer's attorney to withdraw and found that the Employer's motion for a stay of proceedings had been withdrawn since no one was present to argue the motion to withdraw. Employer's motion for a continuance was also denied and Employer was declared in default. The ALJ issued a default judgment against the Employer, ordering it to pay Claimant permanent total disability benefits, medical benefits and an attorney's fee. Employer, now represented, moves for reconsideration.

The Board noted that the ALJ had based his declaration of default and his award of permanent total disability benefits solely on Employer's absence from the proceedings. In vacating the award, the Board stated that "Without any evidence, it is impossible to determine whether claimant is entitled to permanent total disability benefits."

Noting the similarities between 29 C.F.R. § 18.39(b) and Rule 55(c) of the Federal Rules of Civil Procedure (FRCP), the Board agreed with the Employer that the failure to send a company representative to the hearing on the facts presented was insufficient to warrant a declaration of default against Employer and was "an overly harsh sanction" in light of the circumstances presented. The Board noted that 29 C.F.R. § 18.39(b) has a "good cause" standard similar to FRCP 55(c) and applied the good faith standard articulated in *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (**2d Cir.** 1993).

TOPIC 20

Topic 20.1 Presumptions—Generally

Announcement-- Possible Gulf War Fire/Lung Cancer Link

According to the Associated Press, a committee of the Institute of Medicine [a branch of the National Academy of Science, an independent group chartered by Congress to advise the government on scientific matters], states that Gulf War personnel exposed to pollution from the well fires, exhaust and other sources may face an increased lung cancer risk. More than 600 oil well fires were ignited by Iraqi troops during their retreat from Kuwait in 1991.

Topic 20.2.1 Presumptions—Section 20(a)—Prima Facie Case

Mai v. Knight & Carver Marine, (Unpublished)(BRB No. 04-0183)(Oct. 15, 2004).

This case contains a discussion of the "adverse inference rule." Here the Board rejected the claimant's contention that an adverse inference should have been drawn based on the employer's failure to produce the claimant's time cards, which the claimant alleges would have shown maritime employment:

> "Such an inference cannot substitute for claimant's failure to establish an essential element of his claim, namely, that he engaged in maritime employment. Moreover, employer correctly contends that claimant could have obtained this evidence through discovery, but apparently made no attempt to do so."

Topic 20.2.1 Presumptions—Prima Facie Case

Phillips v. Chevron, U.S.A., (Unpublished)(BRB No. 03-0613)(June 17, 2004).

The Board upheld the ALJ's denial of benefits where the claimant alleged that he developed a disabling psychological condition following events surrounding an oil spill because the claimant could not present a prima facie case. The Board noted that while a psychological impairment which is work-related is compensable and that Section 20(a) does apply, in this particular case there was evidence only of personnel issues causing stress, and not an indication that incidents of day-to-day working conditions causing the claimant's illness. The Board noted that it will not second-guess an employer's business practices: "It is not the role of the Board to determine whether the actions taken by employer were based on valid concerns, but rather whether they were legitimate personnel decisions made in the course of business."

Topic 20.2.1 Presumptions--Prima Facie Case

[ED. NOTE:** The following is included for informational purposes only.**]

Stroka v. United Airlines, (Unpublished) N.J. Super. Ct. App. Div. (No. a4274-01)(Nov. 26, 2003).

A New Jersey court of appeals found that a flight attendant who was originally scheduled to work (but was not actually working) on a plane that crashed on September 11, 2001 was not eligible for workers' compensation since her post-traumatic stress syndrome was not triggered while working.

Topic 20.2.1 Presumptions–Prima Facie Case

Haynes v. Vinnell Corporation, (Unreported) (BRB No. 01-0741) (June 17, 2002).

In this Gulf War Illness case (Defense Base Act) the ALJ referenced the causation burden/scheme of the Persian Gulf War Veterans' Act of 1998, 38 U.S.C. § 1117 *et seq.*, Public Law 105-277, which provides a legal presumption for veterans of the United States military that they were exposed to various toxic substances. While the ALJ acknowledged that statute was not applicable to the instant claimant, who was a civilian employee, the ALJ found that the statute could be considered persuasive in establishing a claimant's prima facie case. The ALJ summarily concluded that the evidence (article submitted stated detrimental effects from exposure were dependent on frequency and level of exposure) was not sufficient to invoke the public law presumption. However, the Board noted that the issue for purposes of the LHWCA is whether the claimant established exposure which could potentially cause the harm alleged. The Board noted that both the claimant and employer were in agreement that the claimant was employed by the employer during the period of time that the employer's base camp experienced both the effects of the oil well fires which burned in Kuwait and the application of pesticides throughout the camp.

Topic 20.2.3 Presumptions—Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident

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Topic 20.2.4 Presumptions--ALJ's Proper Invocation of Section 20(a)

Burley v. Tidewater Temps, Inc., 35 BRBS 185 (2002).

Here the Board found the ALJ's exclusion from evidence of a labor market survey to be an abuse of discretion and a violation of 20 C.F.R.. § 702.338 ("...The [ALJ] shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. ...) by excluding this relevant and material evidence. Significantly, the Board stated:

> Moreover, given the importance of the excluded evidence in this case and the administrative law judge's use of permissive rather than mandatory language in his pre-hearing order, employer's pre-hearing submission of its labor market survey to claimant ...does not warrant the extreme sanction of exclusion.

While the submission time of this report did not comply with the pre-trial order, employer argued that it was reasonable in that it was in direct response to a doctor's deposition taken only four days prior to the time limit. Furthermore, the employer argued that the ALJ's pre-trial order used the permissive rather than mandatory language ("Failure to comply with the provisions of this order, in the absence of extraordinary good cause, may result in appropriate sanctions.")

In ruling in favor of the employer on this issue, the Board distinguished this case from *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (Held: ALJ has discretion to exclude even relevant and material evidence for failure to comply with the terms of a pre-hearing order even despite the requirements of Section 702.338) and *Smith v. Loffland Bros.*, 19 BRBS 228 (1987) (Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) The Board noted that *Durham* did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished *Smith* as a case where the party did not exercise due diligence in seeking to admit evidence.

Additionally, in *Burley*, the Board found that the ALJ properly invoked the Section 20(a) presumption, finding that the parties stipulated that the claimant sowed that he suffered an aggravation to a pre-existing, asymptomatic fracture in his left wrist and that conditions existed at work which could have caused this injury.

Topic 20.3 Presumptions—Employer Has Burden of Rebuttal with Substantial Evidence

Harris v. Elmwood Dry Dock & Repair, (Unpublished) (BRB No. 04-0171)(Oct. 19, 2004).

At issue in this Section 20(a) case was whether the death of a deceased worker was causally related to his employment. He died of septic shock caused by aeromanas hydrophilia. Aeromonas hydrophilia is a bacterium commonly found in fresh water. Aeromonas hydrophilia can enter the bloodstream from a cut or puncture would and

contact with fresh water, by ingestion from drinking water into the gastro-intestinal tract, or by aspiration directly into the lungs. Aeromonas hydrophilia may cause skin and soft tissue infection at the site of the cut or would, and intestinal tract infection. In rare cases it causes pneumonia or sepsis.

Topic 20.3 Presumptions--Employer Has Burden of Rebuttal With Substantial Evidence

Boone v. Barnhart, Commisioner of Social Security, 353 F.3d 203 (**3rd Cir.** 2003).

Here the **Third Circuit** found that substantial evidence needed to show that the claimant could perform a significant number of jobs existing in the economy was lacking Therefore there was no support for the proposition that the claimant was not disabled and thus not entitled to supplemental Security Income disability benefits. The court, while not making a general ruling, specifically found here that an unexplained conflict between a vocational expert's testimony and the Dictionary of Occupational Titles necessarily requires reversal. The court further found that the vocational expert's testimony in this case was not substantial evidence.

Topic 20.3 Presumptions--Employer has Burden of Rebuttal with Substantial Evidence

Charpentier v. Ortco Contractors, Inc., ___ **U.S.** ___, 124 **S.Ct.** 825, (Mem.)(*Cert. denied* December 1, 2003). **[*See* next entry.]**

The **Supreme Court** refused certiorari in the **Fifth Circuit's** holding, *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (**5th Cir.** 2003), that the Board failed to give proper deference to the ALJ's assessment of evidence by erecting a higher evidentiary standard for rebutting the Section 20(a) presumption than the one specified in the LHWCA (that an employer submit only "substantial evidence to the contrary"). In this case the worker's heart attack began at home the night before and progressed at work the following day, culminating in cardiac arrest. The medical evidence was to the effect that the only connection between the death and the employment was the fact that the worker was at work when the heart attack process concluded. The Board had expressed several different formulations of the requirement imposed by the LHWCA for proving that an injury is not work-related: (1) "rule out," (2) "unequivocally state," and (3) "affirmatively state." The **Fifth Circuit** noted that all three of these formulations violated its decision in *Conoco v. Director, OWCP*, 194 F.3d 684 (**5th Cir.** 1999). It stated that the LHWCA requires a lower evidentiary standard--that the employer must adduce only substantial evidence that the injury was not work-related.

Topic 20.3 Presumptions–Employer has Burden of Rebuttal with Substantial Evidence

Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (**5th Cir.** 2003). **[*See* Above.]**

Here the **Fifth Circuit** held that the Board failed to give proper deference to the ALJ's assessment of evidence by erecting a higher evidentiary standard for rebutting the Section 20(a) presumption than the one specified in the LHWCA (that an employer submit only "substantial evidence to the contrary"). In the instant case the worker's heart attack began at home the night before and progressed at work the following day, culminating in cardiac arrest. The medical evidence was to the effect that the only connection between the death and the employment was the fact that the worker was at work when the heart attack process concluded.

The Board had expressed several different formulations of the requirement imposed by the LHWCA for proving that an injury is not work-related: (1) "rule out," (2) "unequivocally state," and (3) "affirmatively state." The **Fifth Circuit** noted that all three of these formulations violated its decision in *Conoco v. Director, OWCP*, 194 F.3d 684 (**5th Cir.** 1999). It stated that the LHWCA requires a lower evidentiary standard -- that the employer must adduce only substantial evidence that the injury was not work-related.

Topic 20.3.1 Presumptions—Failure to Rebut

Boh Brothers Construction Co. v. Booker (Unpublished) (No. 04-60464 Summary Calendar)(**5th Cir.** Nov. 10, 2004).

In determining that the ALJ's factual conclusions were supported by substantial evidence, the **Fifth Circuit** noted that Employer's Counsel "does not make the distinction between findings of fact and conclusions of law." The court explained that in Section 20(a) cases the relevant legal standard assesses the admissibility of expert opinion for purposes of assisting the factfinder. The employer had argued that although the ALJ and Board appeared to conduct the requisite burden-shifting regime, "the practical effect of their decision in the case" was to presume coverage for the claimant. The court found that "This approach aims to reframe the ALJ's factual findings as mistaken conclusions of law subject to *de novo* review and, as such, has no merit.

Topic 20.4.1 Presumptions—Evidence Based on Record as a Whole

Cooper/T Smith, Inc, v. Veles, (Unreported)(No. 03-60809)(**5th Cir.** March 17, 2004); 2004 U.S. App. LEXIS 5077.

In this Section 20(a) presumption case, the employer faulted the ALJ for preferring the testimony of treating physicians over the respondent's expert witness and for crediting the claimant's testimony with respect to the difficulties caused by his knee and back. However, the **Fifth Circuit** found that the ALJ's findings were supported by

substantial evidence, and that the Board acted properly in refusing to gainsay them. The court found that although the respondents pointed to the employer's physician's doubts that the back injury flowed from the claimant's limp, and also pointed to the claimant's "hypersensitivity" to pain, it was within the ALJ's purview to exercise his judgment in evaluating witnesses' credibility and in assembling the evidence presented to him. "Merely because different determinations of credibility could have led to different conclusions, does not mean that the ALJ's fact finding was unsupported by substantial evidence."

Topic 20.5.1 Presumptions—Application of Section 20(a)—Causal Relationship of Injury to Employment

Darling v. Bath Iron Works Corp., (Unpublished)(BRB No. 04-0285)(Dec. 17, 2004).

In this psychological injury case the Board made it clear that without Congressional action, it has no plans to deviate from using the general causation standard [“arises out of and in the course of employment”] for psychological injury cases as well as for physical injury cases. The employer had suggested that the Board adopt the “clear and convincing” standard codified by the Maine legislature. In rejecting this suggestion the Board noted that the general standard for establishing a prima facie case of causation pursuant to Section 20(a) is longstanding and well recognized.

Topic 20.6.2 Section 20(a) Presumption-Does Not Apply to Jurisdiction

Watkins v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 21(2002).

Held, a claimant's work emptying trash barrels from the side of a ship under construction constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of the employer's compliance with a federal regulation. Here the claimant was assigned to employer's Cleaning and Janitorial Department as a cleaner. The first half of her shift she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. The claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. In addition, the claimant and her partner would drive around to other shipyard buildings and dump dumpsters.

This case is also noteworthy as to the Board's treatment of the Section 20(a) issue. The Director had argued that the ALJ should have given the claimant the benefit of the Section 20(a) presumption as to jurisdiction. The Board stated that it "need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the

Act's coverage provision." The Board then cited to several circuits that support this view. However, the Board neglected to point out that several circuits hold opposing views.

Topic 20.7 Section 20(b) Presumption That Notice of Claim Has Been Given

Bath Iron Works Corp. v. U.S. Labor, [Onebeacon f/k/a Commercial Union York Insurance Co. v Knight], 336 F.3d 51(**1st Cir.** 2003).

The **First Circuit** upheld the timeliness of a widow's claim for benefits filed more than 3 years after her husband's death. The ALJ had found that she had not had any reason to believe or suspect that there was an interrelationship between the worker's death and work-related asbestos exposure until shortly before the claim was filed. The death certificate had listed as the cause of death "adenocarcinoma, primary unknown" of "3 mos."duration. The ALJ found that even had the widow known that her husband died of mesothelioma, she had no reason to link that disease to her husband's asbestos exposure in the workplace.

In upholding the ALJ, the **First Circuit** found that Section 13(b)(2) creates a "'discovery rule' of accrual," deferring the commencement of the statute of limitations until an employee or claimant has or should have an awareness "of the relationship between the employment, the disease, and the death or disability." The court noted that the scope of its review is to determine that the ALJ used the correct legal standard. " An ALJ's ultimate conclusion of when a claimant 'becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the disability'...does not present a pure question of law amenable to de novo appellate review. Rather, this fact-intensive determination is one that a reviewing tribunal should disturb only if unsupported by 'substantial evidence.'" The **First Circuit** also concluded that Section 20(b) does create a presumption of timeliness under Section 13(b)(2), and that the burden is on the employer to demonstrate noncompliance with the requirements of Section 13(b)(2).

TOPIC 21

Topic 21 Generally

Olsen v. Triple A Machine Shop, Inc., (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss)(Final Judgment entered December 17, 2001).

In *Olsen*, the Northern District of California ruled that it does not have jurisdiction over a LHWCA Modification Request. The district court, citing *Thompson v. Potashnick Construction Co.*, 812 F.2d 574 (**9th Cir.** 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

Topic 21.1.1 Review Of Compensation Order—Composition and authority of BRB

Schultz v. United States Marine Corps/MWR, (Unpublished)(BRB No. 03-0473)(March 17, 2004).

A motion to correct clerical errors in a settlement order, such as where an ALJ merely recited the wrong monetary figures to which the parties had agreed, does not toll the time for filling a notice of appeal of the underlying compensation order.

Topic 21.1.2 Review of Compensation Order—Composition and Authority of BRB—Grant of Authority

Jackson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0629)(December 20, 2004).

This is an Order on Motion for Reconsideration of 38 BRBS 39 (2004)(In order for a "tender" to be valid pursuant to Section 28(b), such that employer can avoid fee liability, it must be "an offer to pay, expressed in writing, without any conditions attached thereto." As employer's purported tenders were conditioned on claimant's accepting a stipulation, the Board held that employer did not tender compensation within the meaning of Section 28(b). In the Motion for Reconsideration, the employer contended that the Board's decision was contrary to its unpublished decisions in *Boyd v. Newport News Shipbuilding & Dry Dock Co*., (BRB No . 02-0607)(May 22, 2003), and *Jenkins v. Newport News Shipbuilding & Dry Dock Co.* (BRB No. 01-0870)(Aug. 8, 2002).

The Board rejected this contention, finding that the just cited cases were factually distinguishable from the case now before it. Citing to *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990), the Board noted at *Boyd* and *Jenkins* demonstrate the soundness of the principle that unpublished Board decisions generally should not be cited or relied upon by the parties in presenting their cases. "[A]s the Board's decisions therein are based on specific facts, whereas the decision in Jackson resolved an issue of law. That unpublished cases are more readily available does not lessen the validity of the Board's statement in *Lopez*."

Topic 21.1.2 Review Of Compensation Order--Grant of Authority

Meinert v. Fraser, 37 BRBS 164 (2003).

Here the employer appeals to the Board (to review under its abuse of discretion standard) the Vocational Rehabilitation Plan approved by the District Director. The employer contended that vocational rehabilitation is unnecessary because the claimant retains a wage-earning capacity on the open market and that upon completion of the plan,

the claimant will have a lower earning capacity in motorcycle repair than that demonstrated by employer's labor market survey. The Employer averred that the evidence it developed after the implementation of the plan demonstrates the validity of its contentions. The employer also contends that motorcycle repair was merely an interest of the claimant's and that is why retraining in this area was pursued.

After reviewing the pertinent regulations (20 C.F.R. §§ 702.501-702.508) and the statute (Section 39(c)(2), the Board noted that neither the LHWCA nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. The Board held that the employer has not shown that the district director had abused her discretion in implementing the plan, as it failed to demonstrate that the district director did not comply with the regulatory criteria. The Board found that the counselor had adequately documented the wages that the claimant would earn upon completion of the program, as the claimant had no earnings at the time the plan was documented. It further noted that the counselor had documented his placement efforts prior to recommending retraining courses, and he demonstrated how the claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college. Further, the Board noted that "[I]t is self-evident that a claimant is more likely to succeed at a plan if, in addition to its being suitable for him, it involves a vocation in which he is interested."

Employer sought to enter into evidence information which it alleges would establish that the claimant had a current wage-earning capacity without the retraining program that was at least equal to what the claimant would earn upon his completion of the plan. The Board declined to allow the information to be entered into evidence stating that "Assuming *arguendo*, the validity of employer's contention, employer cannot demonstrate an abuse of the district director's discretion where the plan is otherwise fully documented according to the regulatory criteria."

The Board also declined to address the employer's contentions regarding its potential liability for disability benefits during the retraining period. It stated that, "This issue is one that is properly presented to an [ALJ] in the first instance, and employer is entitled to a full evidentiary hearing on this issue."

Topic 21.1.2 Review of Compensation Order--Grant of Authority

Hymel v. McDermott, Inc., 37 BRBS 160 (2003).

Here the claimant sued his employer under the LHWCA as well as in state court against his employer and others, for negligence and intentional exposure to toxic substances in the work place. Executive officers of the employer during the claimant's employment (who were named as defendants in the state court suit) moved to intervene in the LHWCA claim. The ALJ denied the motion to intervene, finding that the issue raised by the interveners was not "in respect of "a compensation claim pursuant to Section 19(a) of the LHWCA. In a subsequent Decision and Order, the ALJ granted the claimant's

motion to dismiss the claimant's claim with prejudice, pursuant to Section 33(g), as he settled a part of his state tort claim for less than his compensation entitlement without employer's prior written approval. The interveners filed an appeal with the Board. The Board dismissed the appeal, on the ground that as claimant's claim was no longer pending, the interveners were not adversely or aggrieved by the denial of their motion to intervene. Interveners then filed a motion for reconsideration of the Board's dismissal.

The Board granted the motion for reconsideration, finding that the interveners are adversely affected or aggrieved by the ALJ's denial of their petition. The Board noted that Section 21(b)(3) of the LHWCA states that the Board is authorized to hear and determine appeals that raise a "substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the LHWCA. However, turning to the merits of the appeal, the Board found that the ALJ's decision was legally correct. The Board noted **Fifth Circuit** case law to support the ALJ's determination that he was without jurisdiction to rule on interveners' entitlement to tort immunity in a state court suit, as that issue was not essential to resolving issues related to the claimant's claim for compensation under the LHWCA. The Board went on to note that even if the claimant's claim had still been pending, the interveners' claim, while based on Section 33(i) of the LHWCA, is independent of any issue concerning the claimant's entitlement to compensation and/or medical benefits and the party liable for such. Section 33(i) does not provide the right of intervention.

Topic 21.2.1 Board Appellate Procedure—Advisory Opinions Not Permissible

Jackson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0629)(December 20, 2004).

This is an Order on Motion for Reconsideration of 38 BRBS 39 (2004)(In order for a “tender” to be valid pursuant to Section 28(b), such that employer can avoid fee liability, it must be “an offer to pay, expressed in writing, without any conditions attached thereto.” As employer’s purported tenders were conditioned on claimant’s accepting a stipulation, the Board held that employer did not tender compensation within the meaning of Section 28(b). In the Motion for Reconsideration, the employer contended that the Board’s decision was contrary to its unpublished decisions in *Boyd v. Newport News Shipbuilding & Dry Dock Co.*, (BRB No . 02-0607)(May 22, 2003), and *Jenkins v. Newport News Shipbuilding & Dry Dock Co.* (BRB No. 01-0870)(Aug. 8, 2002).

The Board rejected this contention, finding that the just cited cases were factually distinguishable from the case now before it. Citing to *Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n. 2 (1990), the Board noted at *Boyd* and *Jenkins* demonstrate the soundness of the principle that unpublished Board decisions generally should not be cited or relied upon by the parties in presenting their cases. “[A]s the Board’s decisions therein are based on specific facts, whereas the decision in Jackson resolved an issue of law. That unpublished cases are more readily available does not lessen the validity of the Board’s statement in *Lopez*.”

Topic 21.2.2 Review of Compensation Order—New Issue Raised on Appeal

Ravalli v. Pasha Maritime Services, 36 BRBS 91 (2002) (2002); previously reported at 36 BRBS 47 (2002).

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the **Second Circuit** in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (**2d Cir.** 2000), *cert. denied*, 532 **U.S.** 1007 (2001) (Termination of benefits is a "decrease" of benefits; held, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

Topic 21.2.5 Review of Compensation Order—Interlocutory Appeals

Hallman v. CSX Transportation, Inc., (Unpublished Order)(BRB No. 04-0731)(November 23, 2004).

This bifurcated coverage issue claim involves the employer's appeal of an ALJ's finding that there was situs and status, and that there would be a subsequent decision and order on other issues. The Board first noted the Supreme Court's three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 **U.S.** 271 (1988) ('collateral order doctrine"). The Board then granted the claimant's motion to dismiss the employer's appeal, noting that the issues of status and situs were not collateral to the merits of the action and could be addressed once a final decision and order granting or denying benefits was issued. Additionally the Board was not persuaded by the employer's argument that the issues presented are important and should be decided now, because the ALJ's decisions have created uncertainty for its risk management procedures, i.e. liability under the LHWCA versus under the FELA. Finally, the Board rejected the employer's contention that it should decide this appeal because the Board has previously decided interlocutory appeals of coverage issues. "The fact that the Board has the authority to decide interlocutory appeals does not require that we do so as it is desirable to avoid piecemeal review."

Topic 21.2.8 Review Of Compensation Order--Direct Appeals from District Director to Board

Meinert v. Fraser, 37 BRBS 164 (2003).

Here the employer appeals to the Board (to review under its abuse of discretion standard) the Vocational Rehabilitation Plan approved by the District Director. The

employer contended that vocational rehabilitation is unnecessary because the claimant retains a wage-earning capacity on the open market and that upon completion of the plan, the claimant will have a lower earning capacity in motorcycle repair than that demonstrated by employer's labor market survey. The Employer averred that the evidence it developed after the implementation of the plan demonstrates the validity of its contentions. The employer also contends that motorcycle repair was merely an interest of the claimant's and that is why retraining in this area was pursued.

After reviewing the pertinent regulations (20 C.F.R. §§ 702.501-702.508) and the statute (Section 39(c)(2), the Board noted that neither the LHWCA nor the regulations provides an explicit role for an employer in the formulation of a rehabilitation plan. The Board held that the employer has not shown that the district director had abused her discretion in implementing the plan, as it failed to demonstrate that the district director did not comply with the regulatory criteria. The Board found that the counselor had adequately documented the wages that the claimant would earn upon completion of the program, as the claimant had no earnings at the time the plan was documented. It further noted that the counselor had documented his placement efforts prior to recommending retraining courses, and he demonstrated how the claimant's vocational background and aptitude testing fit well with the new skills claimant will obtain at the technical college. Further, the Board noted that "[I]t is self-evident that a claimant is more likely to succeed at a plan if, in addition to its being suitable for him, it involves a vocation in which he is interested."

Employer sought to enter into evidence information which it alleges would establish that the claimant had a current wage-earning capacity without the retraining program that was at least equal to what the claimant would earn upon his completion of the plan. The Board declined to allow the information to be entered into evidence stating that "Assuming *arguendo*, the validity of employer's contention, employer cannot demonstrate an abuse of the district director's discretion where the plan is otherwise fully documented according to the regulatory criteria."

The Board also declined to address the employer's contentions regarding its potential liability for disability benefits during the retraining period. It stated that, "This issue is one that is properly presented to an [ALJ] in the first instance, and employer is entitled to a full evidentiary hearing on this issue."

Topic 21.2.12 Review of Compensation Order—Law of the Case

Ravalli v. Pasha Maritime Services, 36 BRBS 91 (2002).

This is a denial of a Motion for Reconsideration. Previously the Board adopted the construction of Section 22 given by the **Second Circuit** in *Spitalieri v. Universal Maritime Services*, 226 F.3d 167 (**2d Cir.** 2000), *cert. denied*, 532 **U.S.** 1007 (2001) (Termination of benefits is a "decrease" of benefits; held, effective date of termination could be date of change in condition.). The Board found Motion for Reconsideration of

several issues not properly before it as these issues had not been addressed at most recent appeal and there was settled "law of the case."

Topic 21.3 Review By U.S. Courts of Appeals

Announcement—Approriations Act Limits Funding For Participation By Solicitor in Circuit Court Appeals In Longshore Cases

The Consolidated Appropriations Act, 2005 (H.R. 4818) has been signed into law by President Bush and again contains language limiting the Solicitor's participation in circuit court appeals to situations involving defense of the special fund per *Director, OWCP v. Newport News Shipbuilding*, 115 S.Ct. 1278 (1995). The legislation also continues the one-year mandate for the Board to decide Longshore decisions.

Topic 21.3 Review By U.S. Courts of Appeals

Holmes v. Director, OWCP, (Unpublished) (No. 01-1761) (**4th Cir.** June 12, 2003).

The claimant here had filed a claim for an alleged work-related psychological injury which was denied by the ALJ. This was appealed to the Board which "affirmed" the ALJ's decision by operation of law pursuant to Public Law 106-554. However, shortly thereafter the Board issued a decision reversing and remanding the ALJ's decision. Several days after that, the Board issued another order withdrawing its reversal. Claimant next filed a motion for reconsideration which was denied. Claimant then filed an appeal to the **Fourth Circuit** which found that by the time the appeal to the circuit was filed, it was untimely and therefore the court lacked jurisdiction.

Topic 21.3 Review by U.S. Courts of Appeals

Newport News Shipbuilding & Dry Dock Co. v. Rowsey, (No. 01-1995) (**4th Cir.** February 12, 2002) (Unpublished.).

Here the claimant was denied benefits by the ALJ and appealed to the Board. Noting that the official record had not been forwarded to its office, the Board stated that it could not consider the merits of the appeal without the record. The Board therefore dismissed the appeal and remanded it to OWCP for reconstruction of the record. Employer filed a petition for judicial review arguing that the ALJ's decision was automatically affirmed pursuant to the Omnibus Consolidated Recisions and Appropriations Act. The Director moved that Employer's appeal should be dismissed as Newport News is not an aggrieved party under the LHWCA. The **Fourth Circuit** agreed, noting that "Because the ALJ denied [Claimant's] claim for workers' compensation

benefits and Newport News has not been required to pay benefits, Newport News has made no showing that it has suffered an injury in fact."

Topic 21.3 Review By U.S. Courts of Appeals

Norfolk Shipbuilding & Drydock Corp. v. Campbell, (Unpublished) (No. 02-1701)(**4th Cir.** January 30, 2003).

After the last opinion was issued Norfolk filed a notice of appeal to the Board seeking a final order so that it could file a petition for review with the **Fourth Circuit**. Without waiting for a final order, Norfolk then filed a petition for review with the circuit court. Noting that the petition for review predated the Board's final order, the **Fourth Circuit** found that it had no jurisdiction and dismissed the petition. "[A]dministrative decisions under the LHWCA are only reviewable by this court if they constitute a final order of the Board." 33 U.S.C. § 921(c) (2000).

Topic 21.3 Review By U.S. Courts of Appeals

Holmes v. Director, OWCP, (Unpublished) (No. 01-1761) (**4th Cir.** June 12, 2003).

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Topic 21.3.2 Review of Compensation Order—Review By U.S. Courts of Appeals—Process of Appeals

Gulf Best Electric, Inc. v. Methe, ___ F.3d ___, (No. 03-60749) (**5th Cir.** Nov. 1, 2004). ***[ED. NOTE:** This case was changed from Unpublished status to Published on December 27, 2004.**]***

The **Fifth Circuit** found that it lacked jurisdiction to consider the claimant's claim that the Board erred in excluding employer contributions to his retirement and health insurance funds when calculating his average weekly wage (AWW). It explained that the claimant had styled his petition a "Cross-Application to Enforce Benefits Review Board Order" but that, in substance, the petition was a simply a request that that the court reverse the Board's order, and thus allow inclusion of the employer's $3.47 per hour contributions to retirement and health insurance funds in calculation of AWW. "Because

the claimant raises this issue as an affirmative challenge to the BRB's decision rather than as a defense to his employer's appeal, his 'cross-application' is properly characterized as a petition for review and, thus is time-barred by Section 921©.

The **Fifth Circuit** further noted that the claimant contended that, because he has filed a petition for modification of the compensation award with DOL pursuant to Section 22, it would be a "waste of this court's time and resources" to dismiss his petition, only to have the claim eventually "work its way back through the system." The court noted that the claimant "cites no authority for the proposition that we may ignore the time requirements for appeal imposed by an agency's organic statute for the sake of equity or judicial efficiency" and therefore it dismissed the petition.

In this matter the court also affirmed the Board's decision that the date on which treatment actually ceased was the correct MMI date, noting that "[o]ne cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed—even if, in retrospect, it turns out not to have been effective." *Abbott v. La. Ins. Guaranty Assn*., 40 F.3d at 126 (**5th Cir.** 1994).

Finally, the court upheld the Board's application of Section 10(a) rather than 10(c) as the ALJ had found. Noting that the claimant worked 47.4 weeks, or 237 days, or 91 percent of the workdays available in the year before his injury, the court stated that while it has not adopted a bright-line test for the applicability of Section 10(a) as the **Ninth Circuit** has (75 percent or more to be under Section 10(a)), "it is clear to us that [the claimant's] record of 91 percent satisfies the requirement of § 910(a) that the claimant have worked 'substantially the whole of the year immediately preceding the injury.'" The court addressed the ALJ's concerns of the "fairness" of possible overcompensation as his rationale for applying Section 10(c) by noting its prior position in *Ingalls Shipbuilding v. Wooley*, 204 F.3d 616 (**5th Cir.** 2000), that the calculation mandated by Section 10(a) aims at a theoretical approximation of what a claimant could ideally have expected to earn… had he worked every available work day in the year. "Over-compensation alone does not usually justify applying § 910(c) when § 910(a) or (b) may be applied."

Topic 21.4.1 Timeliness of Appeal—Appeal to Benefits Review Board

Ferro v. Holt Cargo Systems, (Unpublished)(BRB Nos. 04-0226 and 0400226A)(May 28, 2004).

The Board held that the Director was essentially estopped from contending that he is not bound by an underlying award where the Director's brief did not challenge the award of permanent total benefits. *See Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131 (CRT)(**9th Cir.** 1998). However, the Board did find that there was no effective award in-as-much-as there was no proof that a copy had been sent by registered or certified mail. *See* Section 19(e), 21(a): 20 C.F.R. §§

702.349, 702.350; *see generally Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT)(**7th Cir.** 1989).

Topic 21.5 Review of Compensation Order–Compliance

***[ED. NOTE:** The Following Black Lung case is included since the Black Lung Act draws on the LHWCA procedural provisions. 30 U.S.C. § 932(a).]*

Nowlin v. Eastern Associated Coal Corp, 266 F. Supp. 2d 502 (N.D. W. Va. May 13, 2003) [Order on Motion], *see also* 331 F. Supp. 2d 465 (Aug. 12, 2004).

In the enforcement issue case, the federal district court addressed the enforceability of awards under both Section 18(a) and Section 21(d). It found that an award order may be enforced under either section. The court noted that while Section 18 requires a supplementary order to declare the amount in default and has an express statute of limitations, a claimant could still utilize Section 21(d) for enforcement. The court noted that while a **Ninth Circuit** case, *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381 (**9th Cir.** 1985), concluded that enforcement of a 20 percent penalty under Section 18 is more "logical" and "far better meets the Congressional purpose" than enforcement pursuant to Section 21, it did not expressly foreclose that section as an avenue of recovery for claimants. *See also, Reid v. Universal Maritime Service Corp*., 41 F.3d 200 (**4th Cir.** 1994); *Kinder v. Coleman & Yates Coal Co.*, 974 F. Supp. 868 (W.D. Va. 1997).

The court found that under Section 21, the claimant did not have to secure a supplemental order. Additionally, since Section 21 does not state a statute of limitations time period, the court allowed the adoption of the one used within that state, which happened to be two years.

Topic 21.5 Review of Compensation Order–Compliance

Millet v. Avondale Industries, (Unreported)(E.D. La. 2003), 2003 WL 548879 (Feb. 24,2003).

Federal District court sanctioned use of Section 18 and Section 21(d) by a claimant's attorney to recover costs and expenses incurred when the employer first refused to pay the attorney fee which had been confirmed on appeal by the circuit court when the circuit court had also confirmed the compensation order. District Court Judge found that, "The purpose and spirit of the LHWCA is violated when an employer refuses to pay an award of attorney's fees pursuant to a final order and suffers no consequences. That result awards bad behavior and thwarts the purpose of the LHWCA....The fact that Avondale promptly paid Millet upon notice of this lawsuit does not relieve Avondale of responsibility. Millet was forced to incur costs and expenses to secure payment of a final award pursuant to the provisions of the LHWCA, to which he was rightfully entitled. If

Millet must bear the cost of enforcement of that final fee award then he cannot receive ''the full value of the fees to which [he is] entitled under the Act.'"

Topic 21.5 Review of Compensation Order–Compliance

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