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2021 LHWCA CASELAW SUMMARY

Prepared for

WORKERS' COMPENSATION INSTITUTE

December 12-15, 2021, Orlando, Florida

Summary completed November 29, 2021

Appeals – Final Orders

Letter from District Director was not an order. Appeal premature. *Brooks v. United Stevedores of America, Inc.*, BRB 2109263 (9/15/21) (unpublished).

District Director denied a fee. Claimant filed a timely motion to reconsider. Characterizing claimant's motion as a "letter," the district director issued a letter in response to that motion. Claimant appealed to the BRB, but the Board dismissed the appeal because a letter was not appealable. It was not a proper decision or order. As the district director did not properly dispose of the motion for reconsideration, it remained pending. The appeal therefore was premature and was dismissed without prejudice.

Letter from OWCP claims examiner refusing to issue order approving change of physician was not an order that could be appealed. *Mockel v. SSA Terminals, LLC*, 2021 WL 2375843 (BRB 21-0179, 5/25/21) (unpublished).

Claimant received treatment for years from Dr. Chow for a compensable injury. He sought compensation for a new injury. After a hearing Judge Berlin awarded a short period of TTD, finding claimant recovered from the new injury and then returned to baseline. He according little weight to Dr. Chow, whose services had been so unsatisfactory he "was not a treating physician within the meaning of *Amos v. Director, OWCP*." The decision became final, but claimant asked to the district director to let him treat with a new physician in his first claim. Employer objected in spite of its earlier criticism of Dr. Chow in the new injury claim. After an informal conference

the claims examiner concluded claimant had good cause to change treating physicians. Employer rejected the recommendation. Claimant requested an order granting his request to change physicians. The claims examiner, by letter, denied the request because there was a general factual dispute as to whether claimant established good cause to change physicians, and the issue therefore should be resolved by an ALJ. Claimant requested reconsideration. The claims examiner issued a second letter denying reconsideration. Claimant, contending there were no contested facts, appealed to the BRB. The Solicitor moved to dismiss the appeal, and the Board agreed because the district director had not yet issued a final order that resolved claimant's request for a change of physician. The claims examiner's letters acknowledging the dispute were not appealable to the Board.

[Note: After receiving the order dismissing appeal claimant asked the claims examiner to issue an Order approving or disapproving the request for a change of physician. Employer opposed the request for an order. No order has been issued as of June 20, 2021.]

Appeals – Issues

***Lucia* Appointments Clause objection must be raised before the ALJ.**
Joseph Forester Trucking v. Director, OWCP, 987 F.3d 581 (6th Cir. 2021).

In *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Supreme Court held when an ALJ holds the post in violation of the appointments Clause, Article II, §2, cl. 2, and a party timely objects, any adjudication presided over must be vacated and assigned for rehearing before a different, properly appointment ALJ. An objection is timely when raised first with the ALJ. Issue exhaustion obliges a party to challenge an issue it disputes during an initial proceeding. Traditionally, this requirement has been applied in an Appointments Clause challenge. It is neither jurisdictional nor afforded special entitlement to review and is subject to ordinary principles of waiver and forfeiture. Issue exhaustion in administrative proceedings derives from either statute, regulation, or failing both, judicial prudence. The Black Lung Act contains no explicit statutory exhaustion requirement but DOL regulations require petitions for review to the BRB to list the specific issues to be considered, thereby imposing a regulatory exhaustion requirement applicable to ALJ proceedings. Litigants must raise issues before the ALJ as a prerequisite to review by the BRB. As operators did not timely raise an Appointments Clause objection before the ALJ they waived the issue on appeal.

Appeals - Other

Court declines jurisdiction when employer waived its overpayment which exceeded claimant's request for interest on a pre-judgment §14(e) penalty.

Robirds v. ICTSI Oregon, Inc., 2021 WL 928657 (9th Cir. 19-71634, 19-71865, 3/11/21) (unpublished).

On appeal from an ALJ decision claimant sought interest on a §14(e) penalty. Before briefing employer waived its right to apply its overpayment of compensation to any future modification. The overpayment exceeded the interest claimant sought. Claimant argued a live controversy remained because employer could withdraw the waiver or could refuse to pay interest again. The BRB held the waiver did not moot the controversy. The 9th Circuit held it lacked jurisdiction to resolve the dispute. If Employer withdrew the waiver it would be judicially estopped from doing so in a future proceeding. To repeat its allegedly wrongful conduct claimant would have to again be injured working for employer, there would have to be another dispute over the amount of compensation owed, and employer would have to again fail to pay the disputed amount or timely controvert the claim. Given the highly speculative nature of this chain events there is not reasonable expectation the wrong will be repeated. ICTSI offered the waiver not to avoid an imminent (and presumably adverse) decision on the merits but rather to avoid further litigation costs that would undoubtedly exceed the relatively small amount of money in dispute.

Appeals – Timeliness

Untimely appeal not excused by party's poor health. *Neal v. CP&O, LLC*, ___ Fed Appx ___, 2021 WL 2070512 (4th Cir. 20-2113, 5/24/21).

Claimant had until July 27, 2020 to file an appeal from an ALJ decision to the Benefits Review Board but did not file the appeal until August 26, 2020, contending his personal representative's poor health caused the delay. The Board dismissed the appeal, and the Court affirmed. Because claimant did not file a timely appeal the Board was powerless to grant an extension. The appeal deadline was jurisdictional. No equitable relief is permitted.

After ALJ order on remand, appeal to Board, not Circuit Court. *Zaradnik v. Dutra Group, Inc.*, (BRB 16-0128, 16-0128A, 7/27/21) (unpublished).

On December 9, 2016 Board issued a decision affirming ALJ's finding orthopedic and respiratory injuries were work related but remanded to reconsider the nature of the disability. On March 17, 2021 the ALJ (on

remand) approved a stipulation agreeing claimant was at maximum medical improvement on January 28, 2012, was permanently and totally disabled, and, with the Director's consent, awarding employer §8(f) relief. The stipulation also stated, "The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit. There was no appeal to the Board. On June 1, 2021 employer filed a motion asking the BRB to declare its 2016 decision final, thereby enabling an appeal to the 9th Circuit. The Board denied the motion because in the absence of an appeal to the Board it had no jurisdiction.

In footnote 2 the Board stated employer should have filed a timely appeal of the ALJ's Order Approving Stipulations seeking summary affirmance of the decision and noting the appeal was for the purpose of preserving its right to appeal the underlying Board decision.

Attorney Fees - Amount

ALJ arbitrarily rejected \$25 increase from established rate in 2014 to requested rate in 2018. *Weinert v. XE Services, LLC* (BRB 21-0121, 10/08/21) (unpublished).

In a 2014 decision in another case claimant's counsel was awarded \$350.00 per hour. In this claim he requested \$375.00 per hour for services in 2018. In support of his hourly rate request he presented his *c.v.*, two decisions from the USDC in Pennsylvania awarding fees civil rights cases, and two ALJ decisions awarding fees under the LHWCA. The ALJ awarded \$350.00. The Board held this decision was arbitrary because the ALJ did not consider counsel's position that given the passage of time the modest \$25.00 increase in his requested hourly rate for work conducted from 2018 from the 2014 decision awarding an hourly rate of \$350.00 was reasonable and warranted. He did not consider counsel's statement that his market and billing hourly rate changed from \$350.00 to \$375.00, as did the hourly rates of other members of his firm, as of March 2, 2018. The Board vacated and remanded to address these considerations raised before him as well as sufficiency of counsel's evidence.

No fee enhancement with less than two year delay. *Getty v. Academi*, BRB 21-0260 (9/15/21) (unpublished).

On December 21, 2018 attorney filed a petition for fees for services from October 2017 to December 2018. In April 2019 the ALJ awarded less than the fee requested, and claimant appealed. The Board remanded for reconsideration. The ALJ issued a new order, which claimant appealed

again. Issues on appeal included the failure to account for inflation by increasing the hourly rate according to the increase in the CPI from 2016 to 2020. The Board disagreed, citing *Christensen v. SSA*, 557 F.3d 1049 (9th Cir. 2009). A two year delay in payment is not long enough to merit a fee enhancement. Also, counsel cannot recover for delay due to an appeal of the fee award.

Remanded for reconsideration based on *Seachris*. *Wakeley v. Knutson Towboat Company*, __ Fed Appx ___, 2021 WL 3702008 (8/20/21).

Claimant appealed an attorney fee award from the same ALJ who awarded fees in *Seachris v. Brady-Hamilton Stevedore Company*, 994 F.3d 1066 (9th Cir. 2021). For the same reasons stated in *Seachris* the Court vacated the decision and remanded, instructing the Board to assign the case to a different ALJ (unnecessary because ALJ retired).

Evidence of prevailing market rate satisfied burden of production, was not refuted, and supported requested rate for attorney and paralegal. *Seachris v. Brady-Hamilton Stevedore Company*, 994 F.3d 1066 (9th Cir., 2021); *See also*, *Lesh v. Advantage Federal Resourcing*, 845 Fed Appx 642 (9th Cir. 2021).

Attorney Charles Robinowitz sought \$450 for services from 2007 to 2016 based on

1. His affidavit, recounting 45 years of experience and stating his opinion LHWCA work is similar to commercial litigation;
2. 2009 affidavit of Mr. Goldsmith, who was expert witness on attorney fees, opining \$400 per hour was slightly below market rate in Portland for lawyers of comparable skill, experience, and reputation, and lawyers who specialized in a special niche charged a higher rate;
3. 2008 Morones Survey stating average rate on January 1, 2008 for lawyers of comparable experience was \$446 per hour;
4. 2009 affidavit of David Markowitz who opined Robinowitz' rate should be above the average for attorneys with 30 or more years experience per the Morones Survey, equating to a rate of \$404 per hour;
5. 2010 iteration of the Morones Survey indicating firms with more than five attorneys specializing in commercial litigation with thirty or more years of experienced charged an average of \$431 per hour in 2010;
6. Excerpts from the Oregon State Bar 2012 Economic Survey indicating Portland attorneys with over 30 years of experience reported rates of \$400 per hour in the 75th percentile and \$500 per hour in the 95th percentile.
7. 2014 decision from the 9th Circuit Appellate Commissioner awarding \$425 per hour.

8. 2014 decision from the BRB awarding \$413 per hour for work in 2013 and \$420 per hour for work in 2014. This was based on the average rate of attorneys in the 95th percentile with plaintiff civil litigation personal injury and non-personal injury practices,.

He also requested \$165 per hour for a paralegal, relying on

1. 2009 Goldsmith declaration which opined the \$150 rate he requested at that time was consistent with rates prevailing in the community;
2. 2008 Morones Survey indicated the average rate was \$154 per hour;
3. 2014 decision from the 9th Circuit Appellate Commissioner awarded \$165 per hour as in line with currently prevailing market rates for Portland paralegal work.

ALJ did not give weight to evidence Robinowitz submitted and determined a rate independent of evidence offered, primarily relying on the 2012 OSB Survey in plaintiff civil litigation personal injury, plaintiff civil litigation non-personal injury, and general practice, and for the 75th percentile, then adjusted the rate to account for inflation to produce a rate of \$341.92 per hour. The ALJ also awarded \$150 per hour for the paralegal.

The Court reversed and remanded.

1. Evidence Robinowitz submitted satisfied his initial burden of production.
2. ALJ erred by rejecting evidence of prevailing market rates as outdated. Reliance on evidence of historical market conditions is appropriate when it is the most current information available. ALJ could not disregard Goldsmith and Markowitz 2010 and 2012 information while crediting the 2012 OSB Survey.
3. ALJ erred rejecting evidence of commercial litigation rates. The issue is not whether Robinowitz was a commercial litigator. It is whether the rates charged by commercial litigators are relevant comparators, where the rates involve similar services of lawyers of reasonably comparable skill, experience, and reputation. There are differences between commercial litigation and LHWCA work, but ALJ conflated commercial litigation and complex litigation. Some commercial litigation is complex and other litigation is not. If commercial litigation differs from “straightforward” and “informal” LHWCA work, then so too does plaintiff civil litigation work and litigation handled by general practitioners. “Plainly, an ALJ may not reject commercial litigation as a comparator, arbitrarily, simply because commercial litigation attorneys may charge more than other attorneys.”
4. ALJ erred by rejecting evidence from the OSB Survey of rates charged by Portland attorneys based on years of experience.

5. Prior decisions from the Board had placed Robinowitz in the 75th and 95th percentile. “This was a judgment call that the ALJ could reasonably have resolved either way.” ALJ’s decision to place him in the 75th percentile in this claim was vacated because the ALJ appears to have been influenced by an unwarranted irritation with a brief Robinowitz filed on remand from the 9th Circuit.
6. ALJ’s decision to include the “general” practice area in her analysis was vacated. The “general” category is for attorneys who do not devote at least 50% of their time to any one practice area. Robinowitz is a specialist, not a generalist. There is no evidence to suggest LHWCA attorneys in general, or Robinowitz in particular, are comparable to general practitioners in skills, experience, or reputation, but dissimilar to commercial litigators.

Regarding paralegals, Robinowitz provided the only evidence of market rates for Portland paralegals. On the record the evidence supported a rate of \$165 per hour.

In *Lesh*, Mr. Robinowitz filed a similar appeal from an attorney fee award. The Board vacated and remanded to the Board for further consideration in light of *Seachris*.

Possible ethical violation when outcome was favorable did not justify reduction in attorney fee. *Westbrook v. F. Rodgers Insulation* (BRB 20-0004, 5/18/21) (unpublished).

In 2013 decedent died due, in part, to an asbestos related disease. In 2007 decedent and his spouse, the claimant, retained Brayton Purcell [“BP”] to file civil personal injury claims. Before decedent died they received more than \$1,400,000 from 55 companies and bankruptcy trusts. After decedent died BP filed a wrongful death claim in California on behalf of claimant and the couple’s adult children. Three months later BP filed a LHWCA claim for death benefits on claimant’s behalf. Claimant then chose to pursue only the LHWCA claim and opt out of the wrongful death claim. She was dismissed from that suit before any settlements were reached. In 2016 claimant and employers/carriers agreed to a §8(i) agreement wherein claimant received \$220,000 for her claim and employer/carriers agreed to pay BP fees and costs of no more than \$145,000, apportioned among the employers. BP also secured more than \$240,000 for decedent’s remaining heirs in the wrongful death claim. Judge King approved the agreement, but not the fee, raising *sua sponte* a potential ethical consideration involving counsel. He left the OALJ and the case was assigned to ALJ Berlin. Judge Berlin concluded there was an inherent conflict in simultaneous representation of clients pursuing a longshore and wrongful death claim, per Rule 3-310 of the California Rules of

Professional Conduct. He cut counsel's fee in half, apportioning to employers/carriers in accordance with the agreed percentages. Claimant and BP appealed. The Board reversed.

An ALJ has authority to address whether an attorney committed an ethical breach in deciding to approve an attorney's fee. An ALJ must consider the necessary work done [taking] into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded when awarding a fee. Whether or not a California Rule 3-310 violation occurred, it did not affect the quality of representation in this Longshore claim in a manner that justifies disregarding the fee agreement. BP did not place claimant's claim at risk or jeopardize employer's right to an offset of its longshore liability. No party objected to BP's conduct or contested the right to the agreed upon fee. Given the strong preference for settlement of fees over protracted litigation, the ALJ was bound to honor the parties' fee agreement. The settlement was an objectively exceptional result for claimant. There is no suggestion BP willfully violated the California rule and no showing of any harmful effect on claimant. Opting claimant out of the wrongful death claim protected employer's interests.

Compensation paid pending unsuccessful appeal not considered when assessing fee. No costs because counsel did not document them. *Meeks v. Bis Salamis, Inc.* (BRB 20-0316, 2/26/21) (unpublished).

Claimant sought compensation for tooth and back injuries. After appeals claimant was only awarded \$1,500 in medical services for the tooth injury, but this was after employer had paid more than \$156,000 for the back injury during the appeal. Claimant's counsel petitioned for nearly \$100,000 in fees for services before the OALJ. After reducing some specific entries the ALJ reduced the balance 90% per *Hensley v. Eckerhart*, 4671 UIS 424 (1983) because claimant's success was "substantially limited." Claimant's attorney argued he had actually obtained more than \$156,000 in disability for claimant and therefore should receive the full fee. The Board affirmed. Claimant cannot assert the receipt of payment pending appeal as a reason for increasing or not reducing his attorney's fee. His back claim was not successful. The ALJ did not abuse his discretion in reducing the award.

The Board affirmed denial of costs when claimant had several opportunities to provide supporting documentation for his expenses but did not do so, even when employer had complained there was a lack of supporting documentation.

Fee award remanded when ALJ failed to give counsel the opportunity to submit evidence of market rates in Long Beach. *Spanjol v. Port Maintenance Group, Inc.* (BRB 20-00039, 12/23/2020) (unpublished).

The relevant locality was Long Beach, California. Claimant's attorney submitted declarations from other attorneys regarding prevailing market rates in the San Diego area, the Laffey and United States Attorney's Office fee matrices, and several prior decisions purportedly supporting the requested rate. The ALJ summarily rejected claimant's evidence as not pertinent to the Long Beach market awarded \$410 for counsel's services. On appeal the Board held the ALJ denied claimant's counsel the opportunity to meet his burden of producing evidence that his requested rates were in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience and reputation. The ALJ appeared to have reverted to the "tautological self-referential enterprise" condemned in *Christensen*, 557 F.3d 1054 by merely adopting rates awarded by other administrative law judges. The case was remanded with instructions to allow the parties to submit evidence of the market rates in Long Beach.

Time spent scheduling depositions can be allowed if it requires independent legal judgment. *Spanjol v. Port Maintenance Group, Inc.* (BRB 20-00039, 12/23/2020) (unpublished).

ALJ disallowed time scheduling depositions as clerical. The Board agreed the ALJ erred in summarily denying a fee for two hours scheduling depositions. As a general matter the order of depositions can be critical to the development of a case. Moreover, the cooperation of all parties' counsel and deponent are required. To the extent work required independent legal judgement is it compensable. Case was remanded to determine if time on these tasks required independent legal judgment or were clerical in nature.

Attorney Fees – Entitlement;

No §28(b) attorney fee in 9th Circuit claim without formal action by the district director. *Klett v. SSA Terminals* (BRB 21-0067, 4/28/21) (unpublished).

On January 3, 2019, within 30 days of receiving notice of claim for hearing loss from the district director, employer paid claimant "some" compensation based on an average weekly wage of \$1,410.66. On March 27, 2019 claimant sent a letter to the OWCP indicating disagreement with the average weekly wage, and on January 22, 2020 claimant requested an informal conference. An informal conference was scheduled for March 5, 2020, but on February 13, 2020, before the conference, employer agreed to pay additional PPD based on

an increased average weekly wage. On March 13, 2020 the district director issued a compensation order based on the agreement. On July 1, 2020 claimant's counsel filed a petition for fees. Employer argued counsel was not entitled to an employer paid fee under §28(a) or §28(b). The district director awarded fees under both sections. Employer appealed. The Board reversed.

No fee was due under §28(a) because employer voluntarily began payment of some compensation within thirty days of receiving notice of the claim. Regarding §28(b), the 9th Circuit has generally held a formal proceeding was not a prerequisite provided a controversy remains between the parties *after* informal proceedings. §28(b) applies where the case required action by the district director to address the dispute and claimant obtained greater compensation. That employer may have relied on the work of claimant's counsel does not affect its liability for a fee in this case. §28(b) is applicable only where some action, whether formal or informal, by the Department of Labor, was necessary before the claimant succeeded in his claim. Because the parties resolved their dispute without any action taken by the district director or any other DOL component, §28(b) is inapplicable.

Claimant entitled to file reply to objections to fees when no order prohibited reply. *Guevara v. SOC, LLC* (BRB 21-0019, 3/25/21) (unpublished).

After the ALJ issued an order awarding compensation claimant's attorney filed a petition for fees and employer filed objections. Claimant filed a reply, which included a revised fee petition that addressed some of employer's objections plus a claim for additional time responding to objections. The ALJ disallowed the entire 24.1 hours sought for filing a reply belief because that time "was not necessary under the circumstances, as the Reply could have been avoided had Petitioner been clearer in his original fee petition." "While the explanations provided in the reply brief now fully support the time entries in the initial petition, they should have been included in the initial petition" and counsel "was not entitled to have employer reimburse him for work product that the court did not authorize him to submit." The Board reversed and remanded. The ALJ erred in disallowing claimant's reply brief on the basis that he did not obtain permission to file the brief. 29 CFR §18.33(d), on which the ALJ relied, required the court's permission to file a reply with respect to motions filed prior to hearing. It was not applicable, and the ALJ otherwise did not issue an order prohibiting a reply brief.

Average Weekly Wage - §10(a)

§10(a) can reasonably and fairly be applied when a five-day worker works more than 260 days. *Martin v. Sundial Marine Tug and Barge Works, Inc.*, 12 F.4 915 (9th Cir., 20-70147, 9/2/21).

Claimant worked 264 days in the year before his injury. *Matulic v. Director, OWCP*, 154 F.3d 1052 (9th Cir. 1998), held §10(a) presumptively applies when a claimant works more than 75% of the 260-day measuring year for five-day workers. The ALJ calculated average weekly wage per §10(a) as a five-day per week worker, resulting in an average weekly wage less than a 52 week average. On appeal, claimant argued §10(a) could not reasonably or fairly be applied when the claimant worked more than 260 days. Viewing the dispute as a matter of first impression the Court held the statutory presumption (per *Matulic*) is not rebutted simply because §10(a) would slightly underestimate earning capacity because the claimant worked in excess of 260 days. The statute contemplated some inaccuracy in calculating average weekly wage. Working 264 days by itself does not make use of the §10(a) formula unreasonable or unfair. That a statute should be liberally construed to achieve its purpose does not provide courts freedom to add features that will achieve the statutory purposes more effectively. Courts cannot amend §10(a) to provide it does not apply if the claimant worked more than 260 days.

Average Weekly Wage - §10(c)

Blended AWW when six month contract and claimant did not testify he planned to renew it. *Saheed v. Valbin Corporation* (BRB 20-0393, 3/20/21) (unpublished).

Claimant worked for employer in the USA before accepting a six month contract to work in Afghanistan as a media screener. He injured his back, shoulder and wrist removing body armor he was required to wear. The ALJ calculated an average weekly wage of \$2,749.80 based on earnings for employer in the year before the injury, which included income from stateside and overseas employment. On appeal claimant argued average weekly wage should be \$4,807.69, based solely on overseas earnings. The Board affirmed. Claimant did not testify whether he planned to renew his six month contract. The ALJ's conclusion blended wages was the best measure of earning capacity at the time of injury was rational and supported by substantial evidence.

Causation - §20(a) Presumption

Employer did not rebut presumption. *Beamon v. Huntington Ingalls Industries, Inc.* (BRB 20-0502, 3/25/21) (unpublished); *Stephen J. DeFalco* (BRB 20-0518, 3/25/21) (unpublished); *Garrett v. Dyncorp International* (BRB 20-0167, 4/28/21) (unpublished).

In *Beamon* claimant contended her right knee problem was due to a March 2012 work injury and a July 2013 work injury caused a permanent aggravation of an asymptomatic but preexisting osteoarthritis in the left knee. Employer relied on Dr. Baddar, who opined claimant had bilateral knee osteoarthritis, and the greatest contributing factor was her weight, and right knee flare up in December 2012¹ was due to underlying osteoarthritis. Dr. Baddar said the left knee was directly related to her weight and not related to the injury with the right knee. The ALJ concluded employer had rebutted the presumption and neither knee was compensable. The Board affirmed regarding the right knee but held Dr. Baddar's opinion was insufficient to rebut the §20(a) presumption regarding the left knee because he did not assess claimant's left knee condition in terms of the July 16, 2013 work injury. He failed to state her condition as unrelated to the July 2013 work accident or whether that accident aggravated or accelerated the underlying osteoarthritis.

In *DeFalco*, claimant sought compensation for pulmonary disease due to inhalation of irritants during years of employment. Employer relied on Dr. Conway, who, when asked if work exposure caused or aggravated or contributed to his present obstructive disease, said he did not know the answer. "I cannot tell you that his workplace was the cause. I can't exclude it because of the fact that he gives his history and I can't just simply call him a liar, but I'm disturbed by the inconsistency, and that means that I cannot say with a reasonable degree of probability that his work caused it." Claimant's breathing problems could be caused by cigarette smoking and could have occurred without cigarette smoke or fume exposure. The ALJ concluded employer rebutted the presumption and denied the claim. The Board held Dr. Conway's equivocal opinion was legally insufficient to rebut the presumption because it did not refute claimant's claim that work conditions caused, aggravated, or contributed to his pulmonary condition. He did not "know the answer to that" and could not exclude work as a cause.

In *Garrett*, claimant sought compensation for cumulative injuries to neck, shoulders, and back, calf injury, pulmonary and nasal injuries, tinnitus, eosinophilic esophagitis, and PTSD. Regarding eosinophilic esophagitis Dr. Cluley stated it "can be" due to food allergies, but claimant's condition was

“likely related to some sort of exposure that he experienced during his deployment.” He did not state the condition was due to allergies and not to claimant’s employment. This opinion was not substantial evidence the work environment did not cause, contribute to, or aggravate the eosinophilic esophagitis and did not rebut the presumption.

Claimant did not invoke §20(a) presumption when ALJ concluded she lacked credibility. *Rose v. Vectrus Systems Corp.*, 2021 WL 2375837 (BRB 20-0279, 5/25/21) (unpublished).

Claimant sought compensation for PTSD. DME neuropsychologist testified there was no credible evidence of believable symptoms, but even if they valid they would not reach the level of PTSD diagnosis. The ALJ concluded claimant was not credible, credited the DME’s report, and held claimant’s lack of credibility undermined opinions of other doctors and therapists who relied on claimant’s reporting of her symptoms in forming their diagnosis. The ALJ concluded claimant did not suffer a psychological harm and did not establish a prima facie case to invoke §20(a). On appeal claimant argued the ALJ improperly required her to prove she suffered a harm by a preponderance of the evidence. The Board disagreed. The ALJ did not err in assessing claimant’s credibility in determining whether her subjective reports of symptoms to her physicians were sufficient to establish a prima facie case. As medical providers on whom claimant relied based largely based their diagnosis on claimant’s self reporting of her symptoms, the ALJ acted within her discretion to find claimant’s lack of credibility tainted the diagnosis of her doctors and practitioners and therefore their diagnosis of a work related psychological injury could not be given weight.

DISSENT by Judge Gresh argued establishing a prima facie case was not a heavy burden. All claimant need adduce is *some* evidence tending to establish the prerequisites of the presumption. Harm was supported by claimant’s testimony and the diagnosis of two doctors and her therapist. Also, the ALJ’s finding that claimant was not credible was irrational and unsupported by the evidence.

Claim – Date of Awareness

Claim timely when claimant unaware of the full nature and extent of disability. *Brown v. Global Integrated Security, Inc.* (BRB 20-0435, 9/24/21) (unpublished).

Claimant (subject to the DBA) injured his back lifting weights on August 23, 2013. He continued working but sought treatment for back pain in June

2014 when on leave to the United States. A MRI revealed a herniated disc. On July 8, 2014 claimant agreed to schedule surgery, but he subsequently elected to have epidural steroid injections instead. He returned to work for employer in December 2014 after passing a redeployment physical. In May 2015, after his contract ended, he obtained employment with the Columbia, South Carolina police department after passing another physical. He next sought treatment for back pain in May 2016 and had a fusion in October 2016. He filed a LS-201 notice of injury on October 14, 2016 and on October 27, 2016 filed a LS-203 claim for compensation which included a cumulative trauma injury with employer through April 2015.

The ALJ held the claim for the 2013 weight lifting injury was untimely because it should have been filed within one year of July 8, 2014, when he scheduled back surgery. The Board reversed. The statute begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the work related injury. As a matter of law, the ALJ's reliance on the MRI showing a disc herniation and claimant's canceled surgery was insufficient to infer an awareness of the full impact and extent of the work injury in July 2014. Given claimant's successful return to work for employer and the Columbia Police Department, claimant was not and could not have been aware of the full nature and extent of his injury until after he resumed treatment in May 2016, after which he required surgery for the work injury and alleged ongoing disability.

DISSENT, Judge Boggs, disagreed with the Board's decision to reverse outright the ALJ's conclusion the October 2016 claim was untimely. He would have vacated and remanded to require the ALJ to discuss the relevant evidence and reassess the timeliness of the weightlifting injury claim.

Claim survives summary judgment regarding timeliness when there was no evidence of when claimant was aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury or its impairment of earning power. *Gashi v. Fluor Conops, Ltd.* (BRB 20-0525 (6/28/21) (unpublished).

Claimant experienced numerous traumatic events when working in Afghanistan from March 2010 to June 2015, when he returned to Kosovo. On October 5, 2015 he sought psychiatric treatment from Dr. Jashari and was diagnosed with anxiety-depressive disorder. On February 15, 2016 Dr. Jashari noted claimant was still unable to work. On April 25, 2016 Dr. Jashari linked claimant's psychiatric condition to his employment in Afghanistan and again noted he was unable to work. On March 7, 2019 Claimant filed a claim for work related psychological injury. Employer filed a

motion for summary decision alleging the claim was untimely. ALJ concluded claimant should have known by April 25, 2016 his psychological symptoms and diminished work capacity was related to employment in Afghanistan and found the claim untimely as not filed within two years.

On appeal the Board reversed. The ALJ failed to draw inferences in claimant's favor and erroneously weighed evidence in favor of employer without applying the §20(b) presumption. Although Dr. Jashari diagnosed claimant with a work-related psychological condition in April 2016 there was no evidence of when claimant was aware of this diagnosis or of the relationship of his psychological injury to his working conditions in Afghanistan. "Awareness" means the claimant can, or should be able to, determine from the information given that his ability to earn wages has been affected by his work injury.

Claim timely when claimant filed claim within two years of diagnosis of PTSD. *Rodriquez v. Triple Canopy, Inc.*, 2021 WL 2375841 (BRB 20-0520, 5/27/21) (unpublished).

Claimant performed security services for employer in Iraq. In 2008 an explosion damaged his hearing and killed two persons next to him and a mortar attack rendered him unconscious. In 2010 he sought work for a security company but was not hired because "they said I was crazy, that all of those who had been in Iraq were crazy." In 2014 he applied for another security job and was not hired because he did not pass their psychological examination. He was not given a copy of the results of the examination. On October 21, 2016 a psychologist diagnosed work related PTSD. This was the first medical opinion diagnosing a psychological injury related to claimant's employment. He filed a claim in March 2018. The ALJ found conditions compensable but did not award disability for PTSD because the claim was untimely as claimant should have known no later than some point in 2014 he had work related PTSD because by then he was aware of or should have been aware he had a loss in wage earning capacity due to a work related psychological condition. The Board reversed. Employer did not produce evidence to rebut the §20(b) presumption the claim was timely. Prospective employer rejections did not provide evidence of a work related psychological injury. There was no substantial evidence of the full character, extent, and impact of claimant's work related injury prior to his PTSD diagnosis in October 2016. The claim was filed within two years and was timely as a matter of law.

Claim timely when claimant not immediately aware of full nature and extent of injury. *Garrett v. DynCorp International* (BRB 20-0167, 4/28/21) (unpublished).

Claimant filed a claim for multiple conditions, including a right calf injury on November 20, 2010. He immediately sought treatment but did not miss time from work beyond the date of injury but occasionally had pain. He filed a claim on September 21, 2015. In July and August 2016 he was diagnosed with a chronic calf tear with intermittent flares from increased physical activity. In October 2016 Dr. Lawson opined he had 7% impairment and had reached maximum medical improvement two years after the injury. In February 2017 Dr. Beal opined claimant had 2% impairment and had reached maximum medical improvement six weeks after the accident. The ALJ held claimant should have been aware of the effects of his injury on wage earning capacity as of January 1, 2011 based on Dr. Beal's opinion he would have been at maximum medical improvement then. The ALJ found the claim compensable but did not award disability because it was untimely. The Board reversed.

The statute of limitations begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the injury. The mere diagnosis of a work related condition and treatment therefor does not commence the running of the statute of limitations. In the absence of substantial evidence to the contrary §20(b) presumes the claim was timely filed. The ALJ's conclusion claimant should have been aware of the full nature and extent of his calf injury by January 1, 2011 is unsupported by the evidence and is inconsistent with law. He did not lose time from work and he was not informed by a medical professional or his employer before leaving Afghanistan in December 2014 his injury would cause a permanent impairment or reduction in earning capacity. Dr. Beal's 2017 opinion, on which the ALJ relied, was not rendered until after claimant filed his claim. The earliest date claimant could have been aware was in October 2016, after he filed his claim, when Dr. Lawson examined him and diagnosed a 7% impairment. The claim was filed in September 2016 and is timely as a matter of law.

Costs

No costs because counsel did not document them. *Meeks v. Bis Salamis, Inc.* (BRB 20-0316, 2/26/21) (unpublished).

The Board affirmed denial of costs when claimant had several opportunities to provide supporting documentation for his expenses but did not do so, even when employer had complained there was a lack of supporting documentation.

Interest awarded on costs of litigation. *Seachris v. Brady-Hamilton Stevedore Company*, 2021 WL 1523252 (9th Cir., 18-71807, 4/19/2021).

Claimant requested interest on costs. ALJ and BRB denied the request. The 9th Circuit held under federal fee-shifting statutes interest is available in limited circumstances. An enhancement may be appropriate if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. The amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal. On remand the BRB should determine if an award of interest on costs is appropriate because of the "exceptionally protracted" period the case has been pending.

Death – Qualified Beneficiary

Child of surviving spouse may be entitled to compensation if dependent on the deceased. *Christie v. Bath Iron Works Corporation* (BRB 20-0337, 3/31/21) (unpublished).

Worker died on July 3, 2015 from work related injury on April 7, 2014 and was survived by claimant, his widow, who testified they were married November 29, 2014 but had lived together for nearly eight years at the time of death. Claimant had a daughter, born May 9, 2001, who was autistic and incapable of living independently. The father was a former boyfriend who had not been in contact with her since 2006, had been ordered to pay child support of \$86.83 per week, but frequently did not pay. The daughter lived with decedent since she was seven years old and called decedent "dad." Decedent engaged in activities customary in a parent-child relationship and paid a majority of the household bills and half the mortgage. The ALJ awarded death benefits to the spouse but concluded the daughter was not decedent's "child" as defined in the Act because claimant had not been married to decedent for one year at the time of death and decedent did not

stand *in loco parentis* to the daughter for at least one year prior to death. The Board reversed.

§2(14) defines “child” as including “a child in relation to whom the deceased employee stood in loco parentis for at least one year prior the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased.” There is no requirement a child be the employee’s stepchild for at least one year. There are two methods of qualifying: (1) a child in relation to whom the decedent stood in loco parentis for at least a year; or (2) a stepchild dependent upon the deceased. The one year requirement applies only to the employee’s status in loco parentis to the child. At time of death the stepchild relied on decedent for support or contributions to meet reasonably necessary expenses of living and was a “child” until 18 as a dependent. On remand the ALJ must determine if the child, when 18, was wholly dependent on the employee and incapable of self-support by reason of mental or physical disability or a student as defined in §2(18).

Defense Base Act

Injury in zone of special danger when claimant jumped off balcony when unable to open door or get help. *Mechaelphine v. Pernix Group Co.*, 2021 WL 4206054 (BRB 21-0025, 7/239/21) (unpublished).

Employer selected and paid for a second floor apartment for claimant in Mozambique. On his day off, after living in the apartment for one week, claimant started electric burners on stove to cook breakfast and stepped onto the balcony for the first time since moving in to check the weather. He shut the door behind him to stop mosquitos from getting into the apartment and discovered it was a security door with no handle or keyhole on the outside. It locked automatically, leaving him stranding. After more than an hour, trying various means to pry open or break the door and calling out for help, he became concerned the burners on the stove were a fire hazard and jumped down from the balcony, eight to nine feet, injuring his left ankle. He sought benefits under the DBA, alleging the injury was within the zone of special danger. Employer controverted. The ALJ held jumping off the balcony was unforeseeable, as no employer could reasonable expect a 64 year old employee to engage in such inherently dangerous conduct solely because of a desire not to lose time off from work. The ALJ granted employer’s motion for summary decision.

The Board reversed, holding the injury was covered as a matter of law. The ALJ did not view the undisputed facts in the light most favorable to claimant, ignored relevant facts, and improperly considered fault and the logic of

claimant's decision. Claimant did not jump "solely" because of a desire not to lose time off. He was concerned about the threat of fire, outside temperature, mosquitos, high crime in the area, and it was only eight to nine feet to the ground. The time between considering an action and taking the action is not necessarily a factor under the zone of special danger test, but claimant spent more than an hour on the balcony before jumping. The zone of special danger concept does not preclude coverage merely because the claimant weighed the risks of action versus inaction and proceeded accordingly. Awareness or acknowledgement of danger in and of itself does not disconnect the action from the employment. Fault should not be considered.

Judge Boggs agreed employer was not entitled to summary decision but would have remanded the claim to the ALJ for reconsideration.

Employer/Employee – Borrowed Servant

Borrowed servant was not Jones Act seaman. *Fetter v. Maersk Line Ltd.*, ___ Fed.Appx. ___, 2021 WL 2978881 (3d Cir 20-1426, 5/4/21).

Maersk had an agreement with the seafarer's union allowing it to hire temporary "day engineers" to perform repairs and maintenance when ships were in port. Maersk paid wages to the Union, and the union deducted taxes and fees and remitted remainder to the day engineers. Fetter was hired as a day engineer to work one day only on the docked M/V Maersk Montana. He would not sail with the ship. He was injured when removing a stuck injector and filed civil suit against Maersk and a third-party supervising company, 3MC, based on common law negligence and the Jones Act. A district judge granted summary judgment for defendants on both claims because Fetter was not a Jones Act seaman, and his exclusive remedy was the LHWCA.

Fetter was Maersk's borrowed servant because only Maersk had authority to dismiss him and Maersk retained ultimate control over the engine room and the individuals working in it. Maersk outlined the projects and provided the tools. As a borrowed servant Fetter was within the ambit of the LHWCA and barred from bring common law tort claim against Maersk. He was not covered by the Jones Act because he had no connection to a vessel or group of vessels in navigation that was substantial in terms of duration and nature. His work did not regularly expose him to the special hazards and disadvantages of the sea.

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Estoppel

Claimant collaterally estopped by state claim decision to pursue LHWCA claim. *Nasrueloh v. MTC East/Ports America* (BRB 20-0194, 11/20/2020) (unpublished).

Claimant initially injured his foot, head and neck in a MVA in 2004 and years later settled the claim. On July 17, 2014 he lifted beams in the hull of a ship and alleged reinjury of his back due to repetitive lifting. He continued performing regular work until March 1, 2016 when he "couldn't take it anymore." He filed a state and LHWCA claim for his 2014 injury. In March 2017 the State Board denied the claim, finding the compensable aggravation of his pre-existing condition resolved by June 22, 2015 so he was not entitled to income or medical benefits. At a LHWCA hearing in 2017 claimant sought TTD from March 1, 2016 and medical benefits. The ALJ held the State Board decision had preclusive effect with regard to causation and denied the claim. The Board affirmed.

Collateral estoppel can preclude relitigation of a particular factual issue when (1) the issue to be addressed is identical to one previously litigated; (2) the issue was fully litigated/actually determined in the prior proceeding; (3) the issue was a necessary part of the prior judgment; and (4) the prior judgment is final and valid. The point of collateral estoppel is that the first determination is binding not because it is right but because it is first and was reached after full and fair opportunity between the parties to litigate the issue. Here, all elements applied. Under both acts the claimant had the burden to prove by a preponderance of the evidence the compensability of the claim. In the LHWCA claim the claimant was aided by the §20(a) presumption, but the employer rebutted the presumption with medical evidence, so claimant had the same burden of persuasion under the LHWCA as he did in the Georgia case. As the parties, issues, and burdens were identical, and the causation issue was actually and necessarily litigated in the state forum, the ALJ did not err in applying the doctrine of collateral estoppel to give preclusive effect to the Georgia decision.

Evidence – Expert Medical Evidence

Dosimetry testing and defense expert relying on dosimetry discounted.
Monnens v. TEMCO, LLC (BRB 20-0255, 10/30/2020) (unpublished).

Claimant worked for employer in 1968-1969, 1972 through 2005, and then, as assistant plant manager, from 2005 until retirement on July 31 2015. He had audiograms conducted by his employer and some at his own expense between 1981 to 2014 which showed progressive hearing loss. He had his hearing tested on October 18, 2017. It revealed 36.3% binaural loss. Thereafter he filed a claim for hearing loss, which employer controverted. The ALJ thought the 2017 audiogram was the best evidence of hearing changes through the period of employment and awarded 36.3% PPD.

Employer relied on dosimetry testing conducted January 30 and October 4, 2018 on five supervisors at its facility which allegedly showed claimant's work exposed him to non-injurious noise. The ALJ found this testing did not account for claimant's specific work duties of engaging in periodic extended weekly inspections and more extended monthly inspections and noted testing confirmed some areas of the facility were very loud to dangerously loud. The ALJ also rejected testimony from Dr. Langman, employer's expert, because Dr. Langman did not approach the case objectively and seemed to have been driven to reach conclusions favorable to respondents and to state those conclusions in whatever manner suggested by employer's counsel. Dr. Langman had an inaccurate understanding of claimant's work and was somewhat evasive and cagey in his testimony. Dr. Langman relied on the

OSHA allowable time weighted average of 90 decibels over an 8 hour day and a 5 dB exchange rate but the National Institute for Occupational Safety and Health (NIOSH) measured safe exposure as 85 dB and used a 3 dB exchange rate. The lower exchange rate resulted in a higher TWA than the 5 dB exchange rate.

The Board affirmed, noting the ALJ correctly applied the §20(a) presumption and held on a more likely than not basis claimant's work for employer contributed to progression of his hearing loss from 12.5% to 36.3%.

Evidence – Rules of Evidence

Hearsay not *per se* inadmissible. *Schindler v. Kellogg Brown & Root Services*, 2021 WL 4206048 (BRB 20-0563, 8/20/21) (unpublished).

Claimant worked in Iraq in 2004-2005 overseeing trash disposal in burn pits where he was allegedly exposed to smoke and hazardous fumes. The ALJ excluded five of claimant's exhibits as inadmissible hearsay. The Board reversed the ALJ's evidentiary ruling and remanded. §23(a) states the ALJ shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may make such investigation or inquiry or conduct such hearing in a matter as to best ascertain the rights of the parties. Hearsay is generally admissible in administrative proceedings if it is considered reliable. Hearsay is not *per se* inadmissible. Its probative value, reliability, and fairness of its use are determinative. The ALJ's exclusion without consideration of the determinative factors or findings and a relevant rationale was not in accordance with law or the APA.

Exclusions – Jones Act

Land based welder directed to work on two short term transient repair jobs on two vessels was not a seaman. “Substantial in nature” element not based solely on whether exposed to perils of the sea. *Sanchez v. Smart Fabricators of Texas, LLC*, 997 F.3d 564 (5th Cir. 2021).

Plaintiff was employed as a welder for SmartFab 67 days between August 2017 and August 2018. Six of those days were on welding jobs on land or vessels irrelevant to status as a seaman because they were not owned or controlled by SmartFab's customer, Enterprise Offshore Drilling LLC. He spent the remaining 61 days on two different jack-up drilling rigs owned by Enterprise, Enterprise WFD 350 and Enterprise 263. He worked on WFD 350 for 48 days doing welding work on a discrete repair job. It was jacked up so the deck was level with the dock and separated from the dock by a

gangplank. He could take two steps on the gangplank and was ashore. He commuted from his home to the vessel daily. He worked on Enterprise 263 13 days. Initially it was located on the outer continental shelf (OCS). He was sent to perform repairs necessary to get the vessel in condition to permit drilling operations at a new drilling site. He performed welding and related work on the deck and was on the rig when it was moved to the new drilling location. He stopped working after falling on August 8, 2018 and remained with the crew until repairs completed on August 10, 2018. The rig began drilling on August 11, 2018.

A panel initially held plaintiff was a seaman. *Sanchez v. Smart Fabricators Texas LLC*, 970 F.3d 550 (5th Cir. 2020). He contributed to the function of the vessel or the accomplishment of his mission and had a connection to a vessel in navigation or identifiable group of vessels that was substantial in duration. The panel held his connection was substantial in nature because he could be exposed to the perils of the sea even if his duties were on a vessel jacked up next to dockside or at anchor in navigable waters. The *en banc* court reversed. The court held simply asking if the worker was subject to the perils of the sea was not enough to resolve the nature element. Additional inquiries should be made: (1) Does the worker owe his allegiance to the vessel rather than simply to a shoreside employer? (2) Is the work sea based or involve seagoing activity? (3) Is the worker's assignment to a vessel limited to performance of a discrete task after which the worker's connection to the vessel ends, or does the worker's assignment include sailing with the vessel from port to port or location to location?

The work on WFD 350 was not sea-based and did not satisfy the nature test. All work was performed while it was jacked up with the barge deck level with the deck and gangplank away from shore. His duties on WFD 350 did not take him to sea and when finished he would not sail with the vessel. Work on Enterprise 263 was to make discrete repairs to satisfy regulatory requirements to permit the rig to drill at a new location. There was no evidence he planned to remain completing the job and his time on Enterprise 263 was well below the 30% required for satisfaction of the duration prong of the substantiality test. Discrete transient jobs, usually performed by contractors, are like work done by longshoremen when a vessel calls in port. They have a transitory or sporadic connection to a vessel or group of vessel and do not qualify for seaman status. Plaintiff, as a transitory worker, was in that group and did not satisfy the nature test.

Hearings - Other

Claimant entitled to file reply to objections to fees when no order prohibited reply. *Guevara v. SOC, LLC* (BRB 21-0019, 3/25/21) (unpublished).

After the ALJ issued an order awarding compensation claimant's attorney filed a petition for fees and employer filed objections. Claimant filed a reply, which included a revised fee petition that addressed some of employer's objections plus a claim for additional time responding to objections. The ALJ disallowed the entire 24.1 hours sought for filing a reply belief because that time "was not necessary under the circumstances, as the Reply could have been avoided had Petitioner been clearer in his original fee petition." "While the explanations provided in the reply brief now fully support the time entries in the initial petition, they should have been included in the initial petition" and counsel "was not entitled to have employer reimburse him for work product that the court did not authorize him to submit." The Board reversed and remanded. The ALJ erred in disallowing claimant's reply brief on the basis that he did not obtain permission to file the brief. 29 CFR §18.33(d), on which the ALJ relied, required the court's permission to file a reply with respect to motions filed prior to hearing. It was not applicable, and the ALJ otherwise did not issue an order prohibiting a reply brief.

Insurance - Coverage

Guaranty Fund coverage for claim for death could be based on time of exposure to asbestos, not time of death, depending on terms in policy. State law controls. *Stein v. Thorpe Insulation Co.* (BRB 20-0061, 12/15/2020) (unpublished).

Surviving spouse alleged her husband was exposed to asbestos working at various shipyards from 1963 to 1981 and died August 17, 2012 due to an asbestos related disease. Employer's carriers, Mission and Western Employers' Insurance Company were insolvent. The California Insurance Guarantee Association (CIGA) controverted and sought dismissal. When initially enacted in 1969 California's Guarantee Act excluded claims arising from a policy of ocean marine insurance. In 1989 the Court of Appeals of California held claims under the LHWCA were covered claims for which CIGA had liability. The California legislature subsequently nullified the court decision by enacting legislation, effective January 1, 1988, explicitly excluding LHWCA claims from the definition of a covered claim. Claimant and the Director argued in support of a "continuous trigger" theory wherein liability occurs when there was exposure to harmful conditions, actual injury or damage, or upon manifestation of the injury or damage. CIGA advocated

for a “manifestation approach which the ALJ adopted when concluding a claim for death benefits comes into being at the death of the worker, not before, and because death was in 2012 CIGA did not cover the claims. The Board remanded.

Identifying the “insured occurrence” is a matter of state law. Under California law courts must consider the “occurrence” language in the insurance policies and endorsements broadening coverage. The Board, remanded with instructions to obtain and consider the policies.

Interest

Interest awarded on costs of litigation. *Seachris v. Brady-Hamilton Stevedore Company*, 2021 WL 1523252 (9th Cir., 18-71807, 4/19/2021).

Claimant requested interest on costs. ALJ and BRB denied the request. The 9th Circuit held under federal fee-shifting statutes interest is available in limited circumstances. An enhancement may be appropriate if the attorney’s performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted. The amount of the enhancement must be calculated using a method that is reasonable, objective, and capable of being reviewed on appeal. On remand the BRB should determine if an award of interest on costs is appropriate because of the “exceptionally protracted” period the case has been pending.

Maximum and Minimum Compensation

Maximum compensation rate determined at time of disability. *Miller v. Global Linguist Solutions, LLC* (BRB 20-0180, 11/5/2020) (unpublished).

The parties stipulated claimant sustained a work-related right knee injury and also held right hip and psychological injuries were work related. His average weekly wage was \$2,529.46. Two-thirds of the AWW (\$1,686.31) was more than the maximum compensation rate:

Date	Max CR
10/01/08	\$1,200.62
10/01/09	\$1,224.66
10/01/10	\$1,256.84
10/01/11	\$1,295.20
10/01/12	\$1,325.18
10/01/13	\$1,346.68
10/01/14	\$1,377.02

The ALJ awarded:

Type	From	Thru	Rate	Comment
TTD	07/08/09	09/16/10	\$1,200.62	Right knee and psychological condition
PTD	09/17/10	01/13/14	\$1,226.44, then \$1,256.84, then \$1,295.84, then \$1,325.18, then \$1,346.68.	Right knee, even though psychological condition remained temporary
TTD	01/14/14	03/25/14	\$1,200.62	Right knee, due to surgery
PTD	03/26/14	12/18/14	\$1,346.68	Psychological condition became permanent.
PPD	12/19/14	Ongoing	Did not state rate	Unscheduled PPD (\$480/wk residual) for psychological condition and concurrent 31% scheduled PPD for right knee.

The applicable initial maximum compensation rate is the rate in effect when a claimant first becomes disabled and therefore entitled to compensation,

regardless of when the award is entered, per *Roberts v. Sea-Land Svcs., Inc.*, 566 US 93 (2012). Thereafter a claimant is entitled to the subsequent increased maximum rates only if “currently receiving” permanent total disability benefits. *Roberts v. Director, OWCP*, 625 F.3d 1204 (9th Cir. 2010). A claimant’s benefits for any temporary disability or for PTD remains subject to the maximum rate in effect when the claimant first became disabled. The ALJ did not indicate the maximum compensation rate for claimant’s concurrent PPD awards but his order indicated “the applicable initial maximum compensation rate is that in effect when the claimant first becomes disabled and therefore becomes entitled to compensation regardless of when a compensation order is issued. *** This rate also applies to subsequent permanent partial disability compensation.”

Maximum Medical Improvement

Multiple conditions, when only one condition at maximum medical improvement, disabling condition governs award of benefits. *Miller v. Global Linguist Solutions, LLC* (BRB 20-0180, 11/5/2020) (unpublished).

The parties stipulated claimant sustained a work-related right knee injury and also held right hip and psychological injuries were work related. The ALJ awarded:

Type	From	Thru	Rate	Comment
TTD	07/08/09	09/16/10	\$1,200.62	Right knee and psychological condition
PTD	09/17/10	01/13/14	\$1,226.44, then \$1,256.84, then \$1,295.84, then \$1,325.18, then \$1,346.68.	Right knee, even though psychological condition remained temporary
TTD	01/14/14	03/25/14	\$1,200.62	Right knee, due to surgery
PTD	03/26/14	12/18/14	\$1,346.68	Psychological condition became permanent.
PPD	12/19/14	Ongoing	Did not state rate	Unscheduled PPD (\$480/wk residual) for psychological condition and concurrent 31% scheduled PPD for right knee.

Employer argued the psychological condition was not at maximum medical improvement until March 26, 2014, so claimant was entitled to temporary disability, not PTD, before that date. The Board disagreed. Per *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014), where a claimant establishes an inability to perform usual work due to only one work related condition, rather than a combination of work related injuries, the nature of that disabling condition governs the award of benefits. Here, the nature of claimant's disabling knee injury governed the award of benefits, and employer failed to prove suitable alternative employment was available. Claimant was entitled to PTD from September 17, 2010 through January 13, 2014.

[See "Maximum and Minimum Compensation" topic for discussion of applicable compensation rates.]

Medical Services – Choice of Physicians

Claimant has no right to select physical therapist or PT facility. *Jefferson v. Marine Terminals Corporation (East)* (BRB 21-0234, 9/28/21).

Claimant injured her ankle at work and developed back pain due to her altered gait. Her doctor recommended Progressive PT for her back but Employer but made an appointment for her at RSF-ATI where she had previously received PT for her ankle. Claimant refused to attend. Employer sought suspension of compensation. The ALJ held claimant's refusal to attend was subjectively, but not objectively reasonable and did not suspend compensation. [See discussion indexed as Temporary Disability – Entitlement.] The Board vacated and remanded the ALJ's decision regarding suspension for further consideration but also held, as did the ALJ, claimant did not have a right to choose her own physical therapist or PT facility. A physical therapist is not a physician as defined by 20 CFR §702.404.

Audiologists are physicians per §7. *Jones v Huntington Ingalls, Inc.* (BRB 16-0690, 7/30/21) (on reconsideration of 51 BRBS 29 (2017)).

Claimant sought authorization to be fitted with hearing aids by Dr. McClain, Au.D, who diagnosed a hearing impairment and was the only audiologist claimant chose to see in connection with the claim. Employer conceded claimant could be treated by an audiologist but argued claimant was not permitted to choose which audiologist provides his care. Employer therefore authorized treatment by an audiologist of its choosing. The Board initially held claimant did not have a right to choose his audiologist because

audiologists were not listed in the 20 CFR §702.404 definition of physician. On reconsideration, Board held audiologists are “physicians” within the meaning of §7(b).

§7(a) states an employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care, but the statute does not define physician. Last revised in 1977 in an effort to pattern the FECA definition of physician, 20 CFR §702.404 states: “The term physician includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law ... Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term ‘physician’ as used in this part.” In 1984, §8(c)(13) of the Act was amended to accord audiograms presumptive evidentiary weight if administered by a licensed or certified audiologist or a physician certified in otolaryngology (and other requirements met). A majority of the Board held Congress intended to elevate audiologists to physician status, and the exclusion of audiologist from the second part of 20 CFR §702.404’s “are not listed” sentence was not applicable. Failure to classify audiologists as physician would lead to inconsistent, impractical and costly results. For example, workers might see an audiologist for examination and audiogram but then be forced to see an otolaryngologist to obtain hearing aids, even when the MD would refer the claimant back to an audiologist to obtain and fit the hearing aids.

DISSENT, Judge Boggs, argued the language in the administrative rule was clear and unambiguous. FECA does not classify audiologists as physicians, and as originally constructed the Director wanted the two acts to have similar definitions.

Miscellaneous

Injury driving to work covered under OCSLA. *Owensby & Kritikos, Inc. v. Director, OWCP*, 997 F.3d 587 (5th Cir. 2021).

Claimant was employed by Owensby & Kritikos as an equipment testing technician on platforms located on the OCS. His injury resulted from an auto accident on his way to work for Owensby on the OCS. In the year before the injury claimant spent 89% of his time offshore. When onshore employer paid mileage and driving time from the office to the pickup point for offshore transportation and paid for time on a helicopter or boat to the platform. Applying *Pacific Operators Offshore, LLP v. Valladolid*, 565 US 207 (2012), the ALJ held the injury arose out of and occurred in the course of his

employment and the injury had a substantial nexus to extractive operations on the OCS. The Board and 5th Circuit affirmed.

Not every injury occurring as the result of and in the course and scope of operations on the OCS is covered. There must be a substantial nexus between the injury and extractive operations. The OCSLA does not preclude recovery for an injury suffered en route to the OCS. It depends on the individual circumstances of each case. Here, claimant was compensated for time and onshore mileage traveling to and from the OCS, he was on the job when injured, he had to travel to an intermediary pickup location to be transported from onshore to the OCS, and he transported his testing equipment in his vehicle. Each of these factors supports the injury occurring as the result of operations conducted on the OCS.

No reimbursement for health insurance premiums. *Garrett v. DynCorp International* (BRB 20-0167, 4/28/21) (unpublished).

Claimant purchased health insurance when employer refused to authorize treatment for work related injuries. He sought reimbursement for his premiums. The ALJ held there was nothing in the Act or regulations which allowed reimbursement for private health insurance premiums. The BRB affirmed.

Notice

ALJ's analysis of claim and notice flawed. Evidence of exposure is not alone evidence of knowledge. Claimant's testimony not considered. No explanation of how employer actually prejudiced. *Schindler v. Kellogg Brown & Root Services*, 2021 WL 4206048 (BRB 20-0563, 8/20/21) (unpublished).

Claimant worked in Iraq in 2004-2005 overseeing trash disposal in burn pits where he was allegedly exposed to smoke and hazardous fumes. He developed lung cancer and gave notice to employer in 2018. The ALJ held he should have been aware of the connection between his occupational disease and his work with employer in 2011 and concluded notice and claim were untimely.

The ALJ's analysis of claimant's awareness for purposes of §12 and §13 was flawed. She failed to give claimant the benefit of the §20(b) presumption that notice and claim were timely filed. Although Mayo Clinic notes, on which the ALJ seemingly relied, state claimant was employed as an environmental geologist with some environmental fume exposure, there was no suggestion of a possible link between those exposures in Iraq and the lung cancer or any

opinion on the possible cause of claimant's disease. The ALJ's analysis contained no discussion of claimant's testimony, particularly that he never made any connection between his work with employer and his lung cancer in 2011 and 2013 or his explanation of why he did not make that connection until 2018. The ALJ did not identify any specific interactions demonstrating claimant should have acquired such awareness in 2011.

Regarding prejudice under §12(d)(2), the ALJ merely recited employer's allegations without determining whether they were valid and whether prejudice was actually established. Mere conclusory allegations of prejudice or an inability to investigate a claim when it was fresh are insufficient to render §12(d)(2) applicable.

Permanent Disability – Employer's Burden

Vocational expert testimony jobs routinely available insufficient to prove jobs were available before labor market survey. *Stricklin v. Department of the Army*, 2021 WL 4206049 (BRB 21-0118 & 21-0018A, 8/27/21) (unpublished).

After a work related injury claimant returned to work for employer but was terminated in September 2015. Employer contended termination was due to misconduct, but the ALJ concluded termination was due in part to her injury. The Board affirmed that finding. Employer produced a December 19, 2019 labor market survey. The ALJ found two jobs in the survey, customer service representative and administrative assistant, established availability of suitable alternative employment. He awarded TTD from September 24, 2015 to December 19, 2019 because employer's evidence was insufficient to show suitable jobs were available before the labor market survey. On appeal Employer argued its vocational consultant testified these jobs were "routinely available back in time" but she did not say in her testimony or report how long the jobs had been open. The ALJ determined her testimony was too vague to support the assumption these jobs were regularly open before the date of the labor market survey. The Board affirmed. The ALJ's conclusion was not inherently incredible or patently unreasonable.

One suitable job in labor market survey insufficient to prove employability. *Shaw v. Ceres Marine Terminals, Inc.* (BRB 20-0263, 21-0082 (6/25/21) (unpublished).

After a compensable injury ALJ held claimant could not return to usual longshore work. Employer offered evidence of multiple non-longshore jobs, but all were unsuitable because of physical demands or they required skills with math, writing, communication, computers, or laws which claimant

lacked. He found a job as a ticket taker at a movie theater physically suitable but otherwise unsuitable because claimant's medications, including oxycodone, rendered him sleepy and caused inattention and loss of mental acuity. On appeal, the Board agreed the ALJ was mistaken regarding the ticket taker job because claimant was not taking oxycodone. Nevertheless, citing *Lentz v. Cottman Company*, 852 F.2d 129 (4th Cir. 1988), it was harmless error because one suitable job was insufficient to satisfy employer's burden of showing a range of suitable jobs.

Sheltered employment when claimant did no actual work. Failure to look for work after sheltered employment ended immaterial when employer failed to identify other suitable employment. *Rana v. Internews Network, Inc.* (BRB 20-0315, 20-0315A, 1/29/21) (unpublished).

Claimant worked as an Operations Advisor in Juba, South Sudan. On June 8, 2016 fighting broke out between group loyal to the president and vice president. After she was assaulted and terrorized by soldiers she injured her shoulder during an escape and was evacuated to another country. Employer retained her on the payroll until her contract ended in June 2017 but then paid her salary and provided health insurance through December 31, 2017, plus tuition for a master's degree program. In exchange claimant signed a waiver of all non-DBA causes of action against employer related to the work incident. She filed a clam under the DBA for shoulder and psychological injuries. The ALJ found the claim compensable because employer had not rebutted the §20 presumption regarding the right shoulder and psychological conditions and awarded TPD through June 30, 2017 but nothing thereafter because she removed herself from the workforce by moving to Madrid to enroll in a master's degree program. The Board held employer had rebutted the presumption and remanded to reconsider compensability and whether these conditions prevented claimant from performing usual and customary employment. In the event the ALJ still found conditions compensable and prevented usual and customary work claimant argued (1) work from July 12, 2016 to October 6, 2016 in Manilla was sheltered because she did little actual work for employer consisting of one week, arranging hotel accommodations for a meeting; (2) Claimant was entitled to total disability as of July 1, 2017. The Board agreed.

Work before July 1, 2017 was sheltered, as claimant was paid but did not perform any necessary work. Therefore, claimant was entitled to TTD from October 6, 2016 to June 30, 2017. The position in Manilla was not suitable alternative employment, so the burden to establish such did not expire with claimant's discharge at the conclusion of her employment contract. Her

failure to seek full time work after a layoff is immaterial as Employer has the burden to show suitable employment opportunities.

Permanent Disability – Motivation

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Union job still “available” after claimant voluntarily retired from the union. *Owen v. TEMCO, LLC* (BRB 20-0249, 11/24/20) (unpublished).

Claimant reached maximum medical improvement from his compensable injury on August 2, 2017. He agreed he could perform some but not all of his longshore jobs but did not return to longshore employment and instead retired November 1, 2018. The ALJ held retirement did not preclude consideration of longshore jobs as suitable alternative employment and awarded PPD based on the longshore jobs claimant conceded he could perform. On appeal claimant argued he was required by economic necessity to retire because he could not have worked enough hours to retain his health benefits, and his decision to retire falls within the humanitarian purpose of the Act and should not decrease his entitlement to disability. The Board affirmed, citing *Rhine v. SSA*, 596 F.3d 1161 (9th Cir. 2010), addressing a similar situation and concluding claimant’s preferences, or the possible employment consequences of taking an available job, was not relevant. Claimant’s work related injury did not compel him to retire. Longshore positions could constitute suitable alternative employment notwithstanding claimant’s voluntary relinquishing his union membership by retiring.

In fn 9 the Board stated: “For clarity, we note claimant cannot eliminate an otherwise available union job from consideration by voluntarily removing himself from union membership or choosing not to resume union membership. Thus, the pertinent inquiry concerns the underlying rationale for claimant’s disability retirement from the union, *i.e.*, did claimant voluntarily withdraw from the union or was he compelled by disability to take such recourse?”

Permanent Disability – Other

Use of current edition of AMA *Guides* not an improper delegation of authority and is constitutional. *Pierce v. Electric Boat Corporation*, 2020 WL 7975680 (BRB 18-0609, 12/7/2020).

In 1992 claimant was diagnosed with asbestos related lung injury and filed a claim as a voluntary retiree. In 2015, based on stipulations, an ALJ awarded PPD at different rates (14%, 30%, 32.5%, 47.5%, and then 57.5% as of July 24, 2014) based on whole person impairment per the 6th edition of the *AMA Guides*. In 2017 claimant petitioned for modification, contending he should receive 100% based on the 3rd edition in effect at time of injury. The ALJ awarded 65% based on the 6th edition. Claimant appealed. The Board affirmed.

Legislative history of the 1984 amendments, which awarded disability to voluntary retirees based on their impairment “under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association” contemplated the most currently revised edition of that publication should be used. Doctors should use the most recent edition as of the date they render their medical opinions. This is consistent with *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), *rev’d on other grounds sub nom., Alexander v. Director, OWCP*, 297 F.3d 805 (9th Cir. 2002), approving use of the 3rd edition to evaluate test results in 1989 rather than the 1st edition in effect in 1983 when the disease had its onset.

Use of the most current edition was not an improper delegation of legislative authority. An act is presumed constitutional. Congress legislated as far as reasonably possible and then adopted the current *Guides* to determine retiree impairment. This was done with the understanding the AMA would modify its *Guides* occasionally to keep up to date with the most current scientific and medical knowledge. The mandate to use the *Guides* for retiree benefits does not delegate power to the AMA. It merely prescribes the method by which doctors may calculate a retiree’s impairment. Periodic revisions of the standard will not transform an otherwise constitutional and non-delegatory statutory provision into an unconstitutional delegation of legislative power. Where a standard is periodically updated because of new scientific developments recognized by eminent professionals interested in maintaining high standards in science, the standard may still be adopted by the legislature.

Claimant alternatively challenged use of the 6th edition as a denial of due process because it was a “paradigm change” from previous editions and not based on scientific or updated medical method. The Board rejected the contention the Act was an unconstitutional violation of due process. It declined to address claimant’s challenged the substantive merits, value, and appropriateness and methodology of the 6th edition because the Board lacks the power to legislate and cannot hold that any particular version of the *Guides* should not be used.

Permanent Disability – Retired Workers

Union job still available after claimant voluntarily retired from the union, even when union job was not monetarily advantageous. *Owen v. TEMCO, LLC* (BRB 20-0249, 11/24/20, affirmed on reconsideration, 6/30/21) (unpublished).

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longshore jobs but did not return to longshore employment and instead retired November 1, 2018. The ALJ held retirement did not preclude consideration of longshore jobs as suitable alternative employment and awarded PPD based on the longshore jobs claimant conceded he could perform. On appeal claimant argued he was required by economic necessity to retire because he could not have worked enough hours to retain his health benefits, and his decision to retire falls within the humanitarian purpose of the Act and should not decrease his entitlement to disability. The Board affirmed, citing *Rhine v. SSA*, 596 F.3d 1161 (9th Cir. 2010), addressing a similar situation and concluding claimant's preferences, or the possible employment consequences of taking an available job, was not relevant. Claimant's work related injury did not compel him to retire. Longshore positions could constitute suitable alternative employment notwithstanding claimant's voluntary relinquishing his union membership by retiring.

In fn 9 the Board stated: "For clarity, we note claimant cannot eliminate an otherwise available union job from consideration by voluntarily removing himself from union membership or choosing not to resume union membership. Thus, the pertinent inquiry concerns the underlying rationale for claimant's disability retirement from the union, *i.e.*, did claimant voluntarily withdraw from the union or was he compelled by disability to take such recourse?"

On reconsideration, no member of the panel voted to vacate or modify the earlier decision. The Act compensates loss of wage-earning capacity "because of injury." Claimant's decision to stop working because it was not monetarily advantageous to keep working does not entitle him to total disability benefits.

Permanent Disability – Scheduled PPD

Error to use AMA 6th edition if 6th edition did not apply. *Boudreau v. Industrial Resources, Inc.*, ___ Fed Appx ___, 2021 WL 2142506 (9th Cir. 19-73022, 5/26/21) (unpublished)

Claimant injured his right arm at work but also had congenital absence of the left arm below the elbow. On appeal he requested remand to secure (1) a nominal (*de minimis*) award; (2) increased PPD due to the aggravation rule to account for his preexisting condition of the left arm; (3) recalculation of impairment without using the AMA Guides 6th edition. The court held claimant was not entitled to a nominal award because a scheduled injury presumed a current loss of wage-earning capacity and provided compensation for that disability. The aggravation rule did not apply because §8(c)(19) provided compensation for permanent partial loss or loss of use of a *member*.

The left arm impairment did not increase the impairment caused by the right arm injury. The decision to use the 6th edition as a starting point was error because claimant's diagnosis did not fit within the 6th edition's factual predicates, *i.e.*, history of painful injury, residual symptoms without consistent objective findings, or a surgical release of flexor or extensor origins with residual symptoms. Claimant did not have surgery and his history was supported by consistent objective findings.

Aggravation rule applied in hearing loss claim. *Lewis v. Huntington Ingalls Industries* (BRB 20-0549, 2/17/21) (unpublished).

Claimant had a pre-employment audiogram in 1980 showing normal hearing and 14 audiograms thereafter. In 2017 he filed a claim for hearing loss. Left ear loss was 7.5%. Right ear apparently was more than 7.5%, but Employer paid 7.5% binaural because a doctor opined the right ear loss was likely noise related only to the degree it matched the left ear. The ALJ held his asymmetric right rear loss was not related and refused to award additional PPD. the Board reversed. Under the aggravation rule employer is liable for the entire resultant disability where the employment injury contributed to, combined with, or aggravated a preexisting or underlying condition. The aggravation rule applies to hearing loss injuries and requires the employer to pay for the entire combined hearing loss. Here, there was clear and undisputed audiometric evidence of claimant's right ear hearing loss, albeit of unknown etiology, before the development of a compensable, work related noise induced hearing loss. When a work related hearing loss combines with a preexisting hearing loss in an additive way, it is compensable under the aggravation rule.

Permanent Disability – Unscheduled PPD

ALJ failed to consider non-physical factors when assessing employability. *Young v. Huntington Ingalls Industries, Inc.*, 2021 WL 4206050 (BRB 21-0205, 8/27/21) (unpublished).

In prior litigation claimant was awarded PTD from January 18, 2000 to July 27, 2000 and PPD thereafter. His PPD award was based on physical restrictions of no lifting more than 10#, no pushing or pulling, no overhead work, and no fine manipulation. In 2008 he had a second neck surgery, and in 2015 his doctor placed additional permanent restrictions on him, including a 5# lifting limit and no hand manipulation. Claimant filed a motion for modification due to a change of condition, seeking PTD. The ALJ concluded there had been a change of condition but based on employer's labor market survey denied the motion to award PTD. Claimant appealed. The Board

remanded. Although the ALJ assessed the suitability of jobs in light of physical capabilities she did not assess their suitability in view of claimant's vocational factors, age, and length of absence from the workforce. The evidence in the record did not support the conclusion claimant was qualified for some of the jobs she found suitable and the ALJ did not assess suitability of other jobs requiring a variety of skills in light of claimant's vocational factors, such as a requirement he have excellent customer service skills. She also did not consider whether his age and background made him likely to be hired for any particular position and whether his long absence from work affected his ability to compete for a job.

Responsibility – Hearing Loss Claims

Employer before determinative audiogram responsible for hearing loss.

Spanjol v. Port Maintenance Group, Inc. (BRB 20-0246, 12/23/2020) (unpublished).

PMG employment preceded an audiogram on September 8, 2015 revealing 21.3% binaural impairment. Claimant's last longshore employment was on November 30, 2015, working as a yard clerk for TTI. An audiogram on March 2, 2017 revealed 10.9% binaural hearing loss but the ALJ thought the September 8, 2015 audiogram was determinative and ordered PMG to pay compensation for hearing loss. The Board affirmed.

The responsible employer is the last employer covered under the Act who, by exposing the claimant to injurious noise, could have contributed causally to the disability evidenced on the determinative audiogram. It is for the ALJ to weigh the audiograms submitted and determine the appropriate weight to be given that evidence. Here, the ALJ rejected PMG's contention the 2017 audiogram was determinative because of its divergence with the results of the 2015 audiogram and because it lacked supporting documentation as to its reliability.

Settlements

Attempt to set aside §8(i) agreement fails. Discussion of what could be sufficient, but not proven here. *Rollo v. Service Employees International, Inc.* (BRB 20-0432, 2/17/21) (unpublished); *Reese, Sr. v. Virginia International Terminals, LLC* (BRB 21-0100, 4/28/21) (unpublished)

In *Rollo*, Claimant, represented by counsel, signed, and the district director approved, a §8(i) agreement providing \$708,500 for disability and \$200,000 for medical related costs in addition to nearly \$500,000 claimant received before the settlement, plus \$35,000 fees. Claimant certified he had carefully

considered and fully understood the settlement and certified it was not procured by fraud or duress and was in his best interest. It became final December 22, 2013. In 2017, with new counsel, claimant filed a petition to set aside the order, asserting it was procured by fraud or duress and was inadequate. The OWCP denied the request. Claimant appealed to the Board, but the Board denied the appeal because the district director's letter was not a final and appealable decision or order. The case was referred to the OALJ, who granted employer's motion for summary decision. The Board affirmed.

Claimant's assertions of inadequacy and duress should have been made within the appeal period, as they go to the validity of the agreement. Nevertheless, the Board examined other challenges to the agreement based on equitable considerations, but without deciding if it actually had the authority to reopen a settlement on equitable grounds: (1) fraudulent inducement; (2) Economic duress; (3) FRCP 60(b); (4) FRCP 60(d).

Fraudulent inducement requires a material false representation collateral to a contract, known by the defendant to be false, reasonable reliance by the plaintiff inducing his entry into the contract, and injury. Claimant failed to establish these elements. He initially had concerns about the settlement but decided to sign it nevertheless. If he knew it was inadequate or based on a falsehood when he signed but chose to sign anyway, it undermines any argument he was induced to sign with a lie or that he relied on a lie to sign.

Economic duress occurs where undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him to make an agreement. These circumstances must be sufficiently extreme to overbear the will of the plaintiff. Here, claimant did not make any "deprivation of free will" allegations, and the agreement stated it was not procured by duress.

FRCP 60(b) permits a party to seek relief from a judgment or order based on fraud, misrepresentation, or misconduct by an opposing party. Motions based on this rule must be made no more than a year after entry of the judgment or order. Here, claimant filed his motion to set aside over three years after the order was approved.

FRCP 60(d) permits a court to set aside a judgment for fraud on the court. There is no time limit. Fraud on the court requires an intent to deceive the court and is typically confined to the most egregious cases such as bribery of a judge or juror or improper influence exerted on the court. The relevant inquiry is whether there has been a harm to the integrity of the judicial process. Here, where settlement was between parties represented by counsel

the integrity of the court and its ability to function impartially was not directly impinged.

In *Reese*, within a year of approval of a §8(i) settlement claimant, without counsel, filed a motion to withdraw the settlement and have his claims reopened on the grounds that the settlement was obtained by fraud and duress. The ALJ granted summary judgment for employer and the Board affirmed, finding claimant failed to provide evidence of inadequacy or fraud upon the court. Claimant contended his former attorney, Mr. Walsh, sent ALJ Johnson a letter requesting remand for approval of an agreed settlement when claimant had not agreed to the settlement. Even if the letter was a misrepresentation it did not meet the high bar necessary to establish fraud on the court as the letter did not affect the integrity of the claims process.

Situs – Adjoining Area

Injury on a football field not on a covered situs. *Tillar v. Huntington Ingalls Inc.* (BRB 20-0470, 12/28/20) (unpublished).

Claimant was hired as an apprentice shipyard electrician in Virginia. The school offered students an opportunity to join sports teams. Claimant injured his shoulder at a game in Albany, New York and sought compensation under the LHWCA. The ALJ granted employer's motion for summary decision because claimant was not injured on a covered situs. The football field was not contiguous with navigable waters or customarily used by an employer for maritime activities. The Board affirmed.

Situs under §3(a) is determined by the nature of the place at the moment of injury. The football field was not an enumerated situs or an adjoining area customarily used for loading, unloading, repairing, dismantling, or building a vessel.

Situs – Navigable Waters

Claimant's burden to prove situs without aid of §20(a) presumption. Waterway where claimant worked was navigable in fact. No requirement to prove present commercial use or prove waterway could sustain commonly used commercial ships. *Wilson v. Director, OWCP*, 984 F.3d 265 (3d Cir. 2020), reversing *Wilson v. Creamer-Sanzari Joint Venture*, 2019 WL 4916617 (BRB 19-0076, 9/16/19).

Claimant filed a claim for hearing loss based on work on a project building a new bridge over the Passaic River at RM 11.1, pile driving, drilling, welding,

working on float platforms, and building a cofferdam. The ALJ concluded the area where claimant worked was not a covered situs because the physical depth of the river at the location where claimant was injured severely restricted its use by commercial vessels and would need significant changes to make navigation feasible. The evidence did not show it was possible at any time for an interstate vessel to navigate the river. Although the river was navigable at its southern end, the stretch where claimant was injured was not navigable in fact it was not currently capable of sustaining commercial use and therefore was not navigable waters. The Board affirmed, finding claimant's evidence insufficient to prove navigability. The 3d Circuit reversed.

The Court first held situs was a threshold issue that claimant must prove before §20(a) could be applied. Next, it held under the "navigable-in-fact" standard, a body of water is navigable for purposes of the LHWCA if it by itself or by uniting with other waterways forms a continuous highway capable of sustained interstate or foreign commerce. The ALJ and Board required proof the waterway was capable of sustaining commonly used large commercial ships or evidence of a present commercial use, but a waterway is navigable if it is capable of sustaining any type of interstate or foreign commerce, and demonstrating present commercial use is only one method of establishing navigability. The Board construed "navigable-in-fact" too narrowly and overlooked evidence proving the river was navigable in fact at River Mile 11.8.

Situs – Pier, Wharf, Dock

Pier where chassis inspected and repaired was covered situs. *Spanjol v. Port Maintenance Group, Inc.* (BRB 20-0246, 12/23/2020) (unpublished).

Claimant's worked for PMG for 14 days in June and July 2015 performing roadworthiness maintenance inspections of container bearing chassis and repairing chassis and tires at Pier S. The chassis arrived with containers originated from various locations, including maritime terminals within the Port, where they would be used to move containerized cargo. Once inspected the chassis left Pier S to carry containers over public roads or return to the terminals. Pier S was a 160 acre undeveloped property located within the harbor district of the Port of Long Beach. It bordered navigable waters on the north and east and the Yusen marine terminals affiliated with the Port of Los Angeles on the west. To the south it bordered Pier T but was separated by Interstate 710. Access to Pier S was via a public service road that ran through Pier T, parallel to the freeway and then turned under the freeway and into Pier S. Yard hustlers and transtainer cranes were regularly used on

Pier S to facilitate movement of containers. Marine clerks worked the gate at Pier S to record equipment moving in and out of the facility. Surrounding properties housed active marine terminals with cranes.

PMG did not have LHWCA insurance. PMG employment preceded an audiogram on September 8, 2015 revealing 21.3% binaural impairment. Claimant's last longshore employment was on November 30, 2015, working as a yard clerk for TTI. An audiogram on March 2, 2017 revealed 10.9% binaural hearing loss but the ALJ thought the September 8, 2015 audiogram was determinative and ordered PMG to pay compensation for hearing loss. PMG, on appeal, contended employment was not on a covered situs and claimant lacked status. The Board affirmed.

Citing *Brady Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), the Board held Pier S was an adjoining area. It had a functional nexus with maritime activities related to loading and unloading activities in the various marine terminals. The roadability checks claimant performed were directly linked to the loading/unloading process. Without this work unloading would stop. The neighboring properties were primarily dedicated to maritime commerce. Pier S had a functional and geographical relationship with navigable waters.

Status – Integral Employment

Claimant had status when work was to repair and maintain equipment used in loading and unloading *Spanjol v. Port Maintenance Group, Inc.* (BRB 20-0246, 12/23/2020) (unpublished).

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Claimant had status. Although ships were not loaded or unloaded at Pier S, the work had a maritime purpose. Repair and maintenance of equipment used in loading and unloading process was integral to that process and such work was covered employment.

Temporary Disability – Entitlement

Failure to attend treatment has objective and subjective test. Remanded when ALJ did not explain why subjective refusal was justified. *Jefferson v. Marine Terminals Corporation (East)* (BRB 21-0234, 9/28/21).

Claimant injured her ankle at work and developed back pain due to her altered gait. Her doctor recommended Progressive PT for her back but Employer but made an appointment for her at RSF-ATI where she had previously received PT for her ankle. Claimant refused to attend. Employer sought suspension of compensation. The ALJ held claimant's refusal was objectively unreasonable but subjectively justified and did not suspend compensation.

The Board observed determining whether a claimant's refusal is unreasonable is a two-prong inquiry: whether the refusal is objectively unreasonable and if so, whether it is nevertheless subjectively justified. The first prong evaluates whether an ordinary person in the claimant's position would object to the treatment. "Justification" is a subjective inquiry that evaluates the claimant's particular reasons for refusing to submit to treatment. The employer bears the burden of proof of showing the employee's refusal was unreasonable. If carried, the burden shifts to the employee to show circumstances justified the refusal. Only if the refusal is both unreasonable and unjustified may compensation be suspended, but even then it is still at the ALJ's discretion. If the ALJ determines suspension is

warranted benefit cease as of the date of refusal and recommence on the date of compliance.

The Board vacated and remanded the ALJ's decision regarding suspension because the ALJ did not adequately explain why claimant's refusal was justified, particularly in light of the determination it was reasonable for employer to require claimant to attend PT at the location she previously had received PT for her ankle. The ALJ's logic for finding Claimant's actions justified was suspect.

ALJ awarded total disability when claimant was working. Remanded to determine if claimant was working only with extraordinary effort and in spite of excruciating pain. *Weinert v. XE Services, LLC* (BRB 20-0431, 9/27/21) (unpublished).

Claimant sustained a scheduled injury in Afghanistan when ambushed in a convoy but also developed PTSD. A psychologist opined he would never be psychologically fit to return to a combat situation. When he returned to the USA he worked three months each with UPS and Innox before those employers terminated him for altercation with a co-worker and a background check revealed a felony assault charge. In May 2018 he then secured a job as a van driver with Mayflower, a job he held through the date of the hearing. He testified he had altercations with co-workers on that job too and continued to struggle emotionally and had to restrain himself to get through each work day. Employer ceased paying any TTD or scheduled PPD as of June 22, 2017. The ALJ awarded ongoing TTD from July 29, 2010 because he had not reached maximum medical improvement. Employer appealed, challenging the award of total disability. The Board remanded.

Claimant established a prima facie case of total disability because he could not perform his regular duties at the time of his injury. Working after an injury does not forestall a finding of total disability if he worked only with an extraordinary effort and in spite of excruciating pain. An award of total disability while working is the exception, rather than the rule. The ALJ did not adequately address whether the claimant works only with an extraordinary effort. Moreover, claimant maintained a regular and active schedule, showed up for work at Mayflower on time, and got his work done in a regular and consistent fashion. The ALJ failed to fully address all the relevant evidence and must do so on remand. If not entitled to total disability the ALJ must calculate claimant's low of wage earning capacity. His actual post injury wages need not be the basis for any loss, as the ALJ has the discretion to take into account claimant's psychological pain in awarding

a greater partial award than which would be calculated by use of claimants actual wages alone.

DISSENT, Judge Buzzard, disagreed with the decision to vacate the ALJ's award of total disability, as the ALJ applied the correct standard and his determination was supported by the record.