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**NWLAA Case Law Review**  
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**Attorney Fees – Amount**

**Partial success justified partial fee.** *Cronin v. Pro-Football, Inc.*, 35 BRBS 621 (ALJ 2001).

Claimant raised six issues, prevailed on five, but was only partially successful on the extent issue. This was a significant issue in that claimant only realized 60% of the compensation he had sought. (He received compensation for injuries to back, knees, right ankle, and right arm but failed to secure compensation for injury to his left arm.) Considering the failed left arm claim as the unsuccessful extent issue the ALJ awarded claimant's attorney a fee based on a 40% reduction in the number of hours.

The ALJ did not reduce costs, as they were reasonable expenditures to pursue issues on which claimant achieved some success.

The ALJ adjusted the hourly rate based on the expertise of counsel and other factors but did not reduce fees simply because fees were nearly as much as compensation claimant received. There is no requirement that the fee be commensurate with a claimant's award of benefits.

**Attorney Fees – Entitlement**

**Entitlement to fees not dependent on whether informal conference convened.** *Bolton v. Halter Marine, Inc.*, 35 BRBS 161 (BRB 2001).

ALJ awarded compensation based on an AWW higher than that voluntarily paid by employer. There had been a telephonic informal conference, though it is not clear what the district director recommended. Employer objected to payment of attorney fees because no formal informal conference had been held, citing *Stafftex Staffing v. Director, OWCP*, 34 BRBS 44 (5th Cir. 2000), for the proposition that an informal conference was a prerequisite for application of a §28(b) fee.

HELD, claimant is entitled to a fee. *Stafftex* did not hold that a written recommendation by the district director was required before an employer could be liable for fees per §28(b). It was clear that several issues remained unresolved, and the ALJ awarded increased compensation based on a higher AWW than had been voluntarily paid by employer. The ALJ properly determined that claimant was entitled to a fee.

## Average Weekly Wage – Components

**One time lump sum payment not wages.** *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (BRB 2001).

In the year before his injury claimant received a one time lump sum payment per his union's agreement to terminate the GAI (guaranteed income) program. Claimant contended this payment should be considered when calculating his AWW.

The Board held that GAI payments generally constitute a wage, but claimant's one time payment should not be counted as it did not represent an amount which affected claimant's earning capacity. Including it would inflate his AWW beyond what he is reasonably expected to earn in the future.

**Employer's contribution to retirement fund not wages.** *Baker v. Truck & Trailer Equipment Co.*, 35 BRBS 512 (ALJ 2001).

Claimant argued that employer's contributions to a retirement fund per a union contract should be included in calculation of his AWW. The ALJ held that it should be considered because any advantage claimant received was not easily convertible into cash or readily calculable and therefore was a fringe benefit.

## Average Weekly Wage – Hearing Loss Claims

**AWW in hearing loss claim not based on minimum compensation rate.** *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (BRB 2001).

Claimant's last maritime employment was on 9/30/75 but his hearing was not tested until 1985. The ALJ calculated the AWW based on earnings in the year before 9/30/75. Claimant argued that his scheduled PPD was tantamount to an award of total disability for a limited period of time. Therefore, claimant should receive compensation at the minimum compensation rate when two-thirds of his AWW is less than the minimum compensation rate. The Board rejected this argument. Scheduled PPD is one of four categories of disability: PTD, TTD, unscheduled PPD, scheduled PPD. The minimum compensation rate applies if the disability is total, but not to a scheduled award for hearing loss.

## Causation - §20 Presumption

**ALJ holds Ninth Circuit did not adopt "rule out" standard.** *Bodine v. SSA*, 35 BRBS 707 (ALJ Mapes 2001).

Claimant sought compensation for cardiomyopathy due to physical and mental stress of job as a container yard supervisor. Claimant presented sufficient evidence to invoke the §20 presumption. Dr. Gross testified that mental and physical work stresses may have temporarily exacerbated claimant's cardiomyopathy but these stresses did not accelerate, aggravate, or permanently worsen that condition. Claimant argued this testimony was insufficient to rebut the presumption because he did not unequivocally rule out any possibility of a connection between the work activities and the

cardiomyopathy. The ALJ rejected this argument and found Dr. Gross' testimony sufficient to constitute substantial evidence to rebut the presumption.

The ALJ noted that 11th Circuit had adopted a ruling out standard, but the 1st and 5th Circuits had unequivocally rejected that standard. The ALJ concluded that the 9th Circuit had not considered this argument, but its most recent decision concerning §20(a), *Duhagon v. Metropolitan Stevedore Co.*, 169 F3d 615 (9th Cir. 1999), did not suggest that medical evidence that fails to rule out the possibility of causation is insufficient or equivocal. A physician's testimony that no relationship exists between and injury and employment is sufficient to rebut the presumption. On the merits, he also concluded that claimant had failed to prove that physical and mental stress caused, aggravated, accelerated, or permanently worsened his heart impairment and therefore denied his claim for relief.

### Claim – Hearing Loss Claims

**Uninterpreted audiograms attached to claim forms constituted claims that had to be accepted or controverted.** *Craig v. Avondale Industries, Alario v. Avondale Industries, Howard v. Avondale Industries*, 35 BRBS 164 (BRB 2001).

In each of three consolidated claims claimant forwarded an uninterpreted audiogram with a letter requesting compensation and medical services. Employer controverted, but subsequently paid compensation after obtaining a second audiogram with an interpretation. Claimant's counsel sought a fee. Employer argued its obligation to respond began only after it had received a valid audiogram and medical report. Its response therefore was timely and in the correct amount and eliminated an entitlement to fees.

The Board rejected employer's argument. The audiograms were sufficient for employer to discern whether claimant had a compensable hearing loss. There is no requirement that a claimant submit any evidence of disability or impairment with his claim for compensation. A claim need only consist of a writing that evinces an intent to seek compensation. There is no reason to treat hearing loss claims different than other claims in this regard. The claims here were valid as they evinced an intent to seek benefits for a work related hearing loss. Employer had an obligation to pay benefits voluntarily or to decline to pay benefits within 30 days of its receipt of notice of the claim from the district director. The 30 day period allowed employer sufficient time to have the test interpreted and analyzed.

### Course & Scope – Other

**Fight with co-worker on premises on way to punch in for shift in course and scope of employment.** *McKenzie v. Ingalls Shipbuilding, Inc.*, 35 BRBS 740 (ALJ 2001).

Claimant and a co-worker, Pelfrey, were friends. One day, when claimant was at Pelfrey's home for dinner, claimant grabbed Pelfrey's wife to stop her from falling. Pelfrey walked in just as claimant was catching his wife and assumed something was happening. The relationship deteriorated after this. The two men periodically exchanged verbal insults and hand gestures. One day as Pelfrey was clocking out and claimant was clocking in, Pelfrey was laughing, giggling, and pointing at claimant, and this escalated to a shoving match. Pelfrey took a knife out of his pocket, accosted

claimant, and cut him in the belly. Pelfrey was later convicted of assault. Claimant was charge but the charges were dropped.

The ALJ held that the assault was in the course and scope of employment even though it did not advance the employer's interests. It occurred within the time and space boundaries of employment and during an activity related to employment (punching in for work). Also, claimant did not demonstrate a willful intent to harm himself or another.

### **Employer/Employee – Borrowed Servant; Insurance - Coverage**

**ALJ/BRB lack jurisdiction to resolve contract coverage dispute between employer and borrowing employer.** *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc.*, 35 BRBS 29 (35 BRBS 92 (5<sup>th</sup> Cir. 2001).

TESI, a temporary employment company, sent claimant to work as a laborer for Trinity. The parties agreed that Trinity was a "borrowing" employer. After claimant was injured at Trinity, TESI's insurer, Maryland, paid compensation but sought indemnity from Trinity. The ALJ held that the contract between TESI and Trinity was ambiguous, but TESI had agreed to hold Trinity harmless against all claims brought by TESI employees, including workers' compensation claims, and Maryland, TESI's workers' compensation insurer, had agreed to waive any claims it had against Trinity. Maryland was not entitled to reimbursement as TESI and Maryland had been entrusted to protect and indemnify Trinity from liability for compensation claims

The Court reversed because the contractual indemnification provision was not a question in respect of a claim per §19(a). The disputed issue is not essential to resolve the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim.

The court felt it was not acting contrary to *Total Marine Services, Inc. v. Director, OWCP*, 30 BRBS 62 (5th Cir. 1996), which held that in the absence of a valid and enforceable indemnification agreement the borrowing employer is required to reimburse an injured worker's formal employer for any compensation benefits it has paid to the injured worker, because that case did not hold that an ALJ had jurisdiction to adjudicate contractual indemnification issues. Also, there was no indemnification agreement in *Total Marine*.

The Court reinstated the ALJ's holding that Trinity was liable under the LHWCA and ordering Trinity to reimburse Maryland for compensation paid to claimant. The court also dismissed without prejudice the claims regarding the contractual indemnification provisions for lack of jurisdiction.

### **Exclusions – Jones Act**

**Deckhand, tender, and diver tender installing sewer lines was Jones Act seaman.** *Zdunski v. Orion Construction, Inc.*, 35 BRBS 578 (ALJ 2001).

Employer had a contract to place a sewer line under Lake Erie. Claimant was hired for the duration of the project to install the lines. He had three positions: deckhand, tender, and diver tender. He performed this work from a stationary barge which was towed into

the lake by a tug and reached the barge by a small boat. His job included helping to prepare the barge to be towed into the lake.

The ALJ held that claimant was a seaman because his duties contributed to the accomplishment of the vessel's mission. He had a connection to the vessel that was substantial in nature and in duration.

### **Exclusions – Other**

**Casino boat facilities manager not excluded as employee of recreational operation. Participated in ship building operations.** *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (BRB 2001).

Decedent facilities manager for the Boomtown Belle Casino boat divided his time between employer's facility preparing the dock and loading areas and the shipyard where he oversaw the cleaning of the vessel and installation of wiring for gambling machines, computers, and security system. He collapsed and died due to a stroke, subsequently found related to job related stress.

Employer argued that decedent was excluded from coverage as an employee of a recreational operation. The Board concluded that the nature of claimant's duties, and whether they involved maritime activities and hazards, was dispositive. Decedent's work was linked to vessel construction or outfitting which included installation and wiring of gambling equipment and vessel cleaning prior to delivery and use as a recreational vessel. He was not involved in a recreational operation but a shipbuilding operation and therefore had status.

### **Permanent Disability – Employer's Burden**

**Performance based discharge insufficient to demonstrate availability of suitable alternate employment.** *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 35 BRBS 87 (4<sup>th</sup> Cir. 2001).

Claimant was discharged prior to completing her probationary period for poor performance. She developed a work related wrist injury and was found incapable of performing her usual work at the time of her discharge. Employer argued that her wage earning disability resulted from her termination, not her injury, and that she therefore was not disabled. The Board and court disagreed.

Claimant was not capable of performing her usual employment after she was terminated. This finding created a *prima facie* showing of disability. Employer cannot rebut this presumption by showing that claimant was terminated for poor performance.

### **Permanent Disability – Retired Workers**

**Voluntary retirement. Not entitled to PTD.** *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (BRB 2001).

Claimant injured his right knee on 12/2/91 and was assigned a 28% impairment rating. He returned to light duty until 1995 when he voluntarily took early retirement in exchange for one year of severance pay and monthly retirement benefits. After his

retirement he had additional surgery. Employer voluntarily paid 33% scheduled PPD. After his last surgery his physician opined he was unable to do any work. Claimant unsuccessfully sought PTD. The ALJ held that the light duty job would have been available if he had not taken early retirement for reasons unrelated to his knee injury. The Board agreed that under these circumstances employer was not required to show a continued availability of suitable alternative employment as any loss in wage earning capacity was not due to claimant's injury.

### **Permanent Disability – Scheduled PPD**

**ALJ'S rejection of hearing loss regression analysis affirmed.** *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (BRB 2001).

Claimant's last maritime employment was on 9/30/75. His hearing was tested on 9/24/85, 3/5/92, 4/10/98, and 9/15/98. The last audiogram revealed 55.55% binaural loss, but employer's expert testified that based on a regression analysis of the 1985 audiogram, claimant's hearing loss in 1975 was at most 2.74%. The ALJ awarding claimant 52.81%, based on an average of the last two audiograms, and rejected employer's regression analysis because the first two audiograms did not have presumptive validity because they did not identify the tester and status of the testing equipment could not be identified.

The Board held that a regression analysis was not required, and in this claim there was substantial evidence to support the ALJ's decision to disregard the two earlier audiograms. As the regression analysis was based on invalid audiograms, the ALJ's decision to disregard the regression analysis was based on substantial evidence.

### **Situs – Adjoining Area**

**Land portion of dredge pipeline was covered situs.** *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (BRB 2001).

Employer operated a self-propelled dredge on a navigable waterway to widen and deepen the channel. The dredge pumped the material through a pipe from the vessel to a land supported disposal pit. A booster pump located a quarter mile in-land provided additional pressure to move the material to the pit. Decedent inspected and maintained the land portion of the pipeline to check and repair leaks and unclog debris from the booster pump and pipeline. He used a bulldozer several times to move debris at the dumpsite and occasionally boarded the dredge to retrieve tools, deliver messages, and pick up diesel fuel for the bulldozer.

The BRB affirmed the ALJ's determination that decedent was injured on a covered situs – an area adjoining navigable waters customarily used by employer to unload dredge material.

**Facility used in fabrication of vessel components not covered situs.** *Sowers v. Metro Machine Corporation*, 35 BRBS 154 (BRB 2001).

Employer was injured at the Mid-Atlantic facility which abuts a river and is used for prefabricating steel components and painting items for Navy ships under repair at employer's other facility where there are wet and dry docks. 95% of the items sent to

Mid Atlantic for repair or returned to the shipyard after completion are sent over land by truck. 5% are sent by barge (too heavy or too large to truck). The ALJ found that claimant's work could be done at any site and the use of a barge for large components was insufficient to cover the site under the Act. Water was not necessary for the work performed at the facility.

The Board affirmed, finding that although the facility had a geographic nexus to navigable waters, the activity did not require more than the rare use of a navigable river, and actual ship repair did not take place adjacent to the Mid Atlantic facility.

DISSENT argued that the entire facility was dedicated to ship repair, and the use of a barge for some parts was sufficient to bring the site within the Act's coverage.

### **Status – Integral Employment**

**Land based dredge worker had status.** *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (BRB 2001).

Employer operated a self-propelled dredge on a navigable waterway to widen and deepen the channel. The dredge pumped the material through a pipe from the vessel to and land supported disposal pit. A booster pump located a quarter mile in-land provided additional pressure to move the material to the pit. Decedent inspected and maintained the land portion of the pipeline to check and repair leaks and unclog debris from the booster pump and pipeline. He used a bulldozer several times to move debris at the dumpsite and occasionally boarded the dredge to retrieve tools, deliver messages, and pick up diesel fuel for the bulldozer.

The Board affirmed the ALJ's determination that decedent had status as his duties were essential to the unloading of the dredged material. The dredged material could not have been unloaded satisfactorily without her performing his duties.

### **Temporary Disability – Other**

**Refusal to undergo surgery not unreasonable.** *McCarthy v. Electric Boat Corporation*, 35 BRBS 752 (ALJ 2001).

Claimant refused to have carpal tunnel surgery. §7(d)(4) provides that the Secretary or ALJ may suspend compensation if the employee unreasonably refuses to submit to medical or surgical treatment. In *Hrycyk v. Bath Iron Works*, 11 BRBS 238 (ALJ 1979), the Board held the statute imposed a two part test: (1) The procedure must be likely to aid in relieving the claimant's symptoms and restoring a degree of lost earning capacity without undue risk to health or well-being; (2) The employee's refusal to undergo treatment will be considered unreasonable if an ordinary reasonable person in the claimant's condition and suffering from claimant's pain and physical restrictions would consent to the recommended procedure or examination with minimal hesitation.

Here, the ALJ did not think the evidence satisfied either of the two requirements. His physician offered no guarantee that surgery would help. Claimant was capable of working and feared losing this ability if surgery was unsuccessful. He expressed fears that he would develop problems experienced by some of his coworkers who had surgery.

### Third Party – Calculation of lien/credit

**Credit calculated based on payments made to claimant, not cost of annuity.** *Gilliland v. E.J. Bartells Co., Inc.*, 35 BRBS 103 (9<sup>th</sup> Cir. 2001) (Meagan Flynn for claimant; Dennis VavRosky for employer/carrier). [This case was summarized in an earlier release, but without the full citation.]

A third party defendant agreed to pay claimant monthly payments from 1985 to 2005 with 3% annual increases. Employer funded the obligation by purchasing an annuity. In 1996 employer asserted it had overpaid compensation in view the amount claimant had recovered. Claimant contended the recovery was equal to the purchase price of the annuity. Employer contended it was entitled to a dollar for dollar credit, as paid. The ALJ and the Board agreed with the employer.

The court deferred to the Director's interpretation than an employer/carrier was entitled to a credit for the amount of each payment actually received by the claimant. Claimant's interpretation would thwart congressional intent by creating an opportunity for a windfall or a shortfall if the annuity company became insolvent or the claimant received 100% of the annuity payments. The statute requires an offset of the actual amounts received. Employer was entitled to a dollar for dollar credit for each payment at the time claimant receives it whether or not the employer funded the payments by purchasing an annuity.

### §8(f) – Greater Disability

**In §8(f) claim employer need not present evidence of how residual earning capacity is due to preexisting disability.** *Hodges v. San Francisco Dry Dock Co.*, 35 BRBS 764 (ALJ Mapes, 2001).

Director acknowledged that medical evidence indicated claimant's last work injury alone would have resulted in 15% impairment (a disability precluding heavy lifting), but because of preexisting disability the injury resulted in a 25% impairment (precluding all heavy work). The Director nevertheless contended that employer must present evidence to show that this difference in restrictions produced a material and substantial difference in earning capacity - that employer must present earning capacity evidence in dollars and cents between the 15% impairment without a preexisting disability and a 25% impairment that actually resulted. The ALJ rejected this argument.

The Director did not raise the issue in a timely fashion. Additionally, on the merits, some cases hold that vocational and economic evidence can be provided in lieu of medical evidence, but there are no decisions holding that such evidence must be provided in addition to medical evidence. Also, the 4th Circuit specifically rejected this argument.

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