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## NWLAA Case Law Review

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### Attorney Fees – Amount

**\$200/hr awarded to Portland attorney who failed to provide correct address to employer prior to payment of settlement.** *Hanson v. Marine Terminals Corporation*, 37 BRBS 301 (ALJ Karst 2003).

Employer failed to pay claimant a settlement amount within 10 days and was assessed a 20% penalty. In prior proceedings employer argued that claimant's attorney, Charles Robinowitz, should be equitably estopped to seek a penalty because he knew that employer had the wrong address on file but failed to advise employer that its attempts to deliver the money were doomed to fail. Ultimately, the 9th Circuit held that equitable estoppel was not a relevant consideration and therefore approved assessment of a penalty. Claimant's attorney requested \$237.50/hr. for his services before the ALJ associated with the enforcement action. Employer contended \$175.00/hr. was more appropriate.

The ALJ observed that he must consider: (1) whether the fee is reasonably commensurate with the necessary work done; (2) the quality of the representation; (3) the complexity of the legal issues involved; (4) the amount of benefits awarded; (5) the customary fee for similar work within the community; (6) awards in similar cases. Mr. Robinowitz' work before the ALJ did not reflect misconduct, was competent, and successful. The ALJ awarded \$200.00 per hour.

### Exclusions – Jones Act

**Summer engineering intern injured on ship to gain exposure to oilfield activities was not a Jones Act seaman.** *Becker v. Tidewater, Inc.*, 37 BRBS 49 (5<sup>th</sup> Cir. 2003).

Plaintiff was a 22 year old student of mechanical and petroleum engineering who accepted a summer internship for Baker designed to gain knowledge in a variety of areas, including oil pumping, screen manufacturing for sand control, and repairing fishing tools. Only oil pumping assignments implicated vessels and boating. He spent two weeks on shore and then was offered the opportunity to observe a gravel packing operation on an offshore fixed platform. On the trip to the platform he was a passenger, but he did some work when on the platform. On the return trip he was assigned to fill in for two crew members on the Republic Tide who were in need of time off. The vessel was owned by Tidewater but chartered to Baker to service oil wells during gravel pack operations. When the vessel arrived at a platform operated by Falcon various equipment malfunctioned, and plaintiff was seriously injured. He sued Baker under the Jones Act and in the alternative under the LHWCA and also filed suit against numerous other defendants under multiple theories. A jury found Baker negligent under the Jones Act and assigned 65% of the fault to Baker, 30% to Tidewater, and 5% to Falcon and awarded plaintiff \$29 million in general damages.

To be a Jones Act seaman the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission and the seaman must have a connection to a vessel in navigation that is substantial in terms of duration and nature. Here, it was clear that plaintiff engaged in the vessel's work while on board.

The court observed that it had followed a rule that in general requires a worker to show substantial duration by demonstrating that 30% or more of the time was spent in service of the vessel. There is an exception when an employee is injured shortly after reassignment to a seaman job. To qualify for Jones Act protection the worker must have undergone a substantial change in status, not simply serve on a boat sporadically. Coverage is not solely dependent on working on a ship at sea.

The Court held that plaintiff failed to prove that his status fundamentally changed when he was assigned to the Republic Tide. His assignment on the vessel did not alter Baker's overall plan for him, which comprised land based work almost exclusively. His work on the Republic Tide was not the kind of regular or continuous commitment of labor to the service of the vessel that regularly exposed him to the perils of the sea. Accordingly, the jury's finding that he was a seaman under the Jones Act was improper.

**Worker overhauling ship, slept and ate aboard, not a Jones Act seaman.** *Goodman v. CSI Hydrostatic Testers*, 37 BRBS 244 (ALJ 2003).

Claimant was part of a group of temporary workers overhauling the *Discovery* so that it could perform its mission of removing pipelines from the ocean's floor. He was classified as a deck hand, ate and slept aboard ship, and had an expectation of employment when the overhaul was finished. Thirteen days after the job began he fell off a winch and sustained an injury. The ALJ concluded that he was not a Jones Act seaman. His connection to the vessel was limited to the time that the vessel was undergoing maintenance and repairs. He was only an expectant seaman, and not a seaman in being. He had not worked on a vessel in the past, so status as a seaman had not attached when he began work on the *Discovery*. He did not contribute to the function or mission of the vessel because he did not have a vested interest in the vessel's function or mission after it left port. His connection to the vessel was transitory, and he was not exposed to the perils of the sea.

### **Permanent Disability – De Minimis Award**

**Board approves de minimis award for a scheduled injury.** *Gillus v. Newport News Shipbuilding & Dry Dock Company*, 37 BRBS 93 (BRB 2003).

Employer paid TTD to claimant during several periods due to a compensable knee injury. Her physician opined that she had progressive arthritis of the left knee and that she probably will need a total knee replacement in the future, timing uncertain. Claimant requested a minimal and ongoing compensation award, citing the Supreme Court's Rambo II decision. The ALJ awarded a de minimis award of 1% of her average weekly wage because her condition was likely to deteriorate and impair her earning capacity in the future.

The Board rejected employer's contention that de minimis awards were not available for schedule injuries because the Act takes into account the effect of disability as it may naturally extend into the future. Also, claimant had not claimed or been compensated for any permanent disability, and her condition was not termed permanent by her physician. Thus, her request was really an award for TPD benefits per §8(e).

## Responsibility – Hearing Loss Claims

**Two periods of injurious noise – two compensable claims.** *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (BRB 2003).

Claimant longshoreman had audiometric testing on 11/16/84, filed a claim with Eagle, and settled the claim per §8(i) (based on 10.6% PPD equal to \$8,411.73). Thereafter he worked for Matson, was exposed to injurious noise, had audiometric testing on 3/16/95 which revealed 36.6% impairment, bought a hearing aid, and filed a claim against Matson. Matson controverted, but the claim was not immediately litigated. Several months later claimant began working as a steady foreman for Marine Terminals and had additional testing on 8/25/98, revealing 40.6%. He filed a claim against Marine Terminals for hearing loss. The parties stipulated that the 1995 and 1998 audiograms were valid, credible, and reliable and that claimant was exposed to injurious noise at Matson and at Marine Terminals. The ALJ ordered Marine Terminals to pay for the hearing aid and pay 40.6% PPD. Marine Terminals was granted §8(f) relief, but the Special Fund was given credit for the \$8,411.73 previously paid by Eagle.

HELD, based on *SSS v. Director, OWCP (Benjamin)*, 36 BRBS 29 (9th Cir. 2002), Matson is responsible for 36.6% hearing loss at his 1995 average weekly wage and for medical treatment from that date until the 1998 audiogram. Marine Terminals is liable for 40.6% hearing loss based on his average weekly wage at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount claimant receives for his prior hearing loss injuries. The case was remanded to determine Matson's entitlement to relief per §8(f).

## Situs – Adjoining Area

**Pipe manufacturing facility 4-5 miles from shipyard not covered situs.** *Cunningham v. Bath Iron Works Corporation*, 37 BRBS 76 (BRB 2003).

The East Brunswick Manufacturing Facility (EBMF) was located 1,400 feet west of the New Meadows River and 3,400 feet north of Thomas Bay. Employees at EBMF prefabricated sections of pipe units for installation on ships built at employer's main shipyard on the Kennebec River, 4-5 miles away. Thompson Brook, a tributary of Thomas Bay, crossed employer's property at its western most tip. Prefabricated sections were taken by truck to the main shipyard. This work originally was done in the main shipyard but was moved to EBMF because of space limitations. Claimant was injured at EBMF.

HELD, even though it is not clear if the 1st Circuit, where this case arose, would adopt the 4th Circuit's test in *Sidwell* (i.e., adjoining area must be contiguous to navigable waters), claimant cannot establish situs under this test or under the 9<sup>th</sup> Circuit's test in *Brady Hamilton v. Herron*. Thompson Brook, which crossed the property in question, was not navigable. It flowed beneath a road through a six foot culvert and was a narrow, shallow channel of water with many sharp meandering turns, with no evidence of present commercial use of the Brook. It was not used for commercial purposes, nor was it adaptable for future commercial use. Furthermore, there was no functional relationship between EBMF and the New Meadows River. The pipe prefabrication work need not be done on the water or on a maritime site. The area surrounding EBMF involved mixed usage. There was no evidence employer sought to locate EBMF as close as possible to a navigable waterway. The location is merely fortuitous. There was nothing in the record indicating that prefabrication of pipe systems must be performed on or near the water or at a maritime site.

The Board rejected claimant's argument that situs can be established by demonstrating that a facility has a geographic proximity to one body of water and a functional relationship with

another because this holding would result in coverage of all maritime facilities which were fortuitously placed near a navigable waterway but lacked any usage of that waterway.

Workers at EBMF may have status but they lack situs. This requirement cannot be ignored.

**Injury at coal processing plant waste pond lacked situs.** *Maraney v. Consolidation Coal Company*, 37 BRBS 97 (BRB 2003).

Employer prepared and processed coal on a facility adjacent to the Monongahela River. The coal was moved from barges on conveyor belts, through the plant, and to a barge again. Claimant worked on a construction project preparing a site as a depository for coal slurry. The ALJ held that this site was not customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel. The site was used exclusively for disposal or processing waste and not loading or unloading coal from vessels. The Board affirmed.

Where a site contains distinct areas used for loading and unloading and for non-maritime manufacturing purposes, the separate manufacturing area have been held outside the Act's coverage. Pond #4 was functionally and geographically separate from employer's unloading/loading operations and was not used for any maritime purpose. It was used to store coal refuse and not products destined for vessels.

### **Status – Significant Time**

**Job at injury nonsubject, but status granted because regularly worked in covered employment.** *Maier Terminals, Inc. v. Director, OWCP*, 37 BRBS 42 (3d Cir. 2003).

Claimant spent 50% of his time as a checker, a covered position, and 50% as a delivery clerk, a non-covered position. He was injured when working as a delivery clerk. The court rejected the moment of injury test and held that claimant had status. He spent at least some of his time in indisputably longshoring operations, was subject to reassignment as a checker, and his work in maritime employment was not so momentary or episodic to be insufficient to confer coverage. The proper analysis requires examination of the regular portion of the overall tasks to which claimant could have been assigned as a matter of course to determine if he spent at least some of his time in indisputably longshoring operations. That test was satisfied here.

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