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**NWLAA Case Law Review**  
**Norman Cole, Editor**

**Attorney Fees – Amount**

**\$225 per hour awarded.** *Anderson v. Associated Naval Architects*, 40 BRBS 57 (BRB 2006).

Claimant's attorney sought \$250/hour, but ALJ awarded \$225 based on the nature of the work, the complexity of the issues, and the typical billing rates in the Hampton Roads, Virginia area. Claimant's assertion that he should be paid \$250/hour based on his expertise, nature of the case, and cost of living increases were insufficient to show that the ALJ had abused his discretion.

**Attorney Fees – Entitlement**

**No fee because no written recommendation from informal conference.** *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 40 BRBS 37 (6<sup>th</sup> Cir 2006).

Employer paid TTD, but a dispute arose whether claimant's disability was permanent. An ALJ awarded PTD. Employer was not responsible for paying a fee. §28(a) did not apply because employer voluntarily paid compensation. §28(b) did not apply because the memo of the informal conference described each side's position but did not offer a recommendation that employer rejected, nor could claimant secure compensation greater than employer was willing to pay. The 6<sup>th</sup> Circuit, like the 4<sup>th</sup> and 5<sup>th</sup> Circuits rejected the 9<sup>th</sup> Circuit's view that a fee is due when existence or extent of liability is controverted and claimant succeeds in establishing liability or obtaining increased compensation when represented by counsel.

**Average Weekly Wage - \$10(c)**

**Earnings in Iraq, 322% more than stateside earnings, viewed as representative of earning capacity.** *Proffitt v. Service Employers International, Inc.*, 40 BRBS 41 (BRB 2006).

Claimant worked as a laborer and maintenance worker in the USA for two employers before 4/23/04, when he began working for employer as a foreman in Iraq, earning 322% of the wages earned stateside. He injured his knee on 8/9/04. The ALJ based AWW on actual wages earned in Iraq and proposed to apply §10(b) to calculate an AWW of \$1,534.45. The Board held that §10(b) did not apply because there was no evidence of wages earned by co-workers with the employer. §10(a) did not apply because there was no evidence of the number of days claimant worked in the year before the injury and the jobs stateside for other employers were not comparable to the job claimant had in Iraq. Nevertheless, the error was harmless, since the ALJ rationally concluded that claimant's earnings in Iraq were the best measure of his annual earning capacity.

**ALJ computed AWW based on wages from two jobs during 52 weeks before injury, not simply claimant's earnings while working in Iraq.** *Purcella v. Service Employers International*, 40 BRBS 506 (ALJ 2006).

ALJ thought it was inappropriate to use only claimant's earnings in Iraq divided by 17 weeks because his contract for employment was only for one year and it was unlikely he would have been hired if he had disclosed his past history of mental illness. Therefore, the ALJ combined all earnings from employment in the year before the injury and divided by 52 to calculate AWW.

### **Claim – Excuses/Exceptions**

**Time to assert claim against subsequent employer did not begin to run until first employer was found not liable for compensation.** *Reposky v. International Transportation Services*, 40 BRBS 65 (BRB 2006).

Claimant injured her leg and back on 1/12/95 at Metropolitan. She returned to work without restrictions but stopped working on 9/1/95 after working for MTC. She returned to work, stopped working, returned to work, and stopped working on several more occasions, each time working for different employers before leaving work. The ALJ held that claimant sustained injuries on 1/12/95 with Metropolitan, 9/10/95 with MTC, 10/23/95 with ITS, and 1/15/96 with ITS. Each employer was ordered to pay periods of temporary disability, but ITS also was ordered to pay PTD. On appeal, ITS argued that although the claim against Metropolitan was timely, the claim against it was time barred per §12 and §13.

The Board held that the time limitations of §12 and §13 did not begin to run against a subsequent employer until Metropolitan, against which claimant timely filed, was found to be not liable for claimant's benefits. In cases involving traumatic injuries and OD claims, the employer against whom a claim files her claim must be able to join other potentially responsible employers to defend itself against the claim. Claimant need not give notice of her injury or file her claim against subsequent employers until the responsible employer is identified.

### **Credit – Miscellaneous**

**Sick pay was not advance payment of compensation under the LHWCA.** *H.S. v. Petroleum Helicopters, Inc.*, 40 BRBS 746 (ALJ 2006).

Following an disabling injury that employer initially contested, claimant used sick leave. The ALJ held that employer was not entitled to a credit for sick pay against TTD due because the sick pay was not an advance payment of compensation.

### **Credit – Other Claims**

**Credit for PPD previously paid allowed on dollar for dollar basis.** *Larosa v. King & Company*, 40 BRBS 29 (BRB 2006).

Due to 1993 injury claimant was awarded TTD and 30% PPD as of June 8, 1995. Claimant had additional surgery in 1997, and employer paid TTD from June 26, 1997 through March 15, 1998. The ALJ awarded periods of PTD, followed by 25% PPD. The Board remanded to determine if claimant really was entitled to PTD during periods awarded but also allowed a credit for TTD paid during periods when claimant was awarded PTD and also allowed a credit for the additional 5% PPD paid but held that the 5% excess must be computed on a dollar for dollar basis.

### **Death – Amount of Award**

**Mistress entitled to compensation as dependent, in addition to widow.** *Reed v. Holcim*, 40 BRBS 343 (BRB 2006).

Employer voluntarily paid compensation to the surviving spouse. At time of death decedent was separated from his wife and had been living with another woman (his mistress), who also sought compensation. The ALJ held that she was a dependent and therefore was entitled to 16-2/3% of decedent's average weekly wage. The Board affirmed. A dependent can receive 20% of decedent's average weekly wage, but aggregate of payments cannot exceed 66-2/3%. Therefore, the mistress was limited to 16-2/3%.

### **Employer/Employee – Borrowed Servant**

**Claim against borrowing employer not barred by settlement with lending employer.** *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (BRB 2006).

Labor Ready, an employment broker (insured by Reliance), sent a worker to Norquest (insured by Wausau), where claimant sustained an airways disease due to exposure to toxic fumes. Claimant first sought compensation from Labor Ready, who settled the claim for \$10,000 per §8(i). Claimant then filed a civil

suit against Norquest under §5(b), who successfully asserted in district court that it was claimant's employer, and as a consequence claimant had to seek compensation under the LHWCA. Claimant then filed a LHWCA claim against Norquest, who then sought dismissal due to the §8(i) settlement with Labor Ready. The ALJ denied the motion because Norquest was not a "party" to the prior settlement and after a hearing ordered Norquest to pay compensation but allowed a credit for the \$10,000 settlement.

The Board held that Norquest, as the borrowing employer, was solely liable for compensation. The settlement with Labor Ready was not a settlement under any other workers' compensation law or the Jones Act, and per *Alexander v. Director, OWCP*, 36 BRBS 25 (9<sup>th</sup> Cir 2002), Norquest was not be entitled a credit for the prior settlement. (Here, however, the parties had stipulated that Norquest was entitled to a credit.)

### Evidence – Rules of Evidence

**ALJ took judicial notice of distances using Yahoo Maps.** *Black v. Logistec of Ct., Inc.*, 40 BRBS 462 (ALJ 2006).

ALJ held that claimant was able to commute 30 miles to and from a job on a daily basis. Employer's vocational expert failed to compute the driving distances between claimant's home and the possible alternate employers, and on this basis employer failed to meet its burden. Nevertheless, the ALJ took judicial notice of the actual driving distances using Yahoo Maps, which corroborated information contained in Employer's post hearing brief and claimant's testimony that the majority of the positions were located more than 30 miles away from his home. The ALJ concluded that reference to Yahoo was not a violation of due process.

### Exclusions – Jones Act

**Crane operator on barge: Jury question whether he was a Jones Act seaman.** *Scheuring v. Traylor Brothers, Inc.*, \_\_\_ BRBS \_\_\_ (9<sup>th</sup> Cir 2/14/2007).

Claimant operated a crane on a barge, the *William F*. He occasionally handled lines, weighed and dropped anchors, stood lookout, and monitored marine band radio and spliced wire and rope. The barge was subject to the tides and tossed by sea swells, waves, wakes, and currents. It moved by slackening and tightening anchor lines. At times claimant helped move the *William F* by heaving back and forth her anchor lines. To get to the barge he had to walk down a 20 foot ramp leading from the water's edge to an offshore float and from there take a skiff to the barge. Claimant was injured when he slipped and injured his back when lifting the ramp out of the water to place it back on the float. He filed suit against his employer under the Jones Act and alternatively sued under §5(b) as a harbor worker under the LHWCA against the vessel owner. The District Court granted summary judgment. The 9<sup>th</sup> Circuit reversed.

Under the Jones Act the worker'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 the vessel in navigation that is substantial in terms of duration and nature. The vessel's movements in light of plaintiff's duties should be examined to determine if a jury could find a substantial connection to the vessel in duration and nature, thereby indicating whether employment was land based or sea based. Here, the movement of the vessel and the sea based duties of the plaintiff, although ancillary to his core responsibility as a crane operator, raised a genuine issue of a material fact which warranted jury consideration.

Under the LHWCA there was a genuine issue of material fact as to whether the duty owed to plaintiff belonged to Traylor Brothers as the vessel owner. This case involved "turnover" duty – the duty of safe condition and the duty to work upon the commencement of stevedoring operations. There was an issue whether the ramp was part of the *William F*'s equipment and appliances and whether Traylor Brothers acted reasonably in fulfilling its turnover duty.

### **Maximum Medical Improvement**

**Disability becomes permanent when claimant reaches maximum medical improvement or disability has continued for a lengthy period and appears lasting or indefinite.** *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 40 BRBS 37 (6<sup>th</sup> Cir 2006).

Employer argued that claimant was not entitled to permanent disability because there was a possibility he would improve with additional psychotherapy and antidepressant medications. The court rejected this argument because the possibility of improvement did not preclude a finding of permanency. The possibility of favorable change in the future does not foreclose a finding of permanent disability. Disability becomes permanent when claimant reaches maximum medical improvement or the disability has continued for a lengthy period and appears lasting or indefinite.

### **Maximum & Minimum Compensation**

**Maximum comp rate for temporary disability depends on period when comp is newly awarded, not on date award is made. Initial rate for PTD based on rate last paid as TTD.** *Reposky v. International Transportation Services*, 40 BRBS 65 (BRB 2006).

Claimant sustained an injury on 1/12/95 at Metropolitan when her AWW was \$1,259.64. Two-thirds of the AWW equals \$839.76, but maximum compensation rate then was \$760.92. It increased to \$782.44 as of 10/1/95. Metropolitan paid TTD for periods when claimant was unable to work during various periods from 1/12/95 through 8/12/03 @ \$760.92. Claimant was awarded PTD as of 8/13/03,

payable by ITS, at an initial rate of \$839.76 because as of that date maximum compensation was \$996.54. Claimant, however, sought TTD @ \$839.76 from 1/12/95 because the ALJ issued her decision in July, 2005, when maximum compensation was \$1,047.16.

In *Puccetti v. Ceres Gulf*, 24 BRBS 25 (BRB 1990), claimant had an AWW of \$1,076, but maximum compensation on 2/8/84, when injured, was \$548.34. Claimant was entitled to TTD from 2/84 to 1/86. The Board held that claimant was not entitled to an adjustment in the TTD rate every October 1. Only those receiving PTD or death benefits were entitled to the new rate. The Board distinguished *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (BRB 1995), because the applicable maximum rate was the rate in effect at the time that entitlement to compensation commenced, and Kubin did not begin to receive compensation as of the date of injury. Here, claimant was awarded TTD from 1/12/95 to 9/9/95 @ \$760.92 and from 9/10/95 to 10/22/95 @ \$782.44 beginning 10/1/95. These were two newly awarded periods of compensation, so the maximum rate in effect at that time was appropriate.

Claimant was entitled to PTD as of 8/13/03 @ \$782.44, because this is the last rate paid during the preceding period of TTD. She was entitled to an increase on 10/1/03 and thereafter.

### Medical Services – Other

**Employer responsible for attendant care provided by spouse.** *M. Cutter Company v. Carroll*, 40 BRBS 53 (9<sup>th</sup> Cir. 2006).

Claimant required 24 hour care due to a compensable injury. The ALJ held that employer should only be required to pay for part time attendant care because claimant's wife could meet claimant's remaining care needs without substantial disruption to her quality of life. The Board and 9<sup>th</sup> Circuit held that the focus should be on what claimant needs. As employer has an obligation to furnish such medical, surgical and *other attendance* or treatment, nurse and hospital surface, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require, the statute mandates that employer furnish the required care.

**Dietary supplement not compensable in absence of evidence demonstrating it is reasonable and necessary.** *Aycock v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 521 (ALJ 2006).

A chiropractor prescribed Proanthanol, a dietary supplement that claimant said helped relieve his knee symptoms from an on the job injury. It cost \$105.00 per month. At claimant's request, a medical doctor wrote a prescription for Proanthanol, but the doctor testified that he had not heard of the substance and had given claimant the prescription to help him defray the expense (then in excess

of \$13,000.00). A pharmacist testified that it was a dietary supplement, and there were no medical studies on its usefulness, though there were testimonials from people who took it. The ALJ held that employer was not required to reimburse claimant because there was no medical evidence establishing the reasonableness or necessity of treatment with this substance.

## Miscellaneous

### **No federal court original jurisdiction of Defense Base Act claims (probably).**

*Blackwater Security Consulting LLE v. Blackwater Lodge & Training Center, Inc.*, 40 BRBS 55 (4<sup>th</sup> Cir 2006).

Claimant filed suit in state court alleging deceased was killed in Iraq due to negligence of his employer. Defendant removed the action to federal district court, asserting that Defense Base Act preempted the state law claim. Once in federal court defendant sought dismissal, arguing that the Department of Labor had exclusive jurisdiction of a DBA claim. The district court held that because the court did not have jurisdiction of a DBA claim, there was no authority to remove the action to federal court. Therefore, it remanded the claim to the state court. The 4<sup>th</sup> Circuit affirmed, holding that it lacked jurisdiction to hear an appeal from a district court ruling that it did not have subject matter jurisdiction. The court observed that its decision had no preclusive effect, so the state court would have to decide if the DBA applied to the claim and if it had jurisdiction.

### **Union health and welfare plan's lien recognized. Insurer required to satisfy lien, rather than paying compensation to claimant so that claimant could satisfy the lien.**

*Ramey v. Crescent City Marine*, 40 BRBS 583 (ALJ Gee 2006).

ILWU-PMA Welfare Fund filed a Motion to Intervene, asserting that it had paid \$38,506.85 in disability and \$89,196.94 in medical expenses for the injury subject to claimant's compensation claim. Employer agreed claimant was entitled to total disability since September 24, 2004, and claimant acknowledged he was obligated to repay the benefits received from the Welfare Plan. The ALJ held that per §17, the Welfare Plan was entitled to recover its lien. Claimant argued that the insurer should pay all compensation to claimant, who then would pay the Fund (presumably after negotiating a discount and thereby reaping a double recovery). The ALJ held that the insurer must pay the Fund, and it was entitled to a credit for whatever the Fund paid claimant (even if the insurer negotiated a reduced reimbursement to the Fund). "Deducting the Welfare Plan payments from the past-due compensation payments Crescent City must pay to the Claimant will satisfy the purpose of the Longshore Act and provide the Claimant with all the benefits he is entitled to under the Longshore Act."

## Permanent Disability – Hearing Loss Claims

**Audiogram on day after retirement more representative of work related hearing loss than audiogram obtained several years later.** *White v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 609 (ALJ 2006).

Claimant retired on May 30, 1996 and had an in-house “exit” audiogram the next day which showed 1.9% monaural hearing loss. Claimant had another audiogram in 2004 which showed 10.3% binaural loss. Both tests were valid. The audiologist who administered the 2004 test testified that age could have contributed to the loss. The ALJ held that the 1996 audiogram was representative of claimant’s work related loss and awarded claimant compensation based on that audiogram.

## Permanent Disability – Motivation

**Lack of diligent search; employer’s labor market surveys accepted.** *Wilson v. Virginia International Terminals*, 40 BRBS 46 (BRB 2006).

The ALJ held that employer established availability of suitable alternative employment through evidence of a labor market survey. The ALJ also held that claimant had not established a diligent search to secure alternative employment because he did not genuinely search for alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. Because claimant’s post injury wage earning capacity was higher than his average weekly wage, claimant was not allowed benefits in the disputed period.

## Situs – Adjoining Area

**Fixed offshore platform was covered situs because it had docking facility regularly used to transport barges onto which crude oil was loaded.** *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (BRB 2006).

Claimant worked on an oil and gas production platform. The platform consisted of oil tanks, saltwater tanks, living quarters, pipelines attaching it to a number of satellite wells, and a holding barge which also acted as a docking area for crew and supply boats and tug drawn barges that collected and transported crude oil from the holding barge tanks. As a fixed platform is akin to an island, and as cargo shipped from a loading facility on an island would render that facility covered as an adjoining area, the docking facility from which oil was loaded onto transport barges supports a finding that the platform is a covered situs. The entire

platform was a configuration of connecting pipelines used as the means by which oil flows through the process from collection to storage to loading to transshipment by barge. Because the system is interconnected, there was no loading area separate and distinct from the oil collection area, so the entire platform was an adjoining area.

### **Status – Integral Employment**

**Worker on fixed offshore platform had status due to loading duties.** *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (BRB 2006).

Claimant worked on an oil and gas production platform. The platform consisted of oil tanks, saltwater tanks, living quarters, pipelines attaching it to a number of satellite wells, and a holding barge which also acted as a docking area for crew and supply boats and tug drawn barges that collected and transported crude oil from the holding barge tanks. Claimant's job included the upkeep of the holding barge and loading of the transport barges. This work could not occur without claimant's participation, and the ALJ found that claimant's work was essential to the loading of oil onto the transport barges. This was a regular part of claimant's job. Therefore, claimant had status.

### **Status – Load/Unload/Repair/Break**

**Truck driver transporting containers from maritime to land based locations lacked status.** *W.B. v. Sea-Logix, LLC*, 40 BRBS 651 (ALJ 2006).

Claimant transported containers that had been offloaded from ships to various places in the port and to land based customers. Claimant's employer did not provide stevedoring services and was not a member of PMA. Its drivers, like claimant, were members of the Teamster's Union. Claimant's job was to transport cargo from storage to an ultimate destination outside the port. His work in the maritime yard was ancillary to his primary truck driving duties. His limited longshore activities were momentary, episodic, or incidental to non-maritime work. Claimant lacked status.

### **Status – Significant Time**

**Outside operator at acid plant had status. Performed duties that were part of the unloading process. Injured when not engaged in unloading activities.** *Allen v. Agrifos, L.P.*, 40 BRBS 78 (BRB 2006).

As an outside operator in the acid plant claimant monitored and controlled the steam pipes, sulfur pit and furnace, soft water tanks/water clarification system, the thio reaction, and acid transfers. He also volunteered on the HAZMET team, and on a day off from his regular duties, when practicing donning and doffing fire gear, he injured his back.

Within the category of acid transfers, when a ship or barge was docked, he adjusted the valves so that the acid could be discharged from the vessel and pumped to the proper tanks. An employer witness testified that claimant spent 0.5% of his time performing duties related to unloading vessels, but the ALJ thought it was closer to 11%. The unloading process did not end until the vessel's acid flowed into the storage tanks and until then remained in the stream of maritime commerce. As claimant need only spend "some of his time" in longshoring operations, and the key is not the mathematical percentage, and work was not momentary or episodic, claimant met the status requirement.

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