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NWLAA Case Law Review
Norman Cole, Editor

Appeals – Other

Decision is not final until court issues its mandate. *Charpentier v. ORTCO Contractors*, 41 BRBS 5 (5th Cir 2007).

Following an earlier appeal, BRB affirmed an ALJ order awarding compensation for death. On 5/21/03 the 5th Circuit vacated the BRB decision and remanded, and employer ceased paying compensation. Claimant sought compensation until 12/1/03, the day the Supreme Court denied a petition for certiorari. The 5th Circuit held that its *decision* was not *final* within the meaning of §21(c) until the court issued its mandate on 7/10/03. Employer therefore was required to continue payment of compensation from 5/21/03 to 7/10/03.

Pending remand on responsibility dispute, employer initially found responsible must continue payment of compensation. *Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1 (BRB 2005).

ALJ found Dillingham responsible for payment of compensation for death. On appeal, Board held that ALJ had incorrectly applied the §20 presumption and remanded the claim to determine the correct employer based on a correct application of law. Although the Board vacated the prior decision the Board held that inasmuch as decedent's death was related to employment and claimant was entitled to compensation, Dillingham remained liable for payment of compensation pending finding that it is not the responsible employer.

Attorney Fees – Amount

In ERISA claim court approves \$375-\$400/hour based on evidence submitted but approves reduction for block billing and billing in quarter hours. Quarter hour billing method disapproved. *Welch v. Metropolitan Live Insurance Co.*, No. 04-56768 (9th Cir 3/6/07).

After prevailing in a ERISA claim, plaintiff's attorneys sought \$39,112 in fees for 11.5 hours @ \$375/hour and 87 hours @ \$400/hour (after January 1, 2004). The act allows an award of reasonable attorney fees and costs to either party.

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Petitioner submitted declarations from four experienced “ERISA” attorneys who said they charge clients \$400 to \$475 per hour. One declarant said his \$475 rate is not contingent on the result. Petitioner submitted copies of orders granting \$300 to \$375 per hour to lawyers in Petitioner’s firm. MetLife objected but did not offer any evidence. The District Court reduced the rate to \$250 because there was no evidence that petitioner ever collected \$375-\$400 from paying clients except as part of an award issued by this court and imposed a 20% across the board reduction because petitioner block billed and billed in quarter hour increments.

The Court held that a reasonable rate should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. Although a contingency cannot be used to justify a fee enhancement, the delay in payment can be considered. The district court did not explain how the record supported a \$250 hourly rate, especially when petitioner proved that \$375 to \$400 was in line with the prevailing market rate based on other cases litigated in petitioner’s firm and declarations of other ERISA lawyers. Therefore \$375 to \$400 was in line with prevailing community rates.

Although a court can discount the fee due to block billing, because that method makes it more difficult to determine how much time was spent on a particular activity, it was improper to apply a 20% reduction to all of the requested hours. Barely half of the hours were block billed.

The district court reasonably concluded the billing in quarter hour increments resulted in a request for excessive hours.

Attorney Fees – Entitlement

If a fee initially is due per §28(a), all subsequent disputes also are subject to §28(a) rather than §28(b). *W.G. v. Marine Terminals Corporation*, 41 BRBS 13 (BRB 2007).

Claimant injured his right foot and ankle on 11/12/03 and filed a claim on 2/9/04. Employer initially controverted but on 10/20/04 agreed to pay compensation and actually paid TTD, medical benefits, and a fee on 12/16/04. Thereafter, the OWCP recommended payment of PPD of 36%, less a credit from a prior award. Employer paid this on 8/27/05, 9 days after the recommendation. Claimant’s attorney sought a fee for 8.125 hours. The OWCP treated the request for PPD as a new claim and denied a fee. The Board held claimant was entitled to a fee per §28(a) because, pursuant to its plain language, employer did not pay benefits to claimant within 30 days of its receipt of the claim. Employer’s liability for an attorney fee for work involving all benefits due on the claim must be determined according to §28(a). The pursuit of PPD is part of the initial claim for benefits and not a separate claim.

Fees denied when §28(a) did not apply and §28(b) did not provide entitlement to fee when employer accepted OWCP recommendation that no additional compensation due. *Andrepoint v. Murphy Exploration & Production Co.*, 41 BRBS 1 (BRB 2007).

Employer voluntarily paid TTD until claimant reached MMI, when it began payment of 26% PPD for the left leg. Claimant sought PTD. After an informal conference, the OWCP opined that no additional compensation was due. Employer accepted the recommendation. After a hearing claimant was awarded PTD from 12/13/01 to 2/17/03, when suitable alternative employment was established. Claimant's attorneys sought more than \$42K in fees plus nearly \$11K in costs. The ALJ disallowed part of the claim and awarded somewhat more than \$22K in fees plus nearly all of the costs.

The Board held that §28(a) did not apply because employer was voluntarily paying PPD when claimant filed a claim for PTD. §28(b) did not apply because employer accepted the OWCP recommendation. Notwithstanding the award of greater compensation, that section did not provided for payment of fees. DISSENT argued that the Board's literal construction of §28(b) was contrary to the Act's fee shifting provisions where, as here, claimant obtained greater compensation due to proceedings before the ALJ.

Fee awarded when parties agreed to amount of PPD but not terms in stipulation. Tender was not unconditional, employer did not accept OWCP recommendation, and claimant eventually received compensation. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 41 BRBS 1 (4th Cir 2007).

Parties agreed to settle with a compensation order awarding 19% PPD, but when employer's counsel submitted a proposed stipulation stating that the parties were aware of no other outstanding compensation issues, claimant's attorney asked that this paragraph be omitted. Claimant requested an informal conference. Without convening, the OWCP recommended voluntary payment and concluded the term employer wanted was not necessary. The case moved forward, without an order, and without voluntary payment of PPD. Employer filed motions to compel claimant to disclose other issues. At hearing the parties agreed to stipulations without the offending language, and the ALJ entered an order, but claimant's attorney sought a fee.

The Court held that the requirements of §28(b) were satisfied. Employer paid compensation and thereafter a controversy arose over the amount of additional compensation. The letter from the OWCP was a written recommendation which employer refused to accept. Claimant ultimately was awarded compensation. Employer's earlier tender was conditional.

Fees refused in 6th Circuit when some compensation had been paid, but there was no informal conference recommendation. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 40 BRBS 73 (6th Cir 2007).

Employer accepted the claim, paid compensation, and unsuccessfully contested claimant's entitlement to PTD. Although an informal conference was held, the examiner did not issue a recommendation because the parties were considering settlement. Rejecting 9th Circuit precedent, the 6th Circuit held that claimant was not entitled to a fee under either §28(a) or §28(b). §28(a) did not apply because employer voluntarily paid at least some compensation. §28(b) did not apply because the OWCP did not issue a recommendation following an informal conference. Terms of the statute were clear, so there was no need to refer to legislative history. Even if the statute was not clear legislative history did not support the 9th Circuit's view that fees are appropriate whenever the existence or extent or liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation with assistance of counsel. Accordingly, claimant was responsible for paying his attorney's fee

Average Weekly Wage - §10(a)

§10(a) calculation counted, as a day of employment, all days for which claimant was paid vacation, holiday, or bonus pay. *W.K. v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 856 (ALJ 2006).

Claimant was injured on August 5, 2004. She had worked substantially the whole of the year before her injury and was a five day per week worker. Claimant argued she worked 182 days, counting in some instances only a day for vacation or holiday entry regardless of how many hours of vacation were taken at that particular time. Employer counted all days for which claimant was paid, including vacation, holiday, and bonus pay, resulting in 194 days. The ALJ adopted employer's theory.

Causation - §20 Presumption

Strain resolved. Degenerative disc disease caused symptoms thereafter. *Mason v. Gulf Best Electric Co.* 40 BRBS 9 (ALJ 2006).

Claimant injured his back in 1989, received time loss, and eventually returned to his regular job, though sometimes other workers helped with the heavier lifting. In 2004 he sought more treatment and was laid off because he could not do his regular work. The ALJ held that although claimant had sustained a compensable strain, his ongoing complaints were due to the natural progression of degenerative disc disease, unrelated to the claim.

Pre-existing back injury was symptomatically aggravated. Compensable, but limited disability. *T.C. v. Superior Boat Works*, 40 BRBS 922 (ALJ 2006).

On remand, the ALJ held that employer failed to rebut the §20(a) presumption. A work accident need not worsen claimant's underlying condition. It is sufficient if the accident aggravated claimant's symptoms including his pain. Here, employer

failed to prove that the work accident did not aggravated claimant's preexisting condition, including his symptoms and pain.

The ALJ awarded TTD from August 3, 1998 to August 29, 1998, when claimant returned to work (possibly on a light duty job) but was fired for reasons unrelated to the injury and due to his own actions in violating company policy.

Last maritime employment in 1973 did not cause hearing loss revealed on 2005 audiogram. *L.B. v. Northrop Grumman Ship Systems, Inc.*, 40 BRBS 936 (ALJ 2006).

Claimant worked as a pipefitter until 1987, but his last maritime employment for Ingalls was in 1973. He recalled a gradual decrease in hearing sensitivity since 1975 but was not aware of a work related hearing loss until 2005, after an audiogram showed 5.6% right ear and 22.5% left ear, for 8.4% binaural impairment. He had prior audiograms, including one in 1974 showing 0% impairment, but their validity was questionable. The ALJ held that the 2005 audiogram was presumptive evidence of the amount of hearing loss sustained as of the date it was administered, but there was no evidence that claimant had a hearing loss related to employment at the time he left covered employment in 1973. If claimant demonstrated a prima facie case of work related hearing loss employer rebutted the presumption because in 1977 claimant denied having any hearing loss and denied having any loss until 1975.

Death – Other

Irresistible impulse to commit suicide not proven. *Eysselinck v. Ronco Consulting Corp.*, 40 BRBS 55 (ALJ 2006).

Surviving spouse and children of deceased contended that worker had committed suicide due to an irresistible impulse caused by work related post traumatic stress disorder. The record contained conflicting opinions from medical experts. The ALJ found employer's expert more persuasive and held that confronted with a combination of work related and non-work related stressors claimant made an irrational decision to end his life but did not act as a result of an irresistible impulse. Claimant was not entitled to compensation.

Estoppel

Equitable estoppel did not bar claim for 7/10/81 lung injury when claim had not been settled, withdrawn, or closed by a formal order. Also, laches does not apply in LHWCA claims. *Petit v. Electric Boat Corporation*, 41 BRBS 7 (BRB 2007).

Deceased worker last worked for employer in 1975, where he was exposed to asbestos. In 5/81 he was diagnosed with asbestosis. On 7/10/81 he filed a LHWCA claim for lung injury and also filed a state claim for lung injury with a subsequent employer who was not subject to the LHWCA. In 10/82 he retired on disability from the subsequent employer due to his lung and back condition and

subsequently accepted a \$25K lump sum settlement of disability. On 5/7/84 he signed a "Withdrawal of Federal Claim" document, seeking to withdraw the LHWCA claim because the matter had been resolved under the state act., but this document was never filed with or approved by the OWCP, nor was it settled per §8(i). Employer approved subsequent third party settlements and paid for medical expenses. It is not clear when decedent first sought payment of disability, but he filed a prehearing statement seeking PTD on 6/7/04. At hearing employer defended based on laches and equitable estoppel.

The Board held that equitable estoppel did not apply because the claim remained pending and had not been settled, withdrawn, or closed by a formal order. Therefore, it remained open and viable. Also, all necessary elements for equitable estoppel were not established. (Estoppel requires: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts, and (4) he must rely on the former's conduct to his injury.) Also, laches does not apply in LHWCA claim.

Exclusions – Jones Act

Crane operator on barge raised material issue of fact whether he was Jones Act seaman. *Scheuring v. Traylor Brothers, Inc.*, 41 BRBS 9 (9th Cir 2007).

Traylor Brothers owned and operated the *William F*, a 130 foot barge, and hired claimant to operate a crane on the barge as part of a project to build a docking facility for Carnival Cruise Lines in Long Beach Harbor. His primary job was to use the crane to loft pile, hold leads that captured the pile and start the hammer that drives the pile, but he also helped move the *William F* by fleeting, or heaving back and forth on her anchor lines, for purposes of repositioning the barge for the next set of piles to be driven. He occasionally handled lines, weighed and dropped anchors, stood lookout, monitored the marine band radio, and spliced wire and rope. Occasionally lines holding the barge to the shore broke. On three occasions the barge was unmoored and towed to a new anchorage while claimant was on board. To board the barge, claimant had to walk down a ramp from the water's edge to a float, then take a skiff to the barge. The ramp occasionally fell into the water. Claimant was injured while helping others lift the ramp out of the water. He filed suit against his employer under the Jones Act and alternatively against his employer as vessel owner under §5(b) of the LHWCA.

Under the Jones Act there was a factual dispute whether claimant's employment was land based or sea based. The barge was subject to swells, waves, wakes, currents, and was fleeting on her anchor lines daily. The court examined the vessel's movements in light of claimant's duties to assess if there was evidence to allow a jury to find a substantial connection in terms of duration and nature and concluded that the movements of the vessel and the sea based duties of the claimant, though ancillary to his responsibility as a crane operator, raised a genuine issue of material fact that a jury should consider.

Exclusions – Other

Agency of state need not have sovereign immunity to qualify for §3(b) exclusion. *Wheaton v. Golden Gate Bridge, Highway & Transportation District*, 41 BRBS 51 (BRB 2007).

The Golden Gate Bridge, Highway & Transit District was created pursuant to uniform ordinances from six California counties, as authorized by an act of the California Legislature, for the purpose of constructing a bridge. The 9th Circuit previously held that the District was a public corporation and a political subdivision of California. The Board held that under §3(b), the exclusion applicable to agencies of a state was not limited to those bodies that had sovereign immunity. Congress intended the exclusion to be broader.

Retail sales exclusion requires examination of identity of employer and the employee's specific work environment and duties. *Peru v. Sharpshooter Spectrum Venture*, ___ BRBS ___ (9th Cir 6/27/07).

Claimant took, developed, and sold photographs of tourists on the *USS Missouri*, now moored at Pearl Harbor and open to the public. When ascending a ladder on the ship she hit her head and sustained head and neck injuries. The Board held that she was not covered because she was an employee of a retail outlet. The Court agreed with the BRB that a retail outlet was a place where items were sold directly to consumers. Nevertheless, application of the exclusion requires an examination of the identity of the employer and the conditions of the employment, *i.e.*, the employee's specific work environment and duties, to see if the employee was exposed to hazards associated with traditional maritime activities. Here, because neither the employer or claimant engaged in core traditional maritime activities, claimant was excluded from coverage under the retail outlet exclusion. The Court remanded the claim to determine if claimant was covered by Hawaii's state workers' compensation law. If not covered for any reason, she would be eligible for compensation under the LHWCA.

Hearings – Dismissal/Withdrawal

Denial of request to withdraw LHWCA claim approved when not in claimant's best interest. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (BRB 2007).

Decedent filed a claim for death under the Defense Base Act and also filed a civil suit against employer for wrongful death and fraud. An issue in the tort suit was an allegation that decedents were independent contractors, not employees. Employer accepted liability, began paying, asserted an exclusive remedy defense in the civil suit, and sought a compensation order so that it could then obtain reimbursement pursuant to the War Hazards Compensation Act. Claimant objected. Employer filed a motion for summary judgment, and claimant responded with a motion to withdraw the claim. The ALJ held that withdrawal

was not for a proper purpose and was not in claimant's best interest. The Board held that a compensation order could not be issued because the parties did not agree. The ALJ had jurisdiction to rule on the motion for withdrawal. The Board held that withdrawal was for a proper purpose because a claimant is entitled to select the forum in which they first litigate, but it was not in claimant's best interest because recovery in the state forum was uncertain, both on the claims asserted and on a monetary basis.

Hearings – Other

Remand required when employer was not given 10 days notice of hearing. *J.T. v. American Logistics Services*, 41 BRBS 41 (BRB 2007).

In this Defense Base Act claim a 12/5/05 notice of a 3/20/06 Florida hearing was sent to employer at the incorrect city address, was not addressed to Mr. Lee or Mr. Al-Ghanim as officers of the corporation, and was not sent by certified or registered mail or by any method with a tracking system. (It apparently was sent by "regular mail" because the addressee was in Iraq, where there certified mail and mail with a tracking system was not available.) Claimant first filed a claim naming Mr. Al-Ghanim and Mr. Lee as parties six days before the formal hearing, and this document also was improperly addressed. Employer (or alleged employer) contends it did not receive the notice of hearing. The Board held that the failure to notify employer and the individuals of the hearing 10 days prior thereto at the correct address violated §19(c) of the Act. The case was remanded for a new evidentiary hearing, and at the hearing the ALJ was instructed to determine if the DBA applied.

Medical causation dispute ripe even though claimant did not need surgery immediately. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 40 BRBS 69 (4th Cir 2006).

Claimant injured his knee in February, 1999, was put on light duty for a short time, but did not file a claim. On July 5, 2001 he again injured his right knee, had surgery and collected TTD. In May, 2002, after returning to work, he experienced left knee pain and was found to have a meniscal tear. He continued to work even though his physician recommended surgery. Claimant contended the left knee tear was a consequence of overuse caused by the 2001 right knee injury. Employer contended it was due to the 1999 incident. Employer contended a disability claim for the 1999 incident would be time barred but also refused to authorize medical services.

Newport argued that the medical causation issue was not ripe for adjudication because claimant was making a claim for future disability benefits. The Court held that the issue was ripe. All facts necessary to determine causation were placed into evidence, and there was solid evidence disability was due to the 2001 injury. It would be a hardship on claimant to delay adjudication because in the absence of a decision, if claimant had surgery, he might have to do so without

payment of time loss, inasmuch as employer would assert a time bar defense through the 1999 claim.

Maximum Medical Improvement

Disability determination ripe in spite of possibility of improvement. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 40 BRBS 73 (6th Cir 2007).

Claimant sustained an injury causing permanent brain damage. The ALJ awarded PTD. Employer argued that claimant had not reached maximum medical improvement because he could experience some improvement with psychotherapy and thereafter might be able to return to work. The Board noted that there were two tests to determine if disability has become permanent: (1) Did the worker reach maximum medical improvement? (2) Has the disability continued for a lengthy period such that it appears to be of lasting or indefinite duration and is not merely awaiting a normal hearing period? Here, even if claimant had not reached maximum medical improvement, that alone was not dispositive. Claimant's cognitive disability lasted more than a year and a half beyond the primary recovery period and was not likely to improve.

Miscellaneous

Maritime tort claim not subject to state act statute of limitations. *Strong v. B.P. Exploration & Production, Inc.*, 40 BRBS 1 (5th Circuit 2006).

Claimant was injured on 10/1/98 when employed by Cardinal on a project to plug an oil well on the outer continental shelf off the Louisiana coast and received payment under LHWCA. In February, 2003 he filed a third party suit in federal court against Amoco, contending that the Outer Continental Shelf Lands Act (OCSLA) incorporated Louisiana law, which tolled the statute of limitations while claimant received benefits under the LHWCA. Otherwise, claimant's suit was barred by the statute of limitations. The court observed that three conditions must be met before state law is adopted as a surrogate federal law under OCSLA: (1) The controversy must arise on a site covered by the OCSLA; (2) Federal maritime law must not apply of its own force; (3) The state law must not be inconsistent with federal law. Claimant conceded #1 and #3 were satisfied.

The Court held that claimant stated a maritime tort claim by asserting that his injury was caused by the cluttered, unsafe condition of the lifeboat deck. The Supreme Court has consistently applied maritime law to actions arising out of a failure to adequately satisfy that duty. Thus, federal maritime law applies of its own force precluding incorporation of state law under OCSLA and prescribing claimant's third party claim.

Notice

Notice of injury (bunions) from wearing steel toed shoes and walking at work untimely. Employer proved prejudice. *D.G. v. Newport News Shipbuilding & Dry Dock Co.*, 41 BRBS 401 (ALJ 2006).

Claimant sought temporary disability for 12/13/02 to 3/12/03 and from 1/20/04 to 3/17/04 caused by wearing steel toed boots at work that allegedly contributed to bunions. ALJ held that claimant knew or should have known of the relationship between employment and her foot condition by 10/02, when her treating podiatrist recommended surgery. Employer did not have notice until 6/14/05, when claimant filed a LS-203. The ALJ held that this was not an occupational disease claim because walking is not peculiar to her employment. Therefore, the 30 day notice provision applied. Furthermore, employer was prejudiced by untimely notice because claimant had two surgeries before giving notice, and, because she had been wearing shoes she says caused injuries for five years by the time she gave notice, it was more difficult for the employer to investigate her claim and dispel any connection between her foot pain and her work. Moreover, claimant was not able to recall many details of her employment.

Permanent Disability – Hearing Loss Claims

Audiogram closer to employment may years ago, though it did not test 3,000 Hz, was representative of hearing loss. *A.B. v. Sealand Services, Inc.*, 41 BRBS 72 (ALJ 2007).

Claimant retired in 1987 due to a stroke. A 5/1/87 audiogram showed 5.65% binaural hearing loss, though it did not test 300 Hz as recommended by AMA Guides. An audiogram in 1988 was similar, and another audiogram in 2005 showed 28.7%. Claimant filed a claim in 2006. Otolaryngologist Dr. Lambert testified that it was regular medical practice to substitute 4000 Hz when 3000 Hz was not available, and by substituting 4000 Hz the hearing loss probably was slightly overestimated. The 1987 audiogram was similar to the 1988 audiogram, and the increase after 1987 was not due to prior noise exposure. He concluded that claimant's 1987 loss was 5.65%.

The ALJ held that although the 2005 audiogram was presumptively valid, the 1987 audiogram was admissible and was more representative of hearing loss. Therefore, claimant was awarded 5.65%.

Additional 4% awarded to worker with work related hearing loss due to tinnitus. *Fisher v. Georgia Pacific Corp.*, 40 BRBS 69 (ALJ Dorsey 2006) (Greg Bunnell for claimant; Del Brenneman for employer).

Worker filed a claim for hearing loss after retirement. ALJ awarded 16.5% PPD to claimant for work related binaural hearing loss but also awarded an additional 4% due to tinnitus. The decision implies that the additional 4% is payable as a

schedule award even though nothing in the opinion suggests that claimant lost earning capacity due to his tinnitus.

ALJ averaged audiograms to calculate binaural PPD. *Fisher v. Georgia Pacific Corp*, 40 BRBS 69 (ALJ Dorsey 2006) (Greg Bunnell for claimant; Del Brenneman for employer).

Claimant had a series of employer sponsored audiograms prior to retirement in 1997. The last employer sponsored audiogram was in 1995 and showed 6.6% binaural loss. From 2003 to 2005 claimant had additional audiogram which showed 26.3%, 27.2%, and 30.9%, in that order. Finding that on-site audiograms were the best measure of hearing loss when administered, the ALJ nevertheless was not willing to conclude that the 1995 audiogram reflected all of claimant's work related hearing loss. He therefore averaged the 1995 and the 2003 audiograms (6.6% and 26.3%) to calculate 16.5% due.

Permanent Disability – Unscheduled PPD

Full time jobs found suitable when claimant worked part time at time of injury. Pre-injury part time work history relevant to extent of disability, not suitability or availability. *Neff v. Foss Maritime Company*, 41 BRBS 46 (BRB 2007).

Claimant worked full time as a steamfitter until his retirement in 10/95 and then began working part time as a boilermaker. He was injured during this part time employment. The ALJ concluded that as claimant had worked part time before the injury, the full time positions identified by employer were insufficient to establish availability of suitable alternate employment and awarded PTD. The Board reversed. The purpose of analysis of suitable alternate employment is to determine if the claimant retains *any* wage earning capacity. Suitability inquiry encompasses factors such as age, education, technical or verbal skills, vocational history, and physical restrictions. Analysis of wage earning capacity concerns the degree of that capacity. As it is uncontested that claimant is capable of full time work which is within his medical restrictions and chose to work part time before the injury does not affect the analysis of the suitability of the positions identified by the employer. Retirement considerations unrelated to injury generally are not relevant in traumatic injury cases. Because the ALJ held that claimant could perform a security job and a bench assembler job full time but found them unsuitable because they were full time, employer established the availability of suitable alternate employment, and claimant was at most partially disabled. When considering the extent of disability the ALJ can properly consider pre-injury and part time status and may calculate wage earning capacity based on part time wages extrapolated from the suitable jobs or on other relevant evidence of record.

Pre-injury work was part time. Therefore post injury wage earning capacity should be calculated on 27 hour work week. *Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (BRB 2007).

Claimant's usual employment was a part time position, and wages for a 40 hour week were not included in the determination of claimant's AWW. When evaluating suitable alternate employment, the ALJ only considered jobs that were part time and did not discuss the suitability of full time jobs identified by the employer. The Board held that the ALJ rationally determined that computing claimant's post injury wage earning capacity based on a 40 hour week increased earning capacity only by requiring her to expend more effort and to work additional hours. A claimant who is able to earn wages after injury comparable to pre-injury earnings only by expending more time and effort should be compensated. Higher post injury earnings do not preclude a finding of a loss in wage earning capacity when the reason for higher post injury wages was working an extra shift.

Permanent Disability – Vocational Evidence

Labor market survey 39 miles from claimant's residence not geographically suitable. *J.C. v. Service Employees International*, 41 BRBS 149 (ALJ 2007).

ALJ concluded that labor market surveys of suitable and available jobs 39 miles from claimant's residence were inadequate when performed 39 miles from claimant's residence. A commute would cost \$100.00 per week in gas, and since the jobs employer identified paid \$5.15 to \$8.50 per hour, it was not economical for claimant to be expected to commute that far.

Responsibility – Last Injurious Exposure Rule

In responsibility dispute, all parties have simultaneous burden, and ALJ must consider all evidence. *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (BRB 2007).

Once compensability of the claim is established the ALJ must weigh the relevant evidence to determine which employer is liable. Each employer must persuade the fact finder that the employee's disability is due to an injury with another employer. The burden is not sequential; it is simultaneous. The ALJ must weigh all of the evidence and must make a finding on the facts as to which employer last exposed the employee to injurious substance. He need not look at the evidence chronologically or otherwise to relieve it of liability. If the ALJ is not persuaded by any employer, or if it is unclear which employer should be held liable, the ultimate burden of persuasion lies with the employer claimed against. The ALJ must determine which employer, by a preponderance of the evidence, is the last employer to have exposed decedent to potentially injurious stimuli.

Situs – Adjoining area

Employer shipped 1% of goods from its location near water, but sufficient to establish situs. *Pearson v. Jared Brown Brothers*, 40 BRBS 2 (2006).

Employment duties in constructing and maintaining component parts of ships and crane used to load and unload ships were integral to maritime commerce. As employer fabricates ship components and cranes used to load and unload vessels its facility adjoining the Brunswick River satisfied the maritime function requirement of *Exports Stevedore Co. v. Winchester*, 12 BRBS 719 (5th Cir 1980).

Only a small portion of its manufactured goods were shipped by water, but employer also tested pontoons while they were floating in the river. The use of the river in this manner, in addition to the small percentage of goods actually shipped via the river (1%) was sufficient to establish that the employer's facility has the requisite geographic nexus with the Brunswick River.

Situs – Navigable Waters; Situs – Adjoining Area

Deep vein thrombosis from long airplane flight to Hawaii did not occur on a covered situs. *C.C. v. Technico Corporation*, 41 BRBS 90 (ALJ 2007).

Claimant alleged that airplane flights to and from Hawaii as part of work caused deep vein thrombosis. Although claimant was in the course of employment due to the trip payment exception of the coming and going rule, he was not injured on a covered situs. The plane was not upon navigable waters and was not a pier, wharf, dry dock, terminal, building way, or marine railway. It also was not an adjoining area, especially since the plane was not engaged in maritime activity that otherwise would be performed by a ship (such as locating fish), and the area over navigable waters was not customarily used by the employer for loading, unloading, repairing, dismantling or building a vessel.

Status – Integral Employment

Concrete truck driver lacked status. *W.T. v. Gulf Concrete, LLC*, 40 BRBS 864 (ALJ 2006).

Claimant delivered concrete to waterfront locations for use in piers and docks approximately 20 times over five years of working for defendant, but employees of contractors poured or transported the concrete. Claimant did not perform duties integral to loading, unloading, or ship repair process. Claimant was not engaged in maritime employment and was a land based employee who delivered goods to a maritime situs for further transportation elsewhere by employees of contractors of the maritime situs.

Port security guard had status because turning on lights was integral part of maritime loading/unloading operations. *L.J. v. International Guards, Inc.*, 41 BRBS 272 (ALJ 2007).

Security guard at port industrial park patrolled port facility on foot looking for security and safety problems, checked badges and bills of lading at guard shack, went near or onto docks to ensure there were not unauthorized personnel present,

and turned on lights for activities on docks. Because turning on lights was a regular part of security guard duties, and turning on lights was an integral part of maritime loading and unloading process, the ALJ held that claimant had status in spite of §2(3) that excludes individuals employed exclusively to perform security work.

Temporary Disability - Entitlement

TTD suspended due to failure to attend IME. *B.C. v. International Marine Terminals, Inc.*, 40 BRBS 885 (ALJ 2006).

As requested by one of claimant's consulting physicians, employer scheduled an examination with Dr. Colvin to determine if claimant needed pain management at Touro Pain Clinic to treat his chronic back pain. When claimant refused to attend the examination, employer suspended payment of TTD until claimant attended. Claimant testified he refused to see Dr. Colvin because Dr. Colvin previously told him he had high blood pressure, needed to be tested for diabetes, and should stop smoking. The ALJ held that claimant had no basis for rejecting Dr. Colvin's opinion that he needed diabetic testing and provided no justification for his refusal to attend the examination. The ALJ held that employer properly suspended compensation per §7(d)(4) until claimant attended the examination.

ALJ refuses to compel claimant to attend psychotherapy sessions when refusal not unreasonable. *Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 40 BRBS 73 (6th Cir 2007).

In an attempt to prevent entry of a PTD award, employer filed a motion per §7(d)(4) to compel claimant to participate in psychotherapy, and to suspend compensation if claimant refused to participate, based on theory that with this treatment claimant would be able to return to work. The ALJ held that employer failed to prove that refusal to undergo treatment was objectively unreasonable. Claimant had tried several anti-depressant medications, but all had been discontinued due to claimant's inability to tolerate them. Claimant testified that he was not depressed. A reasonable person could conclude that an ordinary person who did not feel depressed would decide not to pursue a course of treatment directed at resolving depression when such treatment would involve taking antidepressant medications toward which he had previously demonstrated considerable intolerance.

Even if refusal had been objectively unreasonable, the claimant could prove that refusal subjectively was justified by the circumstances. The Court did not address this issue because employer failed to prove that refusal was objectively unreasonable.

Third Party – Calculation of Lien/Credit

Credit for prior award in state compensation claim allowed only to the extent paid the current claim for death. *Barscz v. Director, OWCP*, 41 BRBS 17 (2d Cir 2007).

Worker sought compensation under the state act and the LHWCA for asbestosis. A state compensation settlement, prior to death, with worker and his spouses, awarded \$30,000 net to claimant for all injuries, past, present, and future, due to employment, including those from asbestos, shoulder, back, neck, and hearing loss, and possible claims spouse had or may have had due to exposures. ALJ in the LHWCA claim awarded PTD and §8(f) relief. Neither employer or the Special Fund took credit for the state settlement. Following death spouse sought and was awarded compensation under the LHWCA, to be paid by the Special Fund, because lung disease hastened death. Employer now sought credit for \$30K. The Court held that only those injuries *currently* being claimed could be considered in applying the §3(e) credit. It was improper to credit the worker's disability benefits recovery under the state act against the spouse's federal death benefits. On remand, the employer had the burden of proof in proving that a credit should be applied.

Third Party – Notice/Consent

Settlement of Jones Act claim with the vessel, though vessel was owned by the employer, without consent of LHWCA carrier, bars compensation per §33.

Bockman v. Patton-Tully Transportation Co., 41 BRBS 34 (BRB 2007).

Claimant, a mechanic, crane operator, and welder, fell while working on the barge, *M/V Yocona*, owned by employer. Liberty Mutual, the LHWCA carrier, (but not the Jones Act carrier) paid compensation until claimant filed a Jones Act suit. Following negotiations with employer, claimant agreed to settle and dismiss the Jones Act suit for \$50K. Thereafter, the civil suit was dismissed, claimant filed a LHWCA claim, and, at employer's request, executed a formal release of the Jones Act claim. The release applied to several companies under which employer was known and the *M/V Yocona*, and it applied to Jones Act, general maritime, maintenance and cure, and §5(b) claims, among others. Liberty reinstated benefits, but three days after claimant signed the release its attorney sent a letter to claimant's Jones Act attorney stating that Liberty did not approve any settlement. The settlement funds were disbursed to claimant, and six months later Liberty ceased paying LHWCA benefits.

The Board held that the vessel was a third person – some person other than the employer within the meaning of §33(a) – and §5(b) refers to actions against a vessel as a third party in accordance with the provisions of §33. The settlement was for less than the compensation to which claimant would be entitled under the LHWCA, and Liberty did not consent to the settlement. Liberty did not have sufficient participation in the settlement to preclude application of the §33(g) bar.

Its participation was limited to a letter stating that it did not approve the settlement. Therefore, the §33(g) bar applies.

Third Party – Other

Crane operator on barge raised material issue of fact whether in §5(b) action, employer, as barge owner, breached turnover duty due to dangerous ramp-float-skiff system of entry. *Scheuring v. Traylor Brothers, Inc.*, 41 BRBS 9 (9th Cir 2007).

Traylor Brothers owned and operated the *William F*, a 130 foot barge, and hired claimant to operate a crane on the barge as part of a project to build a docking facility for Carnival Cruise Lines in Long Beach Harbor. To board the barge, claimant had to walk down a ramp from the water's edge to a float, then take a skiff to the barge. The ramp occasionally fell into the water. Claimant was injured while helping others lift the ramp out of the water. He filed suit against his employer under the Jones Act and alternatively against his employer as vessel owner under §5(b) of the LHWCA.

The Court held, regarding §5(b), there was a genuine issue of material fact as to whether the owner had a duty regarding the ramp-float-skiff system of entry. This claim involves turnover duty (duty of safe condition and duty to warn), relating to the condition of the ship upon the commencement of stevedoring operations. Here, claimant contends the ramp was a gangway, *i.e.*, an appliance of the vessel, rather than part of the dock or a pier. There was a genuine issue of material fact whether the ramp is more like a gangway than a dock or pier and whether the owner exercised its turnover duty.

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