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

Attorney Fees – Amount

**Enhancement of fee allowed in rare and exceptional case.** *Kenny A v. Perdue*, 2008 WL 4791493 (11<sup>th</sup> Cir 2008).

In an order denying a petition for rehearing en banc, the court held that district judges are vested with discretion to enhance a fee in the rare and exceptional case when there is specific evidence in the record to support an exceptional result and superior performance. Here, the attorney offered evidence of an exceptional result and superior performance. The district judge enhanced the fee based on his own substantial experience and familiarity with the prevailing rates in Atlanta, and his observation of the stellar performance of plaintiff's counsel through a long and difficult case. There was no abuse of discretion. (This was not a LHWCA claim. The enhancement was worth several million dollars.)

DISSENT argued that the manner in which the court used its own testimony to enhance plaintiff's attorney's fees denied defendants due process, in that the judge relied on his own testimony.

**Lodestar correctly reduced.** *Robins v. Matson Terminals, Inc.*, 2008 WL 2490442 (9<sup>th</sup> Cir. 2008) (not selected for publication).

Worker prevailed in part. ALJ reduced the lodestar fee by 50% after considering the complexity of the issues, the amount of benefits received, and degree of success. Based on the record, the ALJ did not abuse his discretion.

**Lodestar method approved. Other awards may be considered. Quarter hour billing approved.** *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6<sup>th</sup> Cir 2008).

After successful prosecution of a black lung claim, claimant's attorney sought \$250.00 per hour. The District Director reduced the fee to \$200.00 per hour, stating that the work was routine and comparable to rates charged by other highly qualified experienced attorneys in the same geographical location. The ALJ approved \$250.00 per hour, noting that this had been awarded in prior cases and

citing the attorney's experience and expertise. The ALJ reduced the amount by seven hours for time spent on matters not before the ALJ and for some routine correspondence. The BRB found no abuse of discretion by the OWCP or ALJ and reduced the rate on appeal to \$225.00 due to the nature and complexity of the case and subtracted 6 hours for duplicative work and work unrelated to the appeal.

The Board held that the lodestar method applied in black lung claims, noting that the 9<sup>th</sup> Circuit had approved this method in a LHWCA claim. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950 (9<sup>th</sup> Cir 2007). When determining the lodestar, the Board said that rates from prior cases can provide some inferential evidence of what a market rate is, just as state bar surveys of rates provide evidence of a market rate but themselves do not set the rate. Reliance on earlier cases might not be warranted in all instances. If there is a relatively large number of similarly experienced attorneys in the same geographic and practice areas, there will likely exist a robust market rate with which to compare the attorney's requested rate. Where there is only a relatively small number of comparable attorneys, adjudicators can look to prior awards for guidance in determining a prevailing market rate.

Quarter hour billing is required by 20 CFR 802.203(d)(3). While attorneys who record their time in quarter hour increments might overbill their clients, attorneys who bill in tenth hour increments might also overbill. The risk exists under both methods. As long as the total number of billable hours is reasonable in relation to the work performed, the award should be affirmed.

Courts give considerable deference to fees awarded by district courts and administrative adjudicators. There was no abuse of discretion here.

**Josh Gillelan awarded \$250/hour based on Cincinnati area rate, rather than \$400/hour claimed appropriate for Washington D.C.. Laffey matrix rejected.**  
*Harmon v. McGinnis, Inc.*, 2008 WL 344707 (6<sup>th</sup> Cir 2008) (not selected for publication).

Gillelan, a Washington D.C. attorney specializing in longshore cases and appellate and enforcement actions, successfully prosecuted an enforcement action on behalf of a Kentucky attorney whose fee had not been paid following an award. He sought a fee @ \$400/hour. The ALJ held that \$400 was excessive for the Cincinnati area and reduced the fee to \$250, which was the top of the Cincinnati market and more than previously awarded to the Kentucky attorney.

When fees are sought by an out of town specialist the courts must determine if hiring the specialist was reasonable and whether the rates are reasonable for an attorney of that degree of skill, experience, and reputation, and whether competent counsel was readily available locally at a lower rate.

The court held it was permitted to and should consider prior fee awards. The ALJ awarded Gillelan an enhanced fee, considering his qualifications, and addressed claimant's argument based on the *Laffey* matrix and rejected it because it concerned rates payable in DC. There was no abuse of discretion.

### Attorney Fees – Entitlement

**Pre-controversion fees denied per §28(a); Pre-dispute fees not allowed per §28(b).**  
*Day v. James Marine, Inc.*, 518 F.3d 411 (6<sup>th</sup> Cir 2008).

§28(a) authorizes fees when the worker files a claim, the employer receives notice of claim from the deputy commissioner, the employer controverts the claim or there is a 30 day gap without payment, and the employee “thereafter” uses an attorney to prosecute the claim. The Court held that under this statute, employer was not responsible for fees before controversion or the 30 day gap without payment.

§28(b) authorizes a fee when the carrier pays or tenders payment of compensation, and “thereafter” a controversy develops over the amount of additional compensation, and four things happen: (1) there is an informal conference; (2) a written recommendation; (3) refusal by employer to accept the recommendation; (4) claimant secures more compensation than employer was willing to pay with assistance of an attorney. Under this section, employer is not responsible for fees before the dispute.

### Average Weekly Wage – Components

**Per diem was substitute for wage.** *B & D Contracting v. Pearley*, 2008 WL 4811102 (5<sup>th</sup> Cir 2008).

When claimant began work in July 1999 his employer divided his paycheck into an hourly taxable rate of \$8.50 and an untaxed hourly per diem of \$8.00. In July 2000 the rate was increased to \$9.50 wages, \$9.00 per diem. When claimant sustained an injury, the employer based AWW on wages, but not the per diem. The ALJ found that the per diem payments did not directly correspond to any actual expense, as it was paid at an hourly rate and would have been paid if claimant lived across the street from the job site. It was designed to maximize employee take home pay and provide a tax benefit to the employer.

The Court refused to adopt a strict rule that only taxable compensation could constitute wages under the LHWCA. Here, per diem played the role of wages and should be considered wages for purposes of calculating the AWW.

## Average Weekly Wage - §10(c)

**§10(c) division of annual earnings by 33 weeks actually worked not justified without evidence that work was available for 52 weeks.** *M&M Project Staffing v. Director, OWCP*, 2008 WL 3876233 (5<sup>th</sup> Cir 2008) (not selected for publication).

The parties agreed that AWW should be calculated per §10(c). The ALJ divided claimant's pre-injury earnings by 33, the number of weeks worked, to calculate AWW. The Court held that to credit an intermittent worker with the earning capacity of a full time worker, the record must contain evidence that the worker would have had the opportunity to be employed year round. To hold otherwise would defeat one of the central purposes of having three different methods of calculating a claimant's average weekly wage. It would be unfair to calculate an intermittent employee's wage under §10(a or b), since to do so would treat the claimant as a full time worker and thereby exaggerate his loss.

Here, there was not substantial evidence to support an assumption the claimant would have had the opportunity to work continuously in the future, so it reversed and remanded for a redetermination of the AWW.

## Causation – Intervening Injury

**MVA did not sever causal connection with injury.** *Lake Charles Food Products LLC v. Broussard*, 2008 WL 3820861 (5<sup>th</sup> Cir 2008) (not selected for publication).

Following a compensable back injury, claimant was in an unrelated MVA. He reported increased back pain for a month. MRI showed no objective worsening, ALJ concluded that a MVA did not overpower and nullify the worker's prior workplace injury or worsen his disability from the workplace injury in a significant way, such that the accident was not a supervening cause of the worker's disability, relieving the employer and its insurer of liability under the LHWCA. BRB affirmed.

*Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5<sup>th</sup> Cir 1951), held that a supervening cause was an influence originating entirely outside the employment that overpowered and nullified the causal effect of the employment on the claimant's injury. In *Mississippi Coast Maine, Inc. v. Bosarge*, 637 F.2d 994, *modified on other grounds, and reh'g denied*, 657 F.2d 665 (5<sup>th</sup> Cir 1981), a panel of the court said that a subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause. The Court indicated it would follow the *Voris* standard, but here, the facts did not support either standard. BRB's decision was affirmed.

## Causation - §20 Presumption

### **Medical evidence based on incorrect history insufficient to overcome §20 presumption.** *Rainey v. Director, OWCP*, 517 F.3d 632 (2d Cir 2008).

Claimant sought compensation for lung cancer caused by inhalation of asbestos and presented sufficient evidence to invoke the §20 presumption. Dr. Teiger wrote that that claimant would have developed his lung cancer even if he had never worked at Electric Boat, or if he had never been exposed to any asbestos in the work place at all. The Court held this did amount to a statement that the lung cancer was not related to employment because an employment related injury need only aggravate, exacerbate, accelerate, or contribute to or combine with a preexisting infirmity.

Dr. Pulde said there was no evidence that claimant's employment or workplace exposure contributed to his tobacco related lung cancer, and that the cancer was a direct and exclusive consequence of the substantial tobacco abuse. The ALJ rejected that part of the opinion, stating exposure was indirect and clinically insignificant based on claimant's testimony regarding his exposure. Because the ALJ made clear her view that a reasonable mind would not accept Dr. Pulde's opinion as evidence, it was not sufficient to rebut the §20 presumption.

### **Secondary injury not subject to §20 presumption.** *Amerada Hess Corporation v. Director, OWCP*, 543 F.3d 755 (5<sup>th</sup> Cir 2008).

Employer accepted a back and groin injury. Claimant alleged that medication and steroids taken for the back caused his hypertension and heart problems. Claimant offered no medical reports in support of this theory but testified that he had no similar problems before the injury, and his doctor told him that steroids and Vioxx and steroids was responsible. The ALJ accepted claimant's testimony as sufficient to invoke the §20(a) presumption. Finding no substantial evidence to rebut the presumption, the ALJ found the conditions compensable and awarded disability.

The Court held that the §20(a) presumption applied to the initial claim but not to secondary conditions, which were compensable if they were the natural or unavoidable result of the work related injury. Secondary injuries are not compensable simply because that condition could have stemmed from the covered injury. The Court remanded to allow the ALJ to apply the correct standard. "It appears to use that such a finding would benefit from, if not require, support of medical experts."

## Claim – Date of Awareness

**Death claim not timely when claimant should have known of relationship to injury.** *V.M. v. Cascade General, Inc.*, 2008 WL 2655784 (BRB 2008) (C. Robinowitz for claimant; J. Dudrey for employer/carrier).

Decedent injured his knee on April 5, 2000 and died in a car crash on April 10, 2002 caused by his own inebriation. Claimant, surviving spouse, after June 6, 2003, filed a claim for death benefits, asserting that inability to return to work because of the knee injury caused excessive drinking, culminating in the fatal car accident. The ALJ held that the claim was untimely.

The Board rejected claimant's contention that she could not have possessed the requisite awareness of the relationship between the injury and the drinking problem until she consulted her attorney and was advised of the potential compensability of decedent's death under the Act. §13(a) states that the limitations period commences when the claimant is aware, or should have been aware, of the relationship between the death and the employment. There is no requirement to acquire the requisite awareness from medical evidence. The ALJ could properly base his findings on her personal knowledge that a relationship existed between the knee injury, the subsequent drinking problem, and his alcohol related fatal car crash.

**Claim timely when claimant did not realize her injury would result in loss of earning capacity more than one year before filing claim.** *E.M. v. Dyncorp International*, 2008 WL 4426414 (BRB 2008).

Claimant, a former Kansas parole officer, was hired as a correctional officer trainer, to be deployed to Iraq, but she was sent to Kosovo for an orientation program. There, on April 17, 2004, she was shot by a Jordanian security officer and returned to the USA, where she received medical treatment and a psychiatric evaluation, but she was not informed of the results of the psychiatric evaluation. She was not allowed to return to her original job as a Kansas parole officer because she could not carry a firearm. She filed a claim on April 16, 2006, stating she did not realize her injury would result in a loss of wage earning capacity until she tried to resume her former job in Kansas in June 2005. The ALJ held the claim was untimely.

The Board held that the statute of limitations commenced when claimant knew or should have known she had a permanent psychological condition related to the injury that impaired her earning capacity. §20(b) contains a presumption that the claim was timely filed. Reviewing the evidence, the Board concluded that the ALJ did not apply the presumption, and the decision was not based on substantial evidence. A temporary inability to work does not put an employee on notice that her earning power has been permanently impaired.

## Course & Scope – Other

**Obligations or conditions of employment create the zone of special danger under the DBA. Fault is irrelevant.** *N.R. v. Halliburton Services*, 2008 WL 2655783 (BRB 2008).

Claimant was hired to work as an electrician at a military base in Afghanistan, but after several months on the job he resigned and sought transportation back to the United States. Dissatisfied with employer's response, he made an unauthorized trip to Kabul, was detained by Military Police, and instructed to travel to Bagram Air Base by convoy. He refused, and MP's handcuffed him, placed him in protective armor, and allegedly injured him in the process. The ALJ held that claimant's conduct placed him beyond the scope of the zone of special danger and not in the course of employment, but the Board reversed.

Claimant's fault was irrelevant. Under the DBA's concept of zone of special danger, considerations including time and space limits or whether the activity is related to the nature of the job do not remove an injury from the scope of employment. An employee need not establish a causal relationship between the actual employment duties and the event that occasioned the injury. The obligations or conditions of employment must create the zone of special danger out of which the injury arise.

Here, the disagreement which resulted in injuries arose out of the obligations and conditions of his employment in that environment.

## Death – Qualified Beneficiary

**Dependency must be proven at time of death and during dependency.** *Holcim, Inc. v. Reed*, 2008 WL 4155352 (5<sup>th</sup> Cir 2008) (not selected for publication).

At time of death on September 12, 2003, worker was not living with his spouse but he had been ordered to pay alimony to her, even though they were not divorced. He was living with another woman, Ms. McLaurin. Deceased paid for all of McLaurin's expenses, and McLaurin did not have a job. Employer conceded spouse was entitled to compensation but disputed McLaurin's entitlement as a dependent. The Court observed that under §9(f), Ms. McLaurin had to be a dependent at time of death and remain a dependent after death. The ALJ found that McLaurin was a dependent a time of death but did not make findings whether she continued to qualify as a dependent. The Court remanded to determine if dependency that existed at death continued beyond that time.

## Employer/Employee – Other

### **Corporate officer may be responsible for payment of compensation when corporation fails to pay.** *E.B. v. Atlantico, Inc.*, 2008 WL 2655779 (BRB 2008).

Atlantico, Inc. had a contract with the Navy to renovate piping and electrical upgrades on a pier at Norfolk Naval Base. Claimant was injured when working on the project. Employer did not have LHWCA insurance, went bankrupt, and eventually failed to pay compensation. §38(a) states that if a corporation fails to secure the payment of compensation, the president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or benefit which may accrue. Therefore, the ALJ should decide if certain named individuals were employer's corporate officers and, if they were, whether they are personally liable.

## Estoppel

### **Employer not equitably estopped to deny payment under the LHWCA because it paid compensation under the LHWCA. No proof of detrimental reliance.** *B.E. v. Electric Boat Corporation*, 2008 WL 2655774 (BRB 2008).

Employer paid medical benefits and temporary disability to claimant from January 20 to February 1 2005 under the LHWCA but later contended that she was not covered by the Act. Claimant argued that employer should be equitably estopped from asserting lack of coverage. The ALJ and the Board agreed that equitable estoppel did not apply because claimant failed to prove detrimental reliance. Claimant did not prove she was precluded from pursuing a state claim.

## Hearings – Other

### **New trial denied in spite of delay because moving party was not prejudiced.** *V.M. v. Cascade General, Inc.*, 2008 WL 2655784 (BRB 2008) (C. Robinowitz for claimant; J. Dudrey for employer/carrier).

Hearings were held on June 10, 2005 and on May 5, 2006, and the ALJ issued a Decision & Order on May 31, 2007 denying all relief. On appeal, claimant contended that the delay in issuing the D&O required a new hearing on the claim for disability benefits.

Although §19(c) states that decisions shall be issued within 20 days after close of the record, the failure to issue a decision within 20 days requires remand only where the aggrieved party shows prejudice resulting from the delay. Here, claimant failed to prove prejudice.

## Miscellaneous

**OCLA has situs and status requirement.** *L.V. v. Pacific Operations Offshore, LLP*, 2008 WL 3984591 (BRB 2008).

Decedent worked for employer as a roustabout primarily at its offshore oil platforms three miles off the coast on the Outer Continental Shelf but was injured at a facility on shore, 250-300 feet from water, used to store scrap metal and service the offshore platforms. The Board held that coverage under the OCSLA requires meeting both a situs of injury and status test. As decedent did not occur while he was working on the OCS, the ALJ correctly granted summary judgment in favor of defendant.

**OCSLA does not apply to vessel used to transport worker from offshore platform to residential platform.** *Grand Isle Shipyard, Inc., v. Seacor Marine, LLC*, 543 F.3d 256 (2008).

Seacor, a contractor for BP, transported claimant, an employee of Grand Isle, another BP contractor, on a vessel, Sea Horse IV, from a work platform to a residential platform which contained living quarters. Claimant was injured when in close proximity, but not in physical contact, with the residential platform. The Outer Continental Shelf Lands Act (OCSLA) has a situs requirement, discussed comprehensively in *Demett v. Falcon Drilling Co., Inc.* 280 F.3d 492 (5<sup>th</sup> Cir 2002). Sea Horse IV did not qualify as a OCSLA situs. It was not the subsoil and seabed of the OCS, an artificial island, or an installation permanently or temporarily attached to the seabed. Thus, claimant was not subject to the OCSLA.

## OWCP

**OWCP may not suspend compensation after case is referred to OALJ.** *L.D. v. Northrop Grumman Ship Systems, Inc.*, 2008 WL 2655776 (BRB 2008) on reconsideration of decision issued 2008 WL 2897027 (BRB 2008).

District Director scheduled an IME, but claimant refused to attend. On February 16, 2007 the district director referred the case to the OALJ, and on March 21, 2007 the district director suspended compensation for failure to attend the medical examination. The Board held that the District Director and the ALJ did not have simultaneous jurisdiction to suspend compensation, so only the ALJ had jurisdiction as of the date it was transferred to the OALJ. Therefore, the Board vacated the March 21, 2007 order.

## Penalties – Enforcement

**Order awarding compensation not enforceable unless it specifies the amount due or means to calculate without resort to extra record facts.** *Stetzer v. Logistec of Connecticut, Inc.*, 2008 WL 40707535, 2008 US App Lexis 23268 (2d Cir 2008).

ALJ awarded TTD for specific period and TPD from March 29, 2002 for a period not exceeding five years. Employer paid compensation, but claimant filed notice of enforcement per §18(a), claiming employer had failed to pay the correct amount of TPD due. ALJ held penalty was not appropriate because it was not possible to determine the amount of compensation due without consideration of extra record facts. The BRB and the Court of Appeals affirmed this part of the decision. The ALJ order was not final and enforceable because it did not specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra record facts which are potentially subject to genuine dispute between the parties.

## Permanent Disability – Scheduled PPD

**Injury to hip is unscheduled injury.** *Electric Boat Corp. v. Blayman*, 2008 US App Lexis 2723 (2d Cir 2008) (not selected for publication).

ALJ determined that claimant suffered hip injury resulting in arthritis, and he did not have an injury to the leg apart for the arthritis in the hip joint. Therefore, it was an unscheduled injury. The BRB held that claimant sustained a injury to the femoral head, which was part of the thigh, or upper leg. The Court reinstated the ALJ's decision. An injury to the hip – even one that subsequently results in impairment in the use of a leg – is an unscheduled injury.

The Court distinguished *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990), where claimant sustained a shoulder *and* a biceps injury and was allowed to receive an unscheduled shoulder injury and a scheduled arm injury. Here, claimant only sustained a hip injury and no separate injury to the leg.

## Settlements; Credit – Other Claims

**Credit denied for future unrelated claims.** *J.H. v. Oceanic Stevedoring Co*, 2008 WL 307445 (2008).

§8(i) agreement provided that if claimant returned to work as a longshoreman after approval of the agreement and had re-injury, permanent aggravation, or new injury, subsequent employer would be entitled to a credit toward any future claim for temporary or permanent disability from money paid in §8(i) agreement if the

subsequent employer was Eller-ITO Stevedoring or any other Signal Mutual Indemnity Assn. member. The Director appealed, contending that the credit provision was not valid. The Board agreed that the credit here was invalid because it was not limited to the rights of the parties and to the claims then in existence. A claim for a new injury was not one currently in existence. Also, this credit was not encompassed in any statutory credit scheme and was contrary to law. If a new injury is unrelated to the old one and independently causes a loss of wage earning capacity, there is no aggravation of the old injury/disability and the credit doctrine cannot apply. *Strachan Shipping Co. v. Nash*, 18 BRBS 45 (5<sup>th</sup> Cir 1986) only applies to scheduled injuries.

### Settlements; Penalties – Enforcement

**Claimant can waive penalty in §8(i) agreement.** *D.G. v. Cascade General*, 2008 WL 4426415 (BRB 2008) (Greg Bunnell for claimant; Norman Cole for employer/carrier).

OWCP assessed 20% penalty when lump sum payment allowed by a §8(i) agreement was not paid within 10 days. Employer paid the penalty but appealed, citing a provision in the agreement that provided for waiver of the penalty if claimant did not provide a valid street address for purposes of delivery. There was not delivery by the USPS to that address. Claimant received his mail at post office box.

The Board held that parties may contract to waive the §14(f) assessment in a §8(i) agreement but remanded the claim for a fact finding hearing to determine if claimant violated the terms of the agreement.

### Situs – Adjoining Area

**Facility 300 feet from ocean used to store scrap metal and service oil platforms not a covered situs.** *L.V. v. Pacific Operations Offshore, LLP*, 2008 WL 3984591 (BRB 2008).

Decedent worked for employer as a roustabout primarily at its offshore oil platforms three miles off the coast on the Outer Continental Shelf but occasionally worked at employer's crude oil flocculation facility (La Conchita) in Ventura, California. This facility was located 250-300 feet from the ocean and was a receiving station for petroleum and oil pumped from the offshore platforms. There, it was processed into oil, water, gas, and solids, and the oil and gas were shipped away by pipeline. Scrap metal from the platforms was offloaded in bins at a different pier, loaded on to a truck and delivered to La Conchita. A third party contractor occasionally dumped the metal out of the bins at various locations at La Conchita, and eventually the metal was sold to a recycler.

Decedent had been directed to take a forklift to the year yard of La Conchita and clean up some scrap metal debris. He apparently stood on top of the raised tines of the forklift to harvest fruit from a plantain tree when the forklift moved, and decedent fell to his death. The ALJ found that decedent was not entitled to benefits under the LHWCA or the OCSLA.

The Board held that La Conchita was not a covered situs, as it had no functional relationship with navigable water. It was not customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel. The proximity of La Conchita to navigable waterways was not dictated by maritime concerns.

**Adjoining area need not be exclusively and directly used for loading, unloading, repairing, dismantling or building a vessel.** *D.S. v. Consolidation Coal Company*, 2008 WL 4426413 (BRB 2008).

Claimant repaired a Terex machine, used to load processed coal onto barges, in a garage located 100 yards from navigable waters. The ALJ held that operations of the garage were related in part to the loading process because repairs were undertaken there of equipment essential to the loading and unloading of coal. Employer argued the garage was not an adjoining area because it was not directly used for loading, unloading, repairing, dismantling or building a vessel. The Board disagreed. An adjoining area need not be exclusively and directly used for loading, unloading, repairing, dismantling or building a vessel. A facility used for repair and maintenance of equipment employed in loading/unloading process may be an adjoining area.

**Construction site 85-90 feet from Hudson River bulkhead not an adjoining area.** *R.V. v. J.D'annunzio & Sons*, 2008 WL 2956291 (BRB 2008).

Claimant was a laborer working on a project involving tree transplantation, demolition, excavation, Hudson River bulkhead repair and restoration, lighting installation, and paving. The day before his injury he spent three hours chipping excess concrete off a bulkhead wall (suspended on scaffolding over the Hudson River) and five hours pouring new concrete into it. The next day he removed landscape lumber away from the bulkhead work area and was injured when 85-90 feet from the bulkhead. The ALJ granted employer summary judgment, holding that claimant was not injured on a covered situs, and the Board affirmed. Claimant was not injured on navigable waters. He was injured in an area that contained no facilities for loading, unloading, mooring, building, repairing, or dismantling vessels.

## Situs – Navigable Waters

**On navigable waters when slipped and fell between two barges.** *T.M. v. Great Southern Oil & Gas*, 2008 WL 2897002 (BRB 2008).

A keyway barge was spudded to prevent movement, and a pipe barge and blending barge were attached to the keyway barge by lines. Claimant was injured while attempting to cross between the floating pipe and blending barges that were attached to the keyway barge. Because these barges were not affixed to the water, and claimant was injured when crossing between these floating barges, his injury was on navigable waters. Per *Perini*, he satisfied situs and status requirements. Moreover, the keyway barge was not permanently affixed to the sea bed and was otherwise afloat on navigable waters and was capable of being moved when required. Therefore, it was not a fixed platform.

## Status – Integral Employment

**Repair of equipment used in loading process was integral to loading.** *D.S. v. Consolidation Coal Company*, 2008 WL 4426413 (BRB 2008).

Barges delivered coal to employer's facility adjacent to the Monongahela River. The coal is moved by conveyor belts through a processing plant and then loaded onto riverside barges. Claimant worked as a mechanic repairing and servicing heavy equipment, including a Terex machine, which was used to load processed coal onto barges. The ALJ found that barge loading would cease if a mechanic did not service the heavy equipment used in the loading process. Therefore, the ALJ held that claimant's work as a mechanic was an integral part of the loading process and that claimant had status. The Board affirmed. The possibility that the loading process might not immediately come to a halt if the Terex was out of service is irrelevant because the lack of a functioning Terex would eventually halt the loading process of stockpiled coal.

**Janitor at shipyard lacked status.** *B.E. v. Electric Boat Corporation*, 2008 WL 2655774 (BRB 2008).

Claimant's work involved cleaning offices and bathrooms, including mopping, vacuuming, dusting and emptying wastebaskets. She did not work on ships and spent most of her time in restricted or confidential area offices. She also cleaned a cafeteria and bathroom used by employees who worked on submarines. She was injured when she slipped on ice and fell at work. On summary judgment, the ALJ held that claimant lacked status, and the Board affirmed. Claimant's duties were not essential to the shipbuilding process. She did not clean or maintain any shipbuilding equipment or the production areas around the equipment. Failure to perform her job would not disrupt the shipbuilding operation.

## §5(b) Suits

**Floating casino capable of movement was a vessel.** *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11<sup>th</sup> Cir 2008).

The Belle of Orleans was a fully operational 150 foot paddle wheeler vessel until it was moored to a Marina on Lake Pontchartrain and used as a casino. The Coast Guard limited it to “permanently moored operations” but did not prohibit it from navigating in the future. It had a captain and crew aboard and maintained engines, generators, and equipment in working order at all times. The owners added steel cables to the mooring system and attached electrical, computer, and phone cables and water in bulk from a shore side source. The vessel was ripped from its mooring by Hurricane Katrina, causing damage to the Marina dock. Tug boats towed it to another shipyard for repairs. In the meantime, the Board of Commissioners instituted an action against the vessel *in rem*, to enforce a maritime lien. The owners of the vessel disputed maritime jurisdiction, contending it was not a vessel.

Citing *Stewart v. Dutra Const. Co.*, 543 US 481 (2005) and *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5<sup>th</sup> Cir 1955), the court held that the Belle was a vessel. It was capable of being used as a means of transportation without the assistance of tow. Per *Stewart*, it was a watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. The focus is on the craft’s capability, not its present use. The Belle was not permanently moored or otherwise rendered practically incapable of transportation or movement.

**No turnover duty to advise of open and obvious defect in cargo stow.** *Kirksey v. Tonghai Maritime*, 535 F.3d 388 (5<sup>th</sup> Cir 2008).

Longshoreman was injured due to unstable stowage of cargo. He filed a §5(b) action against the owner, operator, and charterer of the vessel and secured judgment. Defendant appealed.

Shipowners owe three duties to a longshoreman: (1) turnover duty; (2) duty to exercise reasonable care in the areas of the ship under the active control of the vessel; (3) duty to intervene. This suit was based on turnover duty. This duty requires the owner to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that the expert stevedore can carry on stevedoring operations with reasonable safety, and a duty to warn of latent or hidden dangers which are known to the vessel owner or should have been known. The duty to warn does not apply to dangers which are either open and obvious or dangers a reasonably competent stevedore should anticipate encountering. Here,

the stevedore was sully award of the condition of the cargo stow, so the shipowner had no obligation to warn against the obvious danger.

### §8(f) – Greater Disability; Permanent Disability – Hearing Loss Claims

**Test-retest variability may mean 10 dB difference in response.** *G.K. v. Matson Terminals, Incorporated*, 2008 WL 1942544 (BRB 2008).

Claimant's hearing was tested for most years from 1978 to 2002, but he was not given a copy of the audiogram. A February 14, 2002 audiogram revealed 48.4% binaural hearing loss. January 20, 2003 post retirement audiogram revealed 53.1%, or 4.7% more. Claimant and employer stipulated that claimant was entitled to 53.1% PPD. The ALJ initially denied §8(f) relief because none of the prior audiograms were presumptively valid, and therefore could not be considered as evidence of a preexisting disability, and the increase in the last two audiograms was within test-retest variability, so occupational noise did not contribute to increased loss. Citing *R.H. v. Bath Iron Works Corporation*, 2008 WL 899271 (BRB 2008), the Board held that entitlement to §8(f) relief did not depend on whether a prior audiogram was presumptively valid. It credited evidence that a frequency response within 5 dB was within test-retest variability, so a difference of 10 dB did not necessarily mean a real change. (If #1 was 40, it could be 45. If #2 was 50, it could be 45 = 10 dB difference between #1 and #2.) Therefore the Board affirmed the decision that there was no change between February 14, 2002 and January 20, 2003, but the Board remanded to consider if there had been a change after any of the audiograms before February 14, 2002.

### §8(f) – Other

**§8(f) available to employer when preexisting disability and second injury arise from same course of employment with same employer.** *Electric Boat Corporation v. Martino*, 495 F.3d 14 (2007).

Claimant worked for Electric Boat from 1957 to his retirement in 1994 and died in 1996 due to asbestosis. A 1970 x-ray was consistent with asbestosis. Electric Boat sought §8(f) relief based on an argument that continued asbestos exposure aggravated the preexisting asbestosis. The Court held that an employer was eligible for §8(f) relief where an employee's preexisting disability and second injury both arise from the same course of employment with the same employer, but the Court affirmed the ALJ's finding that there was insufficient evidence of a second injury due to lack of evidence of additional exposure. Accordingly, the ALJ's denial of §8(f) relief was denied.

## §8(f) – Preexisting Manifest Disability

**Audiogram need not be presumptively valid to support §8(f) claim.** *R.H. v. Bath Iron Works Corporation*, 2008 WL 899271; *accord, G.K. v. Matson Terminals, Incorporated*, 2008 WL 1942544 (BRB 2008).

Claimant had 23.8% impairment for binaural hearing loss. Prior audiogram revealed 15% impairment, but Director appealed the grant of §8(f) relief because the prior audiogram was not presumptively valid. The Board held that an audiogram need not be presumptive evidence to be determinative of the degree of hearing loss under the Act. There is a difference between presumptive evidence of hearing loss and audiograms that are sufficient, if credited, to establish the degree of hearing loss under the Act. It is for the ALJ to assess the probative value of audiograms in determining the extent of hearing loss. The key question for purposes of §8(f) as well as establishing the extent of hearing loss is whether there is sufficient probative evidence, applying the *AMA Guides* and procedures of §702.441(d) to establish the extent of claimant's permanent loss of hearing at a particular point in time.

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