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

Attorney Fees – Amount

**“Market rate” based on numerous factors, including prior awards and billing rate for comparable work.** *Jeffboat, LLC v. Director, OWCP*, 553 F.3d 487 (7<sup>th</sup> Cir 2009).

Fee petition seeking \$261 per hour cited a decision in Connecticut, where the attorney was based, approving a fee of \$250 to \$261 per hour, citations from the *Connecticut Law Tribune*, *National Law Journal*, *1994 Survey of Law Firm Economics*, and others sources establishing billing rates for partners in Connecticut, ranging from \$199 to \$420 per hour. Employer objected and offered citations to cases in Covington, Kentucky in 1999 establishing a rate for Longshore cases of \$150 per hour, and three cases from Indiana, where the case was litigated, awarding \$136 to \$175 per hour.

Attorney fee must be reasonable within the community, which may reflect the community of practitioners when, as here, the subject is specialized and the market is a national market. It is within the ALJ’s discretion to adjust an out of town attorney’s rate downward when calculating an lodestar if local counsel could have provided comparably effective services and the rate of the out of town practitioner was higher than the local market.

An attorney’s actual billing rate for comparable work is presumptively appropriate for use as a market rate when making a lodestar calculation. A prior fee award is useful for establishing a reasonable market rate for similar work whether it is disputed or not.

Average Weekly Wage - §10(c)

**Average weekly wage based on comparison to another worker, per §10(c).** *Bay, Ltd. v. Director, OWCP*, 2008 WL 4933752 (5<sup>th</sup> Cir 2008) (unpublished).

Claimant was injured two weeks after he was hired. In the year before his injury he worked “on and off.” The ALJ reviewed wages of three other workers and concluded one worker was similarly situated. Claimant’s AWW was based on

earnings of this worker, whose earnings were representative of claimant's earning capacity. There was no evidence of daily earnings, so §10(b) could not be used. There was substantial evidence to support the ALJ's method per §10(c).

### Course & Scope – Intoxication

**Intoxication defense: Drinking at work, contrary to work rule, not necessarily outside course of employment. If employer rebuts presumption, claimant must prove injury was not solely due to intoxication.** *G.S. v. Marine Terminals Corporation*, 2008 WL 5458943 (BRB 2008) (R. Babcock for employer; M. Flynn for Claimant)

Claimant had been consuming beer and whiskey at work. When relieving himself over a bull rail at employer's dock, he fell over the rail onto a concrete and steel ledge six feet below, resulting in a severe scalp laceration. Drs. Burton and Jacobson testified alcohol intoxication alone was the sole cause of claimant's fall. Other evidence indicated there were no slippery surfaces and no reports of tripping hazards or dangerous conditions.

Although employer had a rule prohibiting working in an impaired or intoxicated condition, the rule did not change the scope of claimant's employment – his job duties – but instead dictated the manner in which he was to perform his duties. Under these principles, claimant remained within the scope of his employment even if his conduct violated employer's rules.

Employer's evidence was sufficient to rebut the §20(c) presumption as a matter of law. Once the presumption was rebutted, claimant bears the burden of proving his intoxication was not the sole cause of his injury. It was not employer's burden to prove on the record as a whole that intoxication was the sole cause of the injury. The ALJ may not infer without a basis in the record that some other factor caused claimant to fall. Remanded.

### Defense Base Act

**No Defense Base Act coverage when not working under contract; Green Zone not covered.** *Z.S. v. Science Applications International Corporation*, 2008 WL 5069529 (BRB 2008).

Claimant went to Iraq to develop business opportunities for the Young Group. Although she gained entrance into the Green Zone by securing a contractor's badge indicating she was working on a contract between employer and the Iraqi Media Network, she did no work pursuant to any such contract. Her hotel in the Green Zone was attacked by rockets, and she later developed PTSD.

Claimant had no coverage under the Defense Base Act for two reasons: (1) She was not working pursuant to a contract or subcontract entered into with the United

States government; (2) The Green Zone was not a military, air or naval base acquired by the United States from a foreign government. The military partly protected the zone but did not control or own the area, nor were the United States military's rules or standards of procedure applicable to people within the area.

### Employer/Employee – Borrowed Servant

**Insurer of lending employer not obligated to reimburse its insured for money its insured agreed to pay borrowing employer per indemnity agreement.** *Dinh v. Louisiana Commerce & Trade Association Self Insurers Fund*, 2008 WL 5069703 (5<sup>th</sup> Cir 2008) (unpublished).

Dinh was hired by Structures but was sent to work for Kye, where he sustained an injury. The Fund, Structures' insurer, began payment to Dinh under the LHWCA. Dinh filed a tort suit against Kye and others. Eventually, Kye was designated as Dinh's real, or borrowed employer, under the LHWCA, thereby giving it immunity from civil suit but creating an obligation to pay compensation under the LHWCA. The Fund discontinued payment. Structures then became obligated to reimburse Kye, per an indemnity agreement. It sought reimbursement from the Fund. The Court held the Fund's coverage obligation did not extend to liabilities which Structure assumed under an indemnity agreement. The Fund's coverage was limited to payment of Structure's obligation under the workers' compensation law.

[Editor's note: This problem could have been avoided if the Fund had signed an indemnity agreement.]

### Penalty – Propriety

**Payment is due 10 days after order filed, even if order is not served on the insurer.** *Carillo v. Louisiana Insurance Guaranty Association*, 2009 WL 368582 (5<sup>th</sup> Cir 2009).

The OWCP approved a settlement agreement on February 27, 2006, but LIGA, a guaranty insurer, did not receive notice of the approved claim until March 16, even though it conceded the District Director formally dated, filed and sent the order via certified mail on February 27, 2006. LIGA paid the claim on March 17. The District Director issued a supplemental order of default, and the District Court ordered enforcement, which LIGA appealed.

The Court held filing occurs once the initial acts by the Direct Director have occurred, such as the formal dating of the order and its filing in the office. Receipt by a party is not part of the act's filing requirement. LIGA owed the penalty.

## Responsibility – Last Injurious Exposure Rule

**Multiple employers have simultaneous, not sequential, burden when responsibility in dispute.** *K.M. v. Lockheed Shipbuilding*, 2008 WL 5458941 (BRB 2008) (Norman Cole for WISCO, Dennis VavRosky for Albina, Russell Metz for Lockheed).

Decedent worked for WISCO, Albina, and then Lockheed and died due to mesothelioma, an asbestos related disease. All employers agreed the claim was compensable, and any exposure to asbestos was capable of causing mesothelioma. WISCO admitted exposure occurred. On remand, Albina was found responsible. On appeal, Albina argued the ALJ should have evaluated responsibility sequentially, rather than simultaneously and found Lockheed responsible because Lockheed failed to prove no exposure occurred during its employment. The Board rejected Albina's argument, again concluding that every employer had a simultaneous burden to prove no exposure or subsequent injurious exposure.

[Note: Albina requested review by the 9<sup>th</sup> Circuit.]

## Settlements

**Settlements must resolve ILWU-PMA lien.** *M.K. v. California United Terminals*, 2009 WL 525237 (BRB 2009).

The ILWU-PMA paid indemnity and medical benefits relating to various claims, pending resolution of the LHWCA claims. It submitted an application to the OWCP and to the ALJ seeking satisfaction of its lien, totaling \$176,919.91, and opposing a §8(i) settlement in the absence of payment. The settlement agreement, which the ALJ approved, confirmed the existence of the lien and the parties' obligation to pay the lien when required, either by direct settlement with the ILWU-PMA or by entry of a subsequent order resolving issues regarding the extent of the lien. The ILWU-PMA appealed.

The Board held the ILWU-PMA's §17 lien claims and all claims for reimbursement of medical expenses under §7 must be resolved simultaneously with the settlement agreements entered into by the claimants and their employments. It vacated the settlement orders and remanded the claim.

§17 imposes on the claimant, not the employer, the obligation to repay the trust fund out of compensation which is due under the Act. Section 7(a) renders employers liable for medical benefits. The ILWU-PMA is entitled to intervene and seek reimbursement from employer or medical expenses necessary for treatment of the work injuries at issue. Its derivative rights depend on an initial determination that claimant is entitled to medical benefits.

The agreement attempted to circumvent the lien by agreeing to pay, adjust, or litigate ILWU-PMA's interests. This would compel ILWU-PMA to litigate

independently the compensability of the claims resulting in the bifurcation of proceedings. Where ILWU-PMA has properly intervened, its lien and reimbursement claims must be resolved simultaneously with the claimant's claims.

Situs – Adjoining Area  
Status – Significant Time

**Can be adjoining area even if not directly involved in loading or unloading or physically connected to the point of loading or unloading. Status because regular part of job was loading of cargo to transport barges for shipment to shore, even though only 9.7% of work activity. *Coastal Production Services, Inc. v. Hudson*, 2009 WL 82367 (5<sup>th</sup> Cir 2005).**

The Saturday Island field comprises a large platform with living quarters (Saturday Island platform), 14 satellite wells connected by horizontal subsurface piping, and a sunken oil storage barge (the Cherokee) adjacent to the platform. The satellite wells pipe their production (oil, gas, saltwater) to the Saturday Island platform, where components are separated. Separated oil is piped to holding tanks on the platform and periodically transferred to larger storage tanks on the Cherokee. When the Cherokee's tanks are full, the oil is transferred into customers' transport barges for delivery onshore. Claimant was responsible for maintenance and upkeep of the satellite wells, servicing and maintaining the Saturday Island platform, transferring oil from the platform to the Cherokee three to four times per week, daily inspection and maintenance of the Cherokee, and assisting loading of oil from the Cherokee to transport barges, which required connecting pipes and hoses and monitoring tank levels. He was injured when a saltwater disposal pump on the Saturday Island platform exploded.

Employer argued claimant was not on a covered situs, citing *Herb's Welding Inc. v. Gray* (offshore oil platform not a covered situs). The court held situs required a functional inquiry and did not necessarily depend on fence lines and local designations. If a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading or physically connected to the point of loading or unloading. If a general area is customarily used for loading and unloading, all parts within it are a maritime situs. Courts should look to the proximity and interconnectedness to the loading and unloading location, along with its function. Here, the Cherokee and its platform were in the same general area customarily used for loading vessels. It cannot be said that the platform was not part of the loading process. Claimant was injured on a covered situs.

Claimant's activities related solely to production of oil and gas from 14 remote production facilities do not imbue him with status, but here, claimant was directly involved in the loading of cargo into transport barges for shipment to shore, which was a distinctly maritime activity. Although this was only 9.7% of his work

activities, there is no minimum time required to qualify as maritime employee. It was a regularly assigned duty. Claimant had status.

### Temporary Disability – Entitlement

**Non-cooperation with vocational consultant irrelevant if claimant totally disabled. Status as illegal alien irrelevant.** *J.R. v. Bollinger Shipyard, Inc.*, 2008 WL 5458942 (BRB 2008).

Claimant, who illegally resided in the USA for seventeen years, refused to see employer's vocational expert, who nevertheless identified jobs which he believed were suitable based on post injury condition and general capabilities. The ALJ found claimant unable to work due to his pain and awarded TTD.

A refusal to cooperate with employer's vocational expert is a factor which should be considered by the ALJ in evaluating the expert's testimony. As the ALJ rationally found claimant was unable to work at all, he was not required to assess evidentiary weight to be accorded to the vocational assessment and failure to cooperate.

Additionally the issue of illegal alienage does not affect compensation entitlement under the Act. Definition of employee does not differentiate between individuals based on their citizenship status.

[Editor's note: Does an illegal alien have an AWW equal to zero if it is illegal to provide employment? It is not clear if the defendant in *J.R.* raised AWW as an issue.]

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