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**NWLAA Case Law Review**  
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**Attorney Fees – Amount**

**Fees may not be based solely on prior awards. Applicant has burden to prove prevailing rate in community for similarly skilled and experienced attorneys. Two year delay does not justify enhancement. Rate should not be reduced based on lack of complexity.** *Christensen v. SSA*, 557 F.3d 1049 (9<sup>th</sup> Cir 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041 (2009).

In two similar cases, the 9<sup>th</sup> Circuit held: The lodestar method is the fundamental starting point in determining a reasonable attorney fee. Neither novelty or complexity of issues is an appropriate factor in determining whether to decrease the basic hourly rate. The applicant must produce evidence that the requested rate is in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill and experience and reputation. Attorneys should be awarded fees commensurate with those which they could obtain by taking other types of cases. The relevant market should not be defined only in terms of what has been awarded by ALJs and the BRB in LHWCA claims. Arbitrarily holding the line at past court generated fee awards does not respect congressional intent animating fee shifting statutes. The award must be based on current rather than mere historical market conditions. If the applicant fails to meet its burden, it may be reasonable to look at that ALJs and the BRB awarded in other LHWCA cases to ascertain a reasonable fee. A two year delay in payment of fees is not so egregious or extraordinary as to require a delay enhancement.

[Note: These decisions prompted the Board to remand *H.S. v. Department of Army/NAF*, 2009 WL 1161357 (BRB 2009) for determinations of a reasonable hourly rate.]

**Attorney fees - Entitlement**

**No fee when employer accepts recommendation from informal conference. 9<sup>th</sup> Circuit view to the contrary rejected.** *Andrepoint v. Murphy Exploration & Production Co.*, 2009 WL 689679 (5<sup>th</sup> Cir 2009 (not selected for publication)).

Employer voluntarily paid TTD plus 26% scheduled PPD for the leg. After informal conference OWCP concluded employer did not owe more compensation. Employer accepted the recommendation. ALJ awarded PTD from 12/13/01 to 2/17/03 as additional compensation, but the attorney was not awarded a fee. BRB and 5<sup>th</sup> Circuit affirmed. §28(a) did not apply because the employer tendered some compensation within the thirty days after filing of the written claim. Rejecting the 9<sup>th</sup> Circuit's view, and agreeing with the 4<sup>th</sup> and 6<sup>th</sup> Circuits, the court held §28(b) did not allow payment of a fee because employer accepted the recommendation from the informal conference.

**Fees allowed for services before employer refused to pay compensation.** *Dyer v. Cenex Harvest States Cooperative*, 563 F.3d 1044 (9<sup>th</sup> Cir 2009).

Employer objected to payment of fees prior to date of controversion, based on language of §28(a), which states, "if the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation \* \* \* and the person seeking benefits shall *thereafter* have utilized the services of an attorney at law in the successful prosecution of the claim, there shall be awarded \* \* \* a reasonable attorney's fee \* \* \* ." The court held "thereafter" means only that the claimant must employ an attorney after the employer declines to pay the claim. A successful claimant is entitled to both pre and post controversion attorney's fees.

### Average Weekly Wage - §10(c)

**AWW based on earnings in Iraq, where injured.** *K.S. v. Service Employees International, Inc.*, 2009 WL 886341 (BRB 2009).

Claimant worked as a truck driver in Kuwait and Iraq from 11/1/03 to the date of injury, 1/11/04. He was under contract to work for a year. The ALJ calculated the AWW based on the combination of earnings overseas and in the USA during the 52 weeks prior to the injury. The Board held the AWW should be based solely on earnings overseas to reflect his earning capacity in the employment in which he was injured. See, *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006), which the Board viewed as indistinguishable. Where claimant is injured after being enticed to work in a dangerous environment in return for higher wages, it is disingenuous to suggest his earning capacity should not be calculated based up on the full amount of the earnings lost due to the injury.

### Causation – §20 Presumption

**Hearing loss not compensable when experts said no increase from noise.** *Arsenault v. Bay Systems Norfolk Ship Repair*, 2009 WL 693354 (4<sup>th</sup> Cir. 2009) (not selected for publication).

In October 2002 claimant filed a claim for 26.9% binaural hearing loss, which employer accepted. In 2004 claimant filed a new claim for hearing loss, based on a new audiogram revealing 29.4% binaural impairment. Claimant alleged he had been exposed to additional noise on his walk between his vehicle and where he worked, and from the equipment operating near his work station in the calibration lab, located in the machine shop, and he occasionally heard noise from two nearby cranes. Dr. Erdreich conducted an acoustical analysis of the facility and testified noise to which claimant exposed would not likely cause hearing loss. Dr. Deutsch evaluated four audiograms and testified claimant did not sustain any increase in his *noise* induced hearing loss. BRB held the §20 presumption had been invoked and rebutted, and claimant failed to meet his burden to prove noise exposure contributed to increased hearing loss. Although one of the audiograms did not meet criteria for presumptive evidence of extent of disability, reliance on Dr. Deutsch's opinion for that reason was not precluded by the AMA Guides or the Longshore Procedure Manual. The AMA *Guides* provide the method for measuring hearing loss, and do not determine the cause of hearing loss, whereas the statute provides the formula for determining how such losses should be compensated.

### Course & Scope – Other

**Spider bite on oil platform consequence of zone of special danger.** *Hotard v. Devon Energy Production Co LP*, 2009 WL 166688 (5<sup>th</sup> Cir 2009) (not selected for publication).

Worker was bit by a spider when sleeping in his bunk on an offshore oilrig platform, where he was employed. A worker is in the course and scope of employment if the obligations or conditions of employment create a zone of special danger out of which the injury arose. To be outside the course and scope an employee must go so far from his employment and become so thoroughly disconnected from the service of the employer that it would be entirely unreasonable to say the injuries suffered arose out of and in the course of employment. Claimant's job created a situation that typically involved sleeping on the platform. He would not have been bitten but for employment. He was in course and scope of employment.

### Death – Other

**Concubine under law of Mexican state of Baja California Sur did not remarry within the meaning of the LHWCA.** *A.S. v. Advanced American Diving*, 2009 WL 1161358 (BRB 2009). [Note: this decision was appealed to the 9<sup>th</sup> Circuit.]

Claimant was receiving compensation due to death of her spouse when she met and began living with another man in the Mexican state of Baja California Sur (BCS). Marriage in BCS is defined as a union of a man and woman with the explicit intention of forming a family through domestic and sexual cohabitation, reciprocal respect and protection, and the eventual perpetuation of the species, but

it must be executed before a Civil Registry official. Knowing this, and with the intent to avoid losing her LHWCA compensation, claimant and her partner had a “commitment” ceremony on the beach in Cabo, presided over by a legitimate Christian minister, where they exchanged vows, and rings in the presence of invited guests. She changed her last name to that of her partner, purchased property with her partner, had two children with him, and each of them bought life insurance with the beneficiary referred to as the purchaser’s spouse. The civil code of BCS also provided a concubinage was the union of one man and one woman with the tacit purpose of forming a family through domestic and sexual cohabitation, reciprocal respect and protection, and the eventual perpetuation of the species. Evidence indicated marriage and concubinage differed only with respect to how each was formed and how each could be dissolved. One expert on Mexican law testified claimant was married within the meaning of Mexican law.

The insurer petitioned for modification, contending, among other arguments, claimant’s status as a concubine was the equivalent of a common law marriage and therefore constituted remarriage, disqualifying her from receipt of compensation for death. The ALJ and Board implicitly agreed claimant was a concubine but both held concubinage was not marriage. Judge McGreevy dissented, concluding the ALJ and Board had failed to consider the word “remarriage” in the context of the statute and *Thompson v. Lawson*, 347 US 334 (1954), which held practical considerations trump a technical legal status in determining a right to death benefits.

## Discrimination

**In discrimination claim, cannot receive lost wages unless able to return to former employment. ALJ had no authority to order payment under short term disability policy.** *G.M. v. P&O Ports Louisiana, Inc.*, 2009 WL 1549192 (BRB 2009).

§48(a) imposes a penalty, payable to the Special Fund, of up to \$5,000 for discrimination and also states: “Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination: Provided, That if such employee shall cease to be qualified to perform the duties of his employment, he shall not be entitled to such restoration and compensation. Here, the ALJ found employer discriminated against claimant by denying claimant short term and long term disability benefits to which he was entitled under the terms of his employment. The ALJ ordered employer to pay a \$3,000 penalty and provide claimant with 26 weeks of short term disability and long term disability benefits thereafter in accordance with employer’s disability plan with a credit for any longshore compensation paid during the period of short term disability. Employer paid the penalty but did not pay the short term disability benefits. Claimant sought enforcement from the district director, who refused to enforce the order because the short timer disability benefits were not compensation. Claimant sought a hearing before the ALJ, who again ordered payment of short and long term

disability, subject to a credit for LHWCA compensation paid. Employer appealed.

The Board held the remedy for a claimant who is discriminated against is the reinstatement of his job and back wages, provided he is qualified to perform the job. As claimant could not perform his former job, claimant could not recover lost wages. As the ALJ's order to pay short term disability in addition to compensation was premised on allowing claimant a recovery for lost wages, a remedy which was unavailable, the award of reimbursement of short term disability as lost wages was improper.

### Employer/Employee – Borrowed Servant

**Borrowing employer had immunity from tort suit.** *Hotard v. Devon Energy Production Co LP*, 2009 WL 166688 (5<sup>th</sup> Cir 2009) (not selected for publication).

Wood, a contractor who supplied laborers for work on offshore oilrig platforms, hired Hotard and sent him to Devon, where he was bit by a spider while sleeping in his bunk on the platform. Hotard sued Devon for damages, but the district court granted summary judgment because Hotard was Devon's borrowed employee, and Hotard's exclusive remedy was workers' compensation, per §5(a). The court affirmed, based on the district court's assessment of the nine factors to determine borrowed employee status stated in *Brown v. Union Oil Co of Cal*, 984 F.2d 674 (5<sup>th</sup> Cir 1993): (1) Who had control? (2) Whose work was being performed? (3) Was there an agreement between original and borrowing employer? (4) Did the employee acquiesce in the new work situation? (5) Did the original employer terminate his relationship with the employee? (6) Who furnished tools and place for performance? (7) Was the new employment over a considerable length of time? (8) Who could discharge the employee? (9) Who had the obligation to pay the employee?

### Exclusions - Other

**Agency of state need not have sovereign immunity to qualify for §3(b) exclusion.** *Wheaton v. Golden Gate Bridge, Highway & Transportation District*, 559 F.3d 979 (9<sup>th</sup> Cir 2009), affirming 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 9<sup>th</sup> Circuit previously held that the District was a public corporation and a political subdivision of California. The Board held under §3(b), the exclusion applicable to agencies of a state was not limited to those bodies that had sovereign immunity. The 9<sup>th</sup> Circuit held the following factors could be considered when determining if the entity was a subdivision of the state: (1) Was it created by state law? (2) Did it have all powers necessary to exercise its functions? (3) Did it

have the power of eminent domain? (4) Could it assess or collect taxes? (5) What was its status under state law? (6) Was it exempt from federal taxation? (7) Was its operations subject to public hearings and were its records open to the public? (8) Were its officials responsible to the public? (9) Were social security benefits for its employees provided voluntarily? (10) Did the entity's officers receive nominal compensation? (11) Did the entity have subpoena power?

9<sup>th</sup> Circuit held subdivision of a state included municipalities of a state, and the District here was a subdivision of the state.

**Security guard not excluded. Did not do office security work exclusively.** *K.L. v. Blue Marine Security, LLC*, 2009 WL 1161355 (BRB 2009).

Claimant worked as a guard aboard a ship, as required by Homeland Security regulations, and was exposed to substances which caused a seizure and loss of consciousness. The Board held claimant was not excluded from coverage because he was not exclusively performing "office" security work., but was working on a vessel subject to the marine hazards attendant thereto. He was not confined physically or by function to an office or other administrative area on land. This was not the type of security officer intended to be excluded per §2(3)(A), as he was exposed to traditional maritime hazards.

### Interest

**Simple, not compound interest.** *Estate of C.H. v. Chevron USA, Inc.*, 2009 WL 886340 (BRB 2009).

Board rejected claimant's request to award compound interest on past due compensation and held simple interest was due.

### Maximum & Minimum Compensation

**TTD based on maximum comp rate at time of injury. PTD based on maximum as of date PTD effective, or perhaps as of next October 1.** *Estate of C.H. v. Chevron USA, Inc.*, 2009 WL 886340 (BRB 2009).

Claimant was injured on 10/13/86 and in December 2003 was awarded TTD from 10/14/86 through 7/5/88 and PTD as of 7/6/88 based on an AWW of \$1,009.63. 2/3 of AWW = \$673.09, but maximum compensation rate was \$605.32 on 10/13/86, \$616.96 on 7/6/88, \$636.24 on 10/1/88, and \$1,030.78 in December 2003. Claimant contended he was subject to the maximum rate in 2003, when awarded PTD. The Board held claimant was entitled to TTD based on the maximum rate in effect in 1986, when temporary disability commenced. As claimant was currently receiving PTD on October 1, 1988 he was then subject to the maximum rate in effect at that time, *i.e.*, \$636.24, with annual adjustments thereafter. The Board implied claimant was not entitled to an adjustment in the

compensation rate from 7/6/88, when PTD commenced, through 9/30/88, even though the maximum rate in this period was \$616.96, which was more than the maximum rate on the date of injury.

### Medical Services – Other

**Chiropractic treatment necessary for spinal manipulation to treat a spinal subluxation is compensable.** *N.T. v. Newport News Shipbuilding & Dry Dock Co.*, 2009 WL 1549207 (BRB 2009).

20 CFR §702.404 states physician includes chiropractors, only to the extent their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. Here, employer paid for manipulation, but not the other modalities. The Board held reimbursement was not limited to the fee for manipulation, if there was a subluxation, but could include any treatment related to the chiropractic manipulation to treat a demonstrated subluxation. Here, the chiropractor testified the other therapies were necessary for spinal manipulation and therefore all treatment was compensable.

### Modification – Mistake in Fact

**Modification requires examination of accuracy. Failure to litigate issue initially is not relevant.** *R.V. v. Friede Goldman Halter*, 2009 WL 8863342 (BRB 2009).

Claimant injured his foot and could not return to usual and customary employment. Employer offered no evidence of alternative employment, and the ALJ awarded PTD. Somewhat more than three years later employer petitioned for modification based on a labor market survey showing suitable alternative employment. The ALJ held the evidence established either the initial decision was factually mistaken or conditions changed and claimant was no longer totally disabled. The ALJ modified the award to allow 18% PPD for the foot. The Board affirmed, reversing its prior decisions in *Feld v. General Dynamics Corp.*, 34 BRBS 131 (BRB 2000), and in *Lombardi v. Universal Mar. Serv. Corp.*, 32 BRBS 83 (BRB 1998), which held §22 was not intended to be a backdoor for litigating an issue which could have been raised in the initial proceeding or for correcting tactical errors or omissions of counsel.

Employer need not prove the evidence it offers for modification was not available before the first hearing. Modification proceedings are *de novo*, and the ALJ is not bound by prior fact finding. §22 reflects the Act's preference for accuracy, as by its very terms it permits the alternation of awards based on claimant's current physical or economic condition or to correct an award resting on a mistake in fact.

**Failure to raise credit in state claim not a bar to modification.** *M.R. v. Electric Boat Corporation*, 2009 WL 886343 (BRB 2009).

Employer initially paid claimant compensation under a state act claim and later was ordered to pay TTD for the same period under the LHWCA. Employer petitioned for modification, seeking credit for compensation paid in the state claim and also seeking payment of PPD rather than TTD. Claimant petitioned for modification to obtain PTD. The ALJ held the credit existed at the time of the first award and could not be addressed in a modification proceeding. The Board held employer was allowed to seek the credit through modification, as the failure to raise entitlement to a credit earlier was not a basis for declining to modify. Modification is not defeated merely on grounds of finality.

### Penalties – Entitlement, Enforcement

**No penalty if amount due cannot be determined. No penalty on unpaid penalty reversed on appeal. Penalty may be based on medical expenses paid by claimant.** *Estate of C.H. v. Chevron USA, Inc.*, 2009 WL 886340 (BRB 2009).

Claimant was injured on 10/13/86 and was awarded TTD from 10/14/86 through 7/5/88 and PTD as of 7/6/88 based on an AWW of \$1,009.63, with credit for compensation previously paid. The ALJ also awarded a 10% penalty per §14(e) and ordered the district director to make the necessary calculations. The district director calculated the amount due, including \$15,511.43 for the §14(e) penalty. Claimant alleged an underpayment and sought a 20% penalty, per §14(f), for failure to pay all compensation due, including the §14(e) penalty. In a separate appeal, the Board reversed the penalty.

No penalty was due because the full amount due was subject to a genuine factual dispute and could not be determined without resort to extra record facts. Therefore, employer cannot be held in default of the additional amounts.

Claimant may be entitled to a §14(f) penalty based on medical expenses claimant paid and for which entitled to reimbursement from the employer.

Additionally, claimant was not entitled to payment of the §14(e) penalty because the underlying award was vacated. [A penalty need not be paid pending appeal, and is not subject to a penalty if it is not paid and is vacated on appeal.]

### Permanent Disability – Other

**Contract prohibiting alternative employment while on time loss enforced. Alternative employment not available if working would result in termination.**

The leave of absence provision of the collective bargaining agreement between employer and her union provided her employment would be subject to termination if she accepted employment with another employer while off work due to a work related injury. The Board held this provision prevented employer

from relying on labor market surveys showing suitable alternative employment. The contract rendered work with other employers unavailable to her. Alternative employment is not available where doing so would result in termination of her employment with employer.

### Responsibility – Last Injurious Exposure Rule

**Responsibility determined simultaneously, not consecutively.** *Dillingham Ship Repair v. USDOL (Schuchardt)*, 2009 WL 784267 (9<sup>th</sup> Cir 2009) (not selected for publication).

The Board held all potentially liable employers had a simultaneous burden to prove no injurious exposure or subsequent injurious exposure. This rule was consistent with prior decisions. Here, the ALJ applied the burden sequentially, beginning with the last employer and working backwards in time, so any error was harmless.

**Asbestos remained because employer failed to prove it was removed.** *R.H. v. Baton Rouge Marine Contractors, Inc.*, 2009 WL 1549195).

Until 1970 claimant's work included unloading asbestos from ships and restacking it on the dock. Thereafter, he became crane operator and had no recollection of directly handling asbestos, but he remembered working in terminals where asbestos was handled. He quit working as a longshoreman in 1977 and worked in non-maritime employment until 2005. Prior to retirement he was diagnosed with asbestosis. Industrial hygienist testified asbestos was difficult to destroy, and an employee would continue to be exposed to asbestos unless the warehouse was decontaminated. There was no evidence asbestos had been removed from employer's facilities, and employer's representative testified there was no asbestos removal program in the 1970's.

The ALJ concluded claimant was an involuntary retiree and was entitled to PTD because employer did not offer any evidence of suitable alternative employment. The last insurer was found responsible. Employer/insurer failed to present any evidence of asbestos eradication prior to leaving the Port in 1977 or any evidence proving claimant was not exposed to asbestos after 1970. The ALJ was entitled to credit the industrial hygienist's testimony. Employer/insurer offered no evidence to rebut it. Therefore, the last insurer was responsible for payment of compensation and medical benefits.

### Third Party – Other

**Boat in port for routine service still in navigation.** *Romero v. Cajun Stabilizing Boats, Inc.*, 2009 WL 150655 (5<sup>th</sup> Cir 2009) (not selected for publication).

Romero, a marine welder, slipped and fell to the floor of the rudder room on the *Court*, injuring his knee. He filed suit against Cajun, the boat's owner, under

§5(b). The district court granted summary judgment for Cajun. On appeal, Romero argued the court did not have jurisdiction because the *Court* was not a vessel in navigation because it had been in dry dock for several weeks before the injury. The court held this brief hiatus from service for routine repairs did not terminate vessel in navigation status.

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