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

**Reductions for out of town attorney travel time must be supported by evidence competent local counsel was available.** *B.H. v. Northrop Grumman Ship Systems, Inc.*, 2009 WL 3159148 (BRB 2009).

Attorney from Louisiana represented claimant from Mississippi. The ALJ reduced travel expenses by half, observing that local counsel were more geographically suited to handle the claim. The Board noted fees for travel time may be awarded when travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. Neither the ALJ or the district director provided factual support for their implicit conclusions or took judicial notice that competent, experienced counsel was available in claimant's community. They did not make explicit findings regarding the geographic area constituting claimant's locality or cite information regarding the number of attorneys within claimant's locality who represent longshore claimants. Without such evidence, claimant's decision to retain counsel in Louisiana was not unreasonable, and counsel was entitled to reimbursement of reasonable travel time and expenses.

**Portland attorney Robinowitz awarded \$309/hour.** *Heidi Eberly-Sherman*, 2007-LHC-00231, (ALJ Etchingham 10/31/07).

[http://www.oalj.dol.gov/Decisions/ALJ/LHC/2007/HS\\_v\\_DEPARTMENT\\_OF\\_THE\\_AR\\_2007LHC00231\\_%28OCT\\_31\\_2007%29\\_155124\\_CADEC\\_SD.PDF](http://www.oalj.dol.gov/Decisions/ALJ/LHC/2007/HS_v_DEPARTMENT_OF_THE_AR_2007LHC00231_%28OCT_31_2007%29_155124_CADEC_SD.PDF)

Attorney Robinowitz sought \$400.00/hour for his time plus \$150.00 per hour for legal assistant time, citing a variety of sources, including the Morones Survey, affidavits of attorneys Goldsmith, Markowitz, Skerritt, and Crow, and 2008 Oregon State Bar Litigation Section Survey. The ALJ found petitioner's practice not comparable or similar to attorneys discussed in affidavits and instead deferred to the Survey of Law Firm Economics. Average fee was \$266.60, but fee for attorneys in the upper quartile was \$309.00. Therefore, the ALJ awarded \$309.00 per hour for attorney time and \$110.00 per hour for legal assistant time.

**Tacoma attorney Sweeting awarded \$285/hr.** *V.P.*, 2008-LHC-00842, (ALJ Berlin 8/18/09).

[http://www.oalj.dol.gov/Decisions/ALJ/LHC/2008/VP\\_v\\_APM\\_TERMINALS\\_ET\\_AL\\_2008LHC00842\\_%28AUG\\_18\\_2009%29\\_173056\\_ATDEC\\_SD.PDF](http://www.oalj.dol.gov/Decisions/ALJ/LHC/2008/VP_v_APM_TERMINALS_ET_AL_2008LHC00842_%28AUG_18_2009%29_173056_ATDEC_SD.PDF)

ALJ found the Laffey Matrix and a survey of 250 of the largest law firms not comparable to petitioner's market. The OSB 2007 Survey found the average workers' compensation attorney billed \$188.00 per hour, but those in the 75<sup>th</sup> percentile billed \$235.00. Applying a cost of living adjustment, which indicated Seattle cost of living is 21% higher than Portland, the ALJ awarded the attorney \$285.00 per hour and awarded \$100.00 for the legal assistant time.

### Attorney Fees – Entitlement

**Responsible employer must pay pre-joinder fees.** *S.T. v. California United Terminals*, 2009 WL 1918154 (BRB 2009).

Claimant initially filed a repetitive trauma claim but continued to work. CUT, a subsequent employer, was joined and eventually was found responsible but argued it should not be responsible for fees before the ALJ issued an order of joinder. The Board held CUT was responsible for pre-joinder fees, per the same rationale discussed in *Dyer v. Cenex Harvest States Co-op*, 563 F.3d 1044 (9<sup>th</sup> Cir 2009). Once liability under §28(a) is established, employer is liable for a reasonable attorney's fee, including pre and post controversion services.

**Fee on appeal because prevailed by proving methodology of calculating fee wrong; immaterial whether rate will increase.** *Christensen v. Director, OWCP*, 2009 WL 2424798 (9<sup>th</sup> Cir 2009).

In prior decisions, the court remanded fee awards because the methodology employed by BRB and other agency decision makers was flawed. In this proceeding, petitioners sought fees for services before the 9<sup>th</sup> Circuit. Employer argued fees were premature because petitioners might receive the same hourly rate on remand. The court rejected this argument. Petitioners unquestionably prevailed on the issue because the court invalidated the agency's methodology. Therefore, petitioner prevailed *on these appeals* and was entitled to a fee.

### Average Weekly Wage - §10(c)

**AWW should be based on earnings in year before disability, if representative of earning capacity.** *J.T. v. Global International Offshore, Ltd.*, 2009 WL 2358304 (BRB 2009).

Claimant worked for Global from October 1995 to February 2006, for Keller from July 1996 to November 1997, and for Global from March 1998 until a heart attack in June 2002. Claimant rarely worked 52 consecutive weeks, except in the last

year of his employment, ending in June 2002. Keller, the last maritime employer, was found responsible for bilateral CTS, bilateral arthritis of hands, and bilateral ulnar entrapments and left ear hearing loss. Disability caused by these conditions did not become manifest until June 2002.

Because the last year was a rare period when claimant worked almost continuously, the ALJ used earnings in 2000 and 2001 to calculate AWW, as the most accurate reflection of earning capacity toward the end of his career when he was physically able to work a full year. The Board reversed. It was not logical to reject more recent earnings because he worked a full year and accept earlier earnings because that was the last period he was able to work for a full year. On remand, the ALJ should use 52 weeks preceding disability, or calculate the average weekly wage based on all of earnings between 2000 and 2002 to give effect to the finding that claimant did not normally work 52 consecutive weeks.

### Causation – Occupational Disease Claims

**Psychological injuries arising from legitimate personnel actions not compensable.**  
*Pedroza v. BRB*, 583 F.3d 1139 (9<sup>th</sup> Cir 2009).

Claimant was unloading a ship when he struck a 440 volt cable line, causing an explosion. He did not seek medical attention. A year later employer's manager sent him a letter stating the accident was caused by his negligence. He then sought medical attention. He had a series of meeting with supervisors regarding his work ethic and was warned he would be demoted if he did not improve. Eventually, he was demoted. A month later he was put on medical leave and then filed a workers' compensation claim for psychological injuries caused by stressful working conditions. The ALJ concluded claimant's psychological injuries were due to legitimate personnel actions rather than the initial accident or "general working conditions." Substantial evidence supported this finding.

Per *Marino v. Navy Exchange Service*, 20 BRBS 166 (BRB 1988), a psychological reaction to legitimate good faith personnel actions by the employer is not compensable because it does not constitute working conditions Congress intended to compensate. Per *Sewell v. Noncommissioned Officers Open Mess*, 32 BRBS 127 (BRB 1997), a claimant must demonstrate a psychological disability was caused by stressful working conditions irrespective of disciplinary and termination proceedings. The Court held the *Marino-Sewell* doctrine was a reasonable interpretation of the Act and a reflection of its underlying policy. Psychological injuries arising from legitimate personnel actions are not compensable under the LHWCA.

## Causation - §20 Presumption

**No injury per §20 when claimant was not credible.** *Turner v. Director, OWCP*, 2009 WL 1809855 (5<sup>th</sup> Cir 2009) (designated as not for publication).

Three months after falling from a ladder and suffering a laceration to the forehead and a broken nose, claimant complained of low back pain. He sought additional compensation due to the alleged back injury. The ALJ found his testimony riddled with contradictions, inconsistencies, inexplicable denials, and accordingly gave no credit to opinions of claimant's medical experts who relied on claimant's false report of symptoms and physical limitations. On appeal, the Board held §20(a) did not apply because claimant failed to prove the predicate injury necessary to invoke the presumptions. Even if invoked, employer presented substantial evidence to rebut it.

## Defense Base Act

**Personal injury, not in zone of special danger.** *R.F. v. CSA, Limited*, 2009 WL 3159147 (BRB 2009).

Claimant contracted to work for employer in Kuwait as a digital imaging specialist. He had a history of treatment for depression and anxiety and a history of undergoing cosmetic dermatologic treatments and procedures. He had been diagnosed as obsessed about his skin. While in Kuwait, he sought and received treatment for wrinkles, evenness of complexion, laser hair treatment, and similar services. As part of the treatment he used a chemical peel, which caused his skin to turn red and become riddled with lines. He "freaked out," sought more treatment from doctors in Kuwait, which was unsuccessful, and was allowed to return to the United States, where he saw a number of dermatologists and mental health professionals for treatment. He filed a claim under the Defense Base Act, alleging the zone of special danger doctrine brought the injury within the course and scope of employment.

Under the DBA, an injury may be in the course of employment even if it did not occur within the space and time boundaries of work, so long as the employment creates a zone of special danger out of which the injury arises. Here, the chemical peel was personal in nature and did not have its genesis in his employment. The zone of special danger doctrine does not apply. Claimant failed to establish working conditions that could have caused his skin damage or psychological harm. Denial of benefits affirmed.

## Employer/Employee – Borrowed Servant

**Plaintiff was borrowed servant of RTI. DBA was claimant's exclusive remedy.**

*Ladd v. Research Triangle Institute*, 2009 WL 1919007 (4<sup>th</sup> Cir 2009) (designated as not for publication).

RTI contracted with USAID to provide reconstruction services in Iraq following the 2003 US invasion. It subcontracted with Chemonics to recruit qualified personnel. Chemonics recruited and hired Ladd. Ladd was injured in a MVA when traveling to a meeting. He filed suit against RTI seeking damages for negligence. RTI exercised direction and control over Ladd, controlled Ladd's salary, and had the power to hire and fire and reassign Ladd to other territories. Ladd admitted he reported to and took instructions from RTI. On summary judgment, the court concluded Ladd was a borrowed servant of RTI, who was subject to the DBA. Therefore, claimant's exclusive remedy was the DBA.

## Employer/Employee – Other

**No employer/employee relationship when told not to come to work but came anyway.** *R.M. v. P&O Ports Baltimore, Inc.*, 2009 WL 2358305 (BRB 2009).

Claimant received a dispatch to report to Port of Baltimore at 7:00 a.m. He arrived at 7:15 a.m., after the timekeeper had called for a replacement. The superintendent told him he could not work. In spite of this, he boarded the vessel and began to unload a vehicle. The Superintendent found him sitting in a car to be driven off the ship. Some sort of altercation occurred when the Superintendent tried to open the door and claimant tried to keep it closed. When claimant drove the vehicle down the ramp he was stopped by security and escorted off premises. He claimed his wrist and shoulder were injured during the altercation.

Claimant failed to prove there was an employer-employee relationship when injured. For this relationship to exist there must be an express or implied contract of employment with the informed consent of both parties. Claimant had not been hired before he was injured. He was not hired to work after he reported late and was replaced. His injuries were not compensable.

## Maximum and Minimum Compensation

**When the compensation rate is the maximum compensation rate, initial PTD is subject to the maximum rate at time of injury, but the next October 1 increase should correspond to the maximum compensation rate at that time.** *W.N. v. Universal Marine Service Corporation*, 2009 WL 1677627 (ALJ Sarno 2009).

Claimant was injured on 02/14/99. His average weekly wage was \$1,364.16. Two-thirds of the average weekly wage was \$909.44, but payment of total

disability was subject to the maximum compensation rate, which progressed as follows:

Date	Maximum CR
02/14/99	\$871.60
10/01/99	\$901.28
10/01/00	\$933.82
10/01/01	\$966.08
10/01/02	\$996.54
10/01/03	\$1,030.78
10/01/04	\$1,047.16

Claimant reached maximum medical improvement on 8/10/00. The ALJ awarded PTD from 08/10/00 through 12/18/00, PPD from 12/19/00 through 08/05/04, and PTD from and after 08/06/04.

The ALJ held the initial payment of PTD from 08/10/00 through 09/30/00 should be paid @ \$871.76, but PTD from 10/01/00 through 12/18/00 should be paid @ \$933.82, the maximum compensation rate at that time. When claimant again became entitled to PTD as of 08/06/04, he did not receive “newly awarded” compensation. Therefore, from 08/06/04 through 09/30/04 the rate was \$871.60, but as of 10/01/04 the rate was \$1,047.16, the maximum compensation rate at that time.

### Permanent Disability – Hearing Loss Claims

**Hearing loss must be based on AMA compliant audiogram.** *Green-Brown v. Sealand Services, Inc.*, 2009 WL 3465934 (4<sup>th</sup> Cir 2009).

Claimant retired in 1987 due to a stroke. A 5/1/87 audiogram showed 5.65% binaural hearing loss, though it did not test 3000 Hz as required 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%. The Court reversed. The statute states determination of loss of hearing *shall be made* in accordance with the AMA Guides. The 1987 audiogram did not measure 3000 Hz and therefore was not AMA compliant. Compensation should be awarded based on the 2005

audiogram, the only one in the record that complies with the AMA *Guides*, even though it was administered 18 years after retirement.

### Situs – Adjoining Area

**Location had functional and geographic nexus to adjoining area.** *S.W. v. Atlantic Container Service*, 2009 WL 2845678 (BRB 2009).

Conley Terminal is located within, and has direct access to, Boston Harbor and is adjacent to Pleasure Bay and the Reserved Channel. Because of space limitations, claimant's job site moved to another facility located one mile outside the Conley Terminal, at 95 Fargo Street, where he tore his rotator cuff. ALJ held the Fargo Street site was not a covered situs. The Board reversed. It was in close proximity to navigable waters and its proximity was dictated by maritime concerns (insufficient space at Conley). It was within the same geographic area near the waterfront as Conley Terminal. It was located as close to the waterway and to Conley Terminal as was feasible and was particularly suited for maritime purposes. Fargo Street had a functional and geographic relationship with the Conley Terminal, which was sufficient to establish it was an adjoining area.

### Situs – Navigable Waters

**Insufficient contact with US to conclude injury in foreign port on navigable waters of the US.** *J.T. v. Global International Offshore, Ltd.*, 2009 WL 2358304 (BRB 2009).

Claimant worked for Global from October 1995 to February 2006, for Keller from July 1996 to November 1997, and for Global from March 1998 until June 2002. Work for Global beginning March 1998 initially was as a barge foreman on the *Iroquois* while it was in Louisiana being prepared for a voyage, and then while it was being towed to a port in Mexico and while laying pipe off the Mexican shore. Then, he worked on barges "264" and the *Seminole* in Malaysia, Singapore, and Indonesia until a heart attack in 2002.

Claimant filed a claim for bilateral CTS, bilateral arthritis of hands, and bilateral ulnar entrapments and L ear hearing loss. The ALJ found all conditions compensable and found Keller responsible as the last covered maritime employer. Keller offered numerous arguments in an attempt to qualify post Keller employment as subject to the LHWCA, all of which were rejected.

Work in Malaysia, Singapore, and Indonesia was not work on a navigable waters of the United States. In *Weber v. S.C. Loveland Co. [Weber I]*, 28 BRBS 321 (BRB 1994), *decision after remand [Weber II]*, 35 BRBS 75 (BRB 2001), *on recon.*, 35 BRBS 190 (2002), claimant worked primarily in the US but was sent to Kingston, Jamaica to unload cargo from vessel loaded in New Orleans. He was injured in Kingston when unloading cargo. The Board extended coverage, noting a trend to extend coverage to foreign waters, especially when all contacts, except

for the site of the injury, are with the US. Here, claimant was based overseas 1998 to 2002 and spent time on barges which were berthed in and departed from foreign ports. Voyages did not begin in the US and did not merely deviate onto the high seas or foreign waters. His assignments commenced and terminate in foreign territories on foreign waters. Claimant did not sustain injuries on navigable waters of the US.

**Injury on bridge not on covered situs.** *F.S. v. Wellington Power Company*, 2009 WL 2845677 (BRB 2009).

Claimant worked as an electrician on the Woodrow Wilson Bridge project. To get to the work site he crossed a series of barges and ascended a stairwell to reach the road deck on the Maryland side of the river and then descended to an unenclosed level beneath the road deck to do his electrical work. The bridge was not open to traffic. The maintenance level where claimant worked was permanently affixed to the bridge. When working on mechanisms related to the drawbridge, he fell and fractured his left wrist.

Although the project was intended in part to increase navigability of the Potomac River, it was not an adjoining area. Also, it was not on navigable waters because it was permanently affixed to land and was an extension of land.

### Permanent Disability – Employer’s Burden

**Proposed job might not be within reasonable commuting distance.** *B.H. v. Northrop Grumman Ship Systems, Inc.*, 2009 WL 3159148 (BRB 2009).

Claimant argued employer failed to establish suitable alternate employment because claimant was incapable of traveling to any jobs because her sole means of transportation had been destroyed by Hurricane Katrina. An inability to drive due to a work related injury should be taken into consideration, but here, claimant was able to drive but did not have a car. The ALJ did not explicitly consider whether the extended commuting distance to the Aerotek position, 58 miles one way, rendered that job unavailable, particularly in view of her lack of an automobile. The case was remanded for further consideration.

**If worker leaves suitable alternative work for reasons unrelated to injury, employer does not bear a renewed burden to prove new suitable employment.** *B.H. v. Northrop Grumman Ship Systems, Inc.*, 2009 WL 3159148 (BRB 2009).

Claimant quit a post injury position with a different employer after receiving a letter from the employer at injury offering her employment in a modified position. That position never materialized.

If suitable alternate employment is established, and claimant leaves the position for reasons other than her work related injuries or voluntarily removes herself

from the workforce, employer does not bear a renewed burden of establishing new suitable alternate employment thereafter. Here, on remand, the ALJ should determine if claimant reasonably left her job in reliance of the job offer. If so, disability should be reinstated unless employer proves other work was suitable and available.

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