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Attorney Fees – Amount

West coast attorney fees generally \$225 to \$250/hour. *Kolina v. Port of Oakland Constructors*, 39 BRBS 158 (ALJ Dorsey 2005) (Roger Levy for employer/carrier; Derek Jacobson for claimant).

Claimant sought payment @ \$290/hour for attorney services and \$125/hour for legal assistant services. The ALJ awarded the attorney \$250/hour and, because there was no objection to the legal assistant rate, awarded \$125/hour for those services. Claimant's counsel never claimed he typically billed his clients \$290/hour, and as plaintiff's attorney he commonly received fees on a contingency basis rather than an hourly rate. A prevailing rate derived from evidence of what lawyers in the community of similar experience and skill for hourly work could serve as a proxy for non-existent hourly rates, but such evidence was unavailable. The ALJ therefore set a rate based on familiarity with the awards currently made to lawyers in other longshore cases. For experienced practitioners in major cities on the west coast the rate currently hovered around \$225 to \$250 per hour.

Exclusions – Jones Act

Not Entitled to Jury Trial on LHWCA and Maritime Negligence claims after Appellate Court ruled rig operator not a Jones Act seaman. *Becker v. Tidewater, Inc.*, 39 BRBS 30 (5th Cir 2005).

Court of Appeals reversed a \$43 million verdict in a Jones Act claim because plaintiff was not a seaman and remanded for further proceedings on alternative LHWCA and maritime negligence claims. Defendant's request for a jury trial on the remaining theories was denied because of the historical exclusion of jury trials for admiralty suits. Furthermore, plaintiff never asserted diversity jurisdiction or any other basis of jurisdiction which would entitle defendant to a jury trial.

Mud engineer on submersible drilling barge was Jones Act Seaman. *Goldman v. Halliburton Energy Services*, 39 BRBS 152 (ALJ 2005).

Claimant was employed as a "mud engineer" whose duties involved collection and storage of drilling fluids in connection with offshore oil and gas exploration. Claimant was injured when on Falcon Barge 63, which had been sunk but was unattached and was being raised to move to a new location. The ALJ concluded that claimant contributed to the function of the vessel because the purpose of the barge was to drill, and claimant's job was to collect, store, and analyze the fluids produced by those drilling operations. Claimant had a connection to the vessel that was substantial in duration and nature. He was not simply a land based employee who happened to be working on the vessel at a given time. He had lab and living quarters on the vessel and worked on the vessel 20-23 days per month.

Hearings – Other

Contention that district judge was prejudiced not considered on appeal due to failure to failure to raise issue below or comply with 28 USC §144. *Becker v. Tidewater, Inc.*, 39 BRBS 30 (5th Cir 2005).

At the request of the parties the district judge mediated a settlement conference in the course of which he gained significant knowledge of the parties' settlement positions. When the settlement negotiations failed, the judge had to become the trier of fact. This role would have been inappropriate given his knowledge of the parties' evaluation of their financial positions on settlement, and he should have been recused, either *sue sponte* or by granting a recusal motion filed by a party. Neither party did this, so when defendant alleged for the first time on appeal that the judge was prejudiced and sought transfer to another judge if the case was remanded the court declined to consider the argument because it had not been raised on appeal, nor had defendant complied with 28 USC §144.

Medical Services – Choice of Physician

Claimant exercised choice of physician. *Hester v. North American Shipbuilding, LLC*, 39 BRBS 51 (ALJ 2005).

Employer's witness, who the ALJ credited, testified that he followed usual the usual procedure of presenting and explaining forms to claimant, which claimant signed, thereby designating a physician. Claimant returned to this physician six times and did not complain until the physician released him to return to work. The ALJ concluded that claimant had exercised his choice of physician. If he had thought otherwise, he should have taken action earlier rather than waiting until the conclusion of his treatment.

Medical Services – Other

Chiropractor entitled to payment for massage and muscle stimulation when done as adjunct to manipulation. *Voytovich v. C&C Marine Maintenance Co.*, 39 BRBS 63 (ALJ 2005).

Chiropractor indicated that his charges reflected evaluation and treatment for subluxation, but prior to correction of a subluxation it was within the standard of care to provide adjunctive physiotherapy modalities which were needed to safely and effectively perform the adjustments or manipulations necessary. Also, he said continuing supportive measures were necessary to prevent rapid deterioration of claimant's condition. §702.404 provides that chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. The ALJ nevertheless held that as muscle stimulation and massages were necessary adjunctive procedures required before a manual manipulation or a subluxation could be safely performed, and examinations were done to determine if treatment was required, all fees were reimbursable under the regulations.

Modification – Mistake in Fact

Defense medical evaluator's "clarification" report received on remand and sufficient to rebut presumption of compensability. Law of the case doctrine does not apply when change in underlying facts, initial decision was erroneous, or it would be manifest injustice to allow it to stand. *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (BRB 2004).

The Board held that the ALJ erred in denying modification because a report from claimant's treating physician was sufficient to show a mistake in fact and a report from employer's consultant, Dr. Nehmer, was insufficient to rebut the §20 presumption. On remand employer

submitted a new report from Dr. Nehmer which the ALJ felt rebutted the §20 presumption. Accordingly, the ALJ denied modification.

The Board held that the “law of the case” doctrine does not apply where there has been a change in the underlying factual situation and the initial decision was erroneous or it would be a manifest injustice to allow the first decision to stand. Here, Dr. Nehmer’s report demonstrated a change in the underlying factual situation. Furthermore, under §22 the fact finder may admit new evidence and reconsider an issue on his own motion or that of any party. §22 displaces notions of finality inherent in the law of the case doctrine and evinces the Act’s preference for accuracy unless modifying the earlier decision would not render justice under the act.

Modification – Other

Letter expressing intent to seek scheduled PPD not anticipatory filing and was valid petition for modification. *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (BRB 2005).

Three months after ALJ issued an order awarding TPD to worker who had injured both hands on the job, had a period of TPD, but then was released for regular work, claimant sent a letter to the OWCP stating: “Please consider this correspondence the claimant’s request for permanent partial disability benefits. She will be scheduling an appointment to meet with Dr. Gilbert for this purpose and I will forward the medical report to your attention upon receipt.” Claimant did not see the doctor for eleven months, at which time claimant forward the doctor’s report to the OWCP requesting 5% PPD.

The letter manifested an actual intention to seek compensation for a particular type of benefit (PPD). Since the ALJ’s order was for a period of TPD employer could reasonably expect a claim for additional compensation. The claim was not anticipatory. Her PPD ran from the date of maximum medical improvement, so she had an additional disability which predated the filing for modification. That the impairment was not yet quantified when claimant filed for modification does not establish the invalidity of her modification request.

Penalties – Propriety

No new controversion required after every new issue when initial claim controverted. *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (BRB 2005).

§14(d) states that employer is liable for an additional 10% penalty unless it files a notice of controversion on or before the 14th day after knowledge of an alleged injury or death. Employer timely filed a notice of controversion but later an ALJ ordered employer to pay TPD. Three months after the ALJ’s order claimant petitioned for modification. Claimant sought a 10% penalty because employer had not timely controverted the claim for modification. The Board held that employer was not liable for a penalty because the plain language of the statute required employer to controvert a claim after obtaining knowledge or notice of the injury, and as a request for modification was a new claim based on an existing injury, no new notice of controversion was required.

Responsibility – Last Injurious Exposure Rule

First employer must prove there was new injury or aggravation in new employment. Second employer must prove condition was solely due to injury with first employer. *McDonnell Douglas Services/Boeing v. AIG Claims Services*, 39 BRBS 117 (ALJ 2005).

Following a 10/28/87 injury when employed by McDonnell Douglas claimant gradually returned to full duty. When working for a new employer, Alsalam, but still receiving treatment, claimant’s condition worsened. The ALJ concluded that to be relieved of liability in a two injury/aggravation

case, the first employer had the burden to prove by a preponderance of the evidence that there was a new injury or aggravate during employment with the second employer. The second employer had to prove that claimant's condition was solely the result of an injury with the first employer. In this claim the ALJ concluded that claimant's disability was solely due to the natural progression of his first injury.

§8(f) – Absolute Defense

§8(f) application untimely when mailed but not received on due date. *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (BRB 2005).

Employer raised §8(f) at an informal conference on 11/13/02 dealing with a claim for PTD. The District Director set 12/13/02 as the deadline for receipt of the application. Employer mailed the application that day but it was received on 12/18/02. The district director denied the application because it had not been timely filed.

Held: the absolute defense applies. The deadline was not arbitrary. Employer did not object or request an extension. Rules adopted by the Board and OALJ providing for additional time when a document is mailed do not apply here. The district director's instructions to the employer were unambiguous regardless of how she had dealt with other employers in other cases.

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The **NWLAA Case Law Review** is provided by Norman Cole. Mr. Cole previously worked as trial counsel for SAIF Corporation for 26 years. As of May 23, 2005 he is at the Portland, Oregon firm of Sather, Byerly & Holloway, where he continues to represent employers and carriers in workers' compensation claims under the Oregon Compensation Act and the L&HWCA.