



ON THE WATERFRONT

LONGSHORE QUARTERLY

U.S. Department Of Labor
Longshore & Harbor Workers'
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JUNE 2005

Effective May, 2005 the case file assignments and telephone numbers are as follows:

Claims Examiners

000-332* Marianne Smith 8-8273* *
333-665 Clyde Taylor 8-8278
666-999 Ken Janicke 8-8276

*Last 3 digits of OWCP File #

** (206) 398-8273

Please note that Elke Crabbe is no longer assigned to this district. Please direct correspondence to the appropriate claims examiner.

Workers' Comp Assistants

000-499 Liddian Rivers 8-8274
500-999 Bill Norcross 8-8272

Claims Clerk (and Mail and File)

Demetrius Hatcher 8-8290

Voc Rehabilitation Specialist

Ed Cope 8-8231

Case Create Clerk and Operator

Annette Marin 8-8280

Annette's last work day with us will be June 30th.

District Director

Karen Staats 8-8277

Generic Email Address

zzESA-OWCP-DLHWC-SEA-REP-ALL

This address will send an email to the claims examiners and district director and should be used for general inquiries only.

Interest, Min/Max and Mileage

Parties are reminded that the interest due on compensation is calculated from the date of entry of the judgment (date order is filed) at a rate equal to the weekly average of one year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System. The current rate can be found at:

www.federalreserve.gov/releases/

Effective **October 1, 2004** minimum and maximum compensation rates were:

**National Average Weekly Wage:
\$523.58**

Maximum: \$1,047.16

Minimum: \$261.79

Percentage Increase: 1.59

This is the mileage rate to be used in reimbursing injured workers for travel necessary to obtain medical care.

2005	(2/4/05)	\$0.405
2004	(1/1/04)	\$0.375
2003	(1/1/03)	\$ 0.36
2002	(1/21/02)	\$0.365
2001	(1/22/01)	\$0.345

Submission of Form LS-202

The claims process generally begins with the receipt of an employer's report of injury (**Form LS-202**), or a claim delivered in person by the claimant or received through the mail.

Under **section 30(a)** of the Act, an employer must within **10** days from the date of an employee's injury or death or from the date that the employer had knowledge of an injury, disease, etc., furnish an employer's report of injury or death on **Form LS-202** to the District Director in the appropriate compensation district. (The district where the injury occurred.) In the event the employer does not have knowledge of the injury, the 10 day period begins to run from the date the employer obtains such knowledge. It is the responsibility of the employer to submit the report of injury. **Section 702.201.**

Any arrangement with the insurance carrier to submit the report of injury to the district office on behalf of the employer will not excuse the employer if the report is late.

It should be pointed out that the filing of an LS-202 does not signify that the employer accepts the facts of the injury. It is an acknowledgment that the employer has been advised that an injury or alleged injury has occurred.

If the injury does not result in loss of time (a time loss injury is one that

causes loss of one or more shifts of work), the employer must still keep a record of the injury. **(Section 702.201(b))** If the injury later results in loss of time or this Office is required to create an administrative file because of disputes regarding the injury, etc., the employer is required to file Form LS-202. **If the former no time loss injury later results in loss of time, the employer should submit Form LS-210 with the LS-202, or otherwise let this Office know that the injury has resulted in loss of time.**

We continue to receive LS-202's that do not indicate time loss. These are returned to the employer and shortly thereafter we receive either a Form LS-206 (Payment of Compensation), or Form LS-208 or Form LS-207 (Notice of Controversion) without a copy of the LS-202. The employer and their insurance carrier need to coordinate submission of these documents.

Forms LS-202, LS-210 and LS-1 are available on the Department of Labor web site: www.dol.gov/esa.

Go to Office of Workers' Compensation Programs and select Longshore. You will also find on the Longshore web site the procedure manual, regulations, addresses and telephone numbers for all district offices, DBA information and dates for upcoming training, Longshore industry bulletins, and much, much more.

Submission of Form LS-208

Section 14(g) of the Act and section 702.235 of the regulations requires the self-insured employer or the insurance carrier to provide the district office Form LS-208 (form prescribed by the Secretary) within 16 days after the **final** payment of compensation. Section 702.235 identifies those payments that are considered final.

Section 14(g) of the Act and section 702.236 of the regulations provides that any employer failing to notify the Office of a final payment shall be assessed a civil penalty of **\$110**. Although our letter advising the employer/carrier that the LS-208 has not been received or is late invites an explanation for the missing or late form, the district director has no discretion to waive the penalty if it is clearly late.

For FY 2004, this Office collected \$3300.00 in § 14(g) penalties which represented 30 late LS-208's.

Another note on LS-208's, please do not use the 208 to show a change in rate or that compensation continues. The LS-208 should be used when compensation is suspended or terminated. Please submit Form LS-206 to show the compensation rate has changed. The exception would be if a settlement called for a lump sum payment and then continuing payments of compensation. In that situation you would submit the LS-208 to show the lump sum, and LS-206 to show payments continue.

Longshore Regions and District Offices

Region I -- Boston

(Jurisdiction - Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont. Defense Base Act jurisdiction - east of the 75th degree west longitude, Newfoundland, and Greenland.)

Boston Longshore District Office
David B. Groeneveld, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
JFK Federal Building, Room E-260
Boston, MA 02203
Phone #: 617-624-6750

Region II -- New York

(Jurisdiction - New Jersey, New York, Puerto Rico, Virgin Islands. Defense Base Act jurisdiction - Mexico, Central and South America (including coastal islands); areas east of the continents of North and South America to the 60th degree east longitude, including Iran, and any other areas or locations not covered under any other district office.)

Richard V. Robilotti, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
201 Varick Street, Room 750
Post Office Box 249
New York, NY 10014-0249
Phone #: 646 264-3010

Region III -- Philadelphia

Baltimore Longshore District Office
(Jurisdiction - Delaware, District of Columbia, Maryland, Pennsylvania, West Virginia)

Emma Riley, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
31 Hopkins Place
Room 410-B - Federal Building
Baltimore, MD 21201
Phone #: 410-962-3677

Norfolk Longshore District Office
(Jurisdiction - Virginia)

Basil Voultides, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
Federal Building, Room 212
200 Granby Mall
Norfolk, VA 23510
Phone #: 757-441-3071

Region IV -- Atlanta

(Jurisdiction - Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, Tennessee)

Jacksonville Longshore District Office
Charles Lee, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
Edward Ball Building
Suite 905, 9th Floor
214 N. Hogan Street
Jacksonville, FL 32202
Phone #: 904-357-4788

Region VI -- Dallas

Houston Longshore District Office
(Jurisdiction - Texas, Oklahoma, New Mexico, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, Wisconsin, Missouri, Nebraska, Kansas. Defense Base Act jurisdiction - Canada, west of the 75th degree and east of the 110th degree west longitude.)

Chris Gleasman, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
8866 Gulf Freeway

Suite 140
Houston, TX 77017
Phone #: 713-943-1605

New Orleans Longshore District Office (Jurisdiction - Louisiana, Arkansas, Mississippi)

David A. Duhon, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
Room 13032, 701 Loyola Avenue
New Orleans, LA 70113
Phone #: 504-589-2671

Region IX -- San Francisco

San Francisco Longshore District Office (Jurisdiction - California (north of the northern boundaries of the counties of San Luis, Obispo, Kern, and San Bernardino), Arizona, Nevada)

R. Todd Bruininks, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
71 Stevenson Street, Room 1705
Post Office Box 193770
San Francisco, CA 94119-3770
Phone #: 415-848-6675

Long Beach Longshore District Office (Jurisdiction - California (south of the northern boundaries of the counties of San Luis, Obispo, Kern, and San Bernardino))

Eric Richardson, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
401 East Ocean Blvd., Suite 720
Long Beach, CA 90802
Phone #: 562-980-3577

Honolulu Longshore District Office (Jurisdiction - Hawaii. Defense Base Act cases jurisdiction - all areas west of the continents of North and South America (excluding coastal islands) to 60 degrees east longitude (excluding Iran).

R. Todd Bruininks, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
300 Ala Moana Blvd., Room 5-135
Post Office Box 50209
Honolulu, HI 96850
Phone #: 808-541-1983

Region X -- Seattle

(Jurisdiction - Alaska, Oregon, Washington, Colorado, Idaho, Montana, N.Dakota, S.Dakota, Utah, Wyoming. Defense Base Act jurisdiction - Canada, west of the 110th degree west longitude, and all areas in the Pacific Ocean north of the 45th degree north latitude.)

Seattle Longshore District Office
Karen Staats, District Director
U.S. Department of Labor
ESA/OWCP/DLHWC
1111 Third Avenue, Suite 620
Seattle, WA 98101-3212
Phone #: 206-398-8255

District 40 - Washington, DC

District of Columbia Workmen's Compensation
Charles Green, District Director
DC Department of Employment Services
64 New York Ave NE - 2nd Floor
Washington DC 20002
Phone #: 202 671-1070

Case Law Highlights

General Construction Company v. Robert Castro; Director, OWCP, 9th Circuit, No.03-72528, 03/02/2005

General Construction Company and Liberty Northwest Insurance Corporation (General Construction), with amicus Longshore Claims Association (LCA), petitioned for review of the determination of the

Benefits Review Board (BRB) that claimant Robert Castro was entitled to total disability compensation under the Longshore Act, during his period of participation in a vocational rehabilitation program approved by the Office of Workers' Compensation Programs (OWCP). General Construction also claimed that the method the administrative law judge (ALJ) used to calculate Castro's average weekly wage was incorrect and that the OWCP violated General Construction's procedural rights under the Administrative Procedure Act (APA) and the Due Process Clause of the federal Constitution.

The 9th Circuit denied the petition for review.

In this case the ALJ issued a decision finding Castro's scheduled disability rating to be 17% and awarded Castro permanent partial disability benefits on the basis of his knee injury for a period of 48.96 weeks (17% of the statutory 288 weeks), pursuant to 33 U.S.C. § 908(c)(2), (19). The ALJ determined that Castro had met his burden of demonstrating inability to return to his usual work (and thus awarded compensation for temporary total disability, permitting compensation additional to that for his scheduled injury). The ALJ also found that General Construction had established the availability of some suitable alternate employment, but found that because Castro was enrolled in a vocational rehabilitation program and had shown that completion of the program both precluded employment and gave him the best long-term earning potential, he was entitled to total disability benefits

for the duration of the program, under Louisiana Insurance Guaranty Ass'n v. Abbott, 40 F.3d 122, 127-28 (5th Cir. 1994).

With respect to the calculation of Castro's award, the ALJ rejected General Construction's assertion that § 10(c) of Act should govern, applying instead § 10(a) in accordance with the Ninth Circuit's holding in Matulic v. Director, OWCP, 154 F.3d 1052, 1056 (9th Cir. 1998).

General Construction timely appealed all three issues: (1) the applicability of *Abbott* to the present case; (2) the applicability of § 10(c) to the present case; and (3) denial of General Construction's procedural rights. In their decision the Ninth Circuit noted that two circuits had considered whether an injured worker could receive compensation for total disability while participating in an OWCP approved vocational rehabilitation program.

In Abbott, an opinion by retired U.S. Supreme Court Justice Byron White, the Fifth Circuit reasoned that although the Act does not explicitly provide for total disability during rehabilitation training, such an interpretation is consistent with "the Act's goal of promoting the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force." Abbott, 40 F.3d at 127 (citation omitted). The validity of this standard in the Ninth Circuit is one of the issues in the present case.

The Abbott rule is consistent with the language and a principal policy of the

LHWCA: the encouragement of vocational rehabilitation. The LHWCA specifically provides that “[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange . . . for such rehabilitation.” 33 U.S.C. § 939(c)(2). Moreover, the LHWCA defines “disability” as the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.” 33 U.S.C. §902(10). Thus, the LHWCA speaks of disability in terms of economic harm, not just physical harm. Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 126-27 (1997). The Abbott rule, consistently with this definition, simply clarifies that it is possible for a claimant to be entitled to benefits for “total disability” when the claimant is physically capable of performing certain work but unable to secure that work for some other reason. See Abbott, 40 F.3d at 127; see also Newport News, 315 F.3d at 295.

The ALJ noted that General Construction objected to the rehabilitation plan and to continued benefits. But the ALJ also reasoned that allowing employers an effective veto power over OWCP-approved rehabilitation programs would undermine the LHWCA’s general policy of encouraging rehabilitation.

The 9th Circuit agreed finding that there was no error in the ALJ’s decision that General Construction’s objection to the rehabilitation program does not sufficiently distinguish Castro’s case from Abbott.

General Construction argued that if a claimant has a scheduled injury, and the employer shows that the claimant is employable, the claimant cannot also be entitled to an award of total disability benefits during a rehabilitation program.

The argument fails because, as the ALJ correctly noted, Pepco addresses only the statutory provisions for partial disability benefits. See id. at 274 & n.8; see also Brown, 34 Ben. Rev. Bd. Serv. at 198 (finding scheduled nature of claimant’s injury irrelevant to appropriateness of rehabilitation program and award of benefits for that period); Gregory, 32 Ben. Rev. Bd. Serv. at 265-66 (noting that “where claimant is totally disabled the schedule does not apply” and that “the fact that any permanent partial disability would be covered by the schedule is not determinative of the total disability issue..) Since Pepco does not address computations of awards for temporary total disability, which is the focus of the Abbott rule, we agree with the ALJ and the BRB that the scheduled or unscheduled nature of a claimant’s injury is irrelevant.

The employer contended that the ALJ incorrectly computed Castro’s average weekly wage under § 10(a) of the Act although he followed the Ninth Circuit’s precedent, *Matulic*. The employer argued that the Ninth Circuit should overrule their own precedent or at least distinguish it.

In *Matulic*, the 9th Circuit concluded that the LHWCA’s language did not require a claimant to have worked 100% of the potential working days

during the year immediately preceding the injury in order for § 10(a) to apply “reasonably and fairly.” That §10(a) presumptively applies “when a claimant works more than 75% of the workdays of the measuring year.” It may even apply when the claimant has worked less than 75% of these days, if the reduction in working days is “atypical of the worker’s actual earning capacity.”

General Construction’s primary arguments for overruling Matulic are as follows: (1) Matulic permits and promotes overcompensation of claimants, a result contrary to the plain language of the LHWCA; (2) the 75% bright line drawn in Matulic creates absurd results; (3) Matulic is inconsistent with the law in other circuits and with the reasoning in relevant Supreme Court precedent.

To begin, we note that “[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.” Benny v. U.S. Parole Comm’n, 295 F.3d 977, 983 (9th Cir. 2002) (citation omitted). Because none of these conditions applies, we reject General Construction’s arguments. Even if we had the capacity to overrule Matulic, however, we would reach the same conclusion.

General Construction argued that it demanded, but was improperly denied, a hearing before an ALJ to determine the necessity of a vocational rehabilitation program for Castro before that plan was implemented. According to General Construction, the LHWCA provides it

with the right to an ALJ hearing upon request. 33 U.S.C. § 919(c), (d).

The LHWCA provisions General Construction cites state only that “the deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon,” 33 U.S.C. § 919(c), and that such hearings will be governed by the APA. Id. § 919(d).

[11] We recently described the scope of § 919(c) in Healy Tibbitts, 201 F.3d at 1094. We held that “section 919(c) does not necessarily require an evidentiary hearing before an ALJ on all contested issues.” Healy Tibbitts, 201 F.3d at 1093. We held that ALJs in fact lack jurisdiction over certain disputes, in particular those involving “strictly legal issues,” id. at 1095, and matters within the discretion of a District Director turning on assessments of “reasonableness” and not involving factual questions resolvable by an ALJ, id. at 1097. Thus, the existence of a dispute does not in itself trigger a right to a hearing under the LHWCA.

The dispute in the present case concerned the initial reasonableness of the vocational rehabilitation plan undertaken by Castro and approved by the OWCP. This determination, while not entirely a legal issue, Healy Tibbitts, 201 F.3d at 1095, turned on a “reasonableness” decision and did not require any factual determinations of disputed issues by an ALJ, id. at 1097. Moreover, the LHWCA and its accompanying regulations commit the direction and

therefore also the approval of such rehabilitation programs to the discretion of the Director. See 33 U.S.C. § 939(c)(2)

Under Healy Tibbitts, the LHWCA did not entitle General Construction to an ALJ hearing on the reasonableness of Castro's rehabilitation plan prior to the implementation of that plan.

We conclude that the OWCP's failure to order an ALJ hearing regarding Castro's rehabilitation program prior to approval of the program did not violate the provisions of the LHWCA.

General Construction claims it was entitled to a hearing before an ALJ prior to implementation of the vocational rehabilitation program, which deprived it of property by requiring payment of benefits to Castro, in violation of the Due Process Clause of the Fifth Amendment.

OWCP's implementation of Castro's rehabilitation plan did not, in itself, deprive General Construction of its property, since that implementation did not automatically trigger payment of permanent benefits to Castro. When the issue of disability compensation arose with Castro's filing of a claim for benefits, the District Director properly forwarded the matter to the Office of Administrative Law Judges for further handling, and an ALJ held a full hearing on the merits of Castro's claim for benefits. General Construction received notice and an opportunity to submit evidence and argument before the ALJ's decision awarding compensation and before it was required to pay anything. This

constituted a sufficient predeprivation hearing.. We conclude, therefore, that the OWCP's handling of Castro's claim for benefits did not deprive General Construction of its due process rights under the federal Constitution.

It should be pointed out that OWCP has put in place a procedure that allows the employers to review and comment upon any vocational rehabilitation plan prior to implementation.

Clark v. Chugach Alaska Corporation, BRB No. 04-0246

This is a decision issued by the Benefits Review Board upholding the district director's award of attorney fees to the claimant's counsel.

In this case, the employer had initially controverted the claim, but following an informal conference, the OWCP claims examiner recommended payment of temporary total disability and medical benefits. The employer ultimately paid the benefits recommended, and thereafter, the claimant's counsel filed an application for an attorney's fee. The district director, after considering objections raised by the employer issued an order approving fees to be paid by the employer.

The employer (Chugach Alaska Corporation) appealed the order raising these arguments:

- (1) There can be no award of fees since there has been no adjudication of the claim.

(2) The Supreme Court's decision in Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001), prohibits a fee from being awarded in this case.

(3) If a fee is awarded against the employer, the fee award is excessive based on their specific objections.

The employer argued that pursuant to the Supreme Court's decision in *Buckhannon* that since payments made to the claimant were voluntary and not the result of an award or settlement and "*cannot be considered the enforceable 'alteration of the legal relationship between the parties' required by Buckhannon so as to warrant a fee.*

The petitioners in *Buckhannon* had sought fees following the dismissal of a suit as moot arguing that they were the "prevailing party" and were entitled to a fee under the "catalyst theory."

The district director found that the claimant's counsel was not seeking fees under the 'catalyst theory' or as a 'prevailing party'. . . but rather under a specific section of the Act. Citing Section 28(a) of the Act, the district director found that the employer denied entitlement to compensation and that the claimant used the services of an attorney in obtaining the denied benefits. Therefore, there was a successful prosecution of the claim, and claimant's counsel was entitled to a reasonable fee. The BRB in discussing the circumstances of *Buckhannon* noted that *the Supreme Court construed language under the relevant statutes*

providing that only a "prevailing party" may obtain an attorney's fee, holding that in order to be a "prevailing party," there must be a "material alteration of the legal relationship of the parties," a voluntary change in conduct lacks the "necessary judicial imprimatur. Thus, the Court held that prevailing as a catalyst is not sufficient basis for an attorney's fee award under either the Fair Housing Amendments Act or the Americans with Disabilities Act.

The BRB acknowledging that there had been no formal adjudication of the claim also noted that no party had requested a referral for a formal hearing.

Citing § 28(a) of the Act, in pertinent part, the BRB found that since the employer had declined to pay compensation within 30 days of receiving a claim that the employer was liable for the attorney's fee.

The BRB stated: **The Board has held consistently that where employer did not pay benefits within the 30-day period, but ultimately did so at the district director level, a claimant's counsel is entitled to a fee under Section 28(a) regardless of the entry of a formal compensation order.**

The BRB cited the Ninth Circuit's decision *Richardson*, 336 F.3d 1103, 37 BRBS 80 (CRT), also arising from this district, in which the court affirmed the Board's denial of a fee due to the claimant's failure to successfully prosecute his claim for benefits for both a back and a knee injury.

In addressing what constitutes “successful prosecution,” the court stated:

*We are unaware of case law thoroughly discussing the “successful prosecution” requirement of section 928(a) and none was cited to us. We therefore look for guidance to similar fee-shifting statutes that require a party to “prevail” such as 42 U.S.C. §1988(b) (the Civil Rights Act). While a party need not obtain monetary relief to prevail for purposes of such fee-shifting statutes, **Fisher v. SJB-P.D., Inc.** 213 F.3d 1115, 1118 (9th Cir.2000), he must obtain some actual relief that ‘materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’ **Farrar v. Hobby**, 506 U.S. 103, 111-112 (1992).*

The Board noted that the *Richardson* decision did not cite or refer to *Buckhannon*. Moreover, the claimant in obtaining compensation and medical benefits did obtain a “tangible” result.

Therefore, under Section 28(a), which does not refer to a “prevailing party” or require a formal “Order,” claimant achieved full success upon payment of benefits by employer. To require something more, such as an order or settlement, which employer argues is unobtainable in this case because of the notice of controversion on file, exceeds the requirements of the Act and is not consistent with Congressional intent of securing prompt and voluntary payments.

The BRB order has been appealed to the Ninth Circuit.

Stevedoring Services of America v. Price 366 F.3d 1045, 1052(9th Cir. 2004)

In this decision filed on May 11, 2004 and amended August 27, 2004 the court found that in this case that an increase in the injured worker’s average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability was not caused by a change in wage-earning capacity, permitting him to retain the full amount of both awards and did not result in any double recovery. Also at issue was the calculation of the employee’s average annual earnings.

The injured worker, Arel Price, suffered a back injury in 1979 resulting in an award for permanent disability due to a loss in wage-earning capacity. Following a second work-related injury in 1998, he was determined to be permanently and totally disabled (PTD). Following a formal hearing the administrative law judge (ALJ) found he remained entitled to his full award for PPD, but that his PTD award must be reduced by the amount of the ongoing PPD award.

The Benefits Review Board (BRB) affirmed the award and also ruled that the combined amount of Price’s awards could not exceed the maximum compensation rate under § 906(b)(1).

The ALJ and the Board used § 910(a) to calculate the claimant's 1998 average annual earnings. The employer/carrier argued that they should have applied § 910(c) since the claimant 's employment was "intermittent and casual" and neither § 910(a) nor 910(b) can be applied when employment is "casual, irregular, seasonal, intermittent and discontinuous" or if their application would result in "excessive compensation in light of the injured worker's actual employment record."

The court found that the ALJ had correctly calculated the average weekly wage and did not result in excessive compensation.

*In **Matulic** we announced a bright line rule that "when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted.*

Regarding the issue of double dipping (receipt of two separate awards for permanent disability), the court reiterated:

We implicitly recognized that the amount of adjustment needed, if any, depended on the factual determination of the cause of the employee's increase in earnings between the time of his first and second injury. If an employee's increase in earnings is not caused by a change in his wage-earning capacity, allowing the employee to retain the full amount of both awards does not result in any double dipping. The reason is that the prior partial disability award compensates the employee for the first reduction in his wage-earning capacity from the first

accident, and the subsequent permanent total disability award compensates the employee for what remains of his earning capacity after the accident. Taken together, the awards do not compensate the employee for more earning capacity than he has actually lost. In comparison, a double dipping problem would rise if a change in condition since the first accident has mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. In that case, because the first award overestimated the effect of the first injury on the employee's wage-earning capacity, combining the full amounts of the first and second award would end up compensating the employee for more wage-earning capacity than he had actually lost.

In Everitt v. Director, OWCP, No-02-74232, 74309, unpublished decision from the Ninth Circuit, filed on August 10, 2004, the court again found that "concurrent awards may be justified when a claimant suffers two discrete injuries."