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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 173
September - October 2004

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

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Associate Chief Judge for Black Lung

I. Longshore

ANNOUNCEMENTS

Applicability of the Civil Rights Tax Relief provision of the American Jobs Creation Act to cases arising under Section 48 of the Longshore Act.

On October 22, 2004, the President signed the American Jobs Creation Act of 2004. Section 703 of this Act establishes a deduction from gross income for attorneys' fees and court costs incurred by, or on behalf of, individuals who prevail in employment discrimination and other cases. This eliminates a burdensome tax effect on plaintiffs in employment discrimination cases which was often a barrier to overcome in settlement negotiations. Under prior law, the IRS required such plaintiffs to pay taxes on the attorneys' fees recovered in litigation or settlements, even though the money went straight to the attorney who also paid taxes on the amount as income.

The provision covers a number of laws administered by the Department of Labor, and may include discrimination claims filed under Section 48(a) of the LHWCA adjudicated by this office. The text of section 703 is posted on the OALJ web site at http://www.oalj.dol.gov/public/part18/refrnc/hr_4520_703.htm

The longshore practitioner should specifically note Sub-Sections 703(e)(17) and (18) of this legislation. Sub-part (17) references "any provision of Federal law (popularly known as whistleblower protection provisions) and specifically notes "reprisal against an employee for asserting rights or taking other actions permitted under Federal law." Sub-part (18) includes in tax relief coverage the following:

> "(18) Any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law—

"ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law."

Section 48(a) of the LHWCA (Amended 1984), formerly Section 49, addresses discrimination against employees who bring proceedings for filing compensation claims or testifying in longshore proceedings. The employer alone and not his/her carrier is liable for penalties and payments under Section 48(a). The LHWCA specifically states, "Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void." A claimant who succeeds in a Section 48(a) discrimination claim is entitled to attorney fees for that claim. While Section 48(a) has never officially been referred to as a whistleblower provision, it certainly falls within general whistleblower criteria as well as the criteria listed in Sub-sections (17) and (18) of the Civil Rights Tax Relief legislation.

A. United States Supreme Court

Kalama Servs., Inc. v. Director, OWCP., ___**U.S.** ___, ____ **S.Ct.** ____, (S.Ct. No. 03-1440), (**Cert. denied** Oct. 4, 2004).

Let stand a **Second Circuit** decision which had found that the Board and ALJ's award of benefits under the "zone of special danger" doctrine. Previously it had been determined that injuries to an off-duty employee during foreseeable horseplay in a bar on Johnston Atoll arose out of a zone of special danger created by the isolation of the island and the limited recreational opportunities available there. Misconduct by the employee during the horseplay was not sufficiently egregious to sever the relationship between his employment and the injury under the zone of special danger doctrine.

[Topics 60.2 Longshore Act Extensions--Defense Base Act; 60.2.7 Defense Base Act--Course and Scope of Employment, "Zone of Special Danger"]

Metropolitan Stevedore Co. v. Crescent Wharf and Warehouse Co., ___ **U.S.** ___, ___ **S.Ct.** ___, (S.Ct. No. 03-1457)(**Cert. denied** Oct. 12, 2004).

Let stand **Ninth Circuit** decision that the last stevedoring company to employ a longshoreman before he underwent bilateral knee replacement surgery is liable for his disability benefits.

[**Topics 2.2.3 Injury; 2.2.5 Multiple Injuries; 2.2.6 Aggravation/Combination; 2.2.7 Natural Progression]**

Howard v. Southern Ill. Riverboat Casino Cruises Inc., ___ **U.S.** ___ (S.Ct. No. 04-51) (**Cert. denied** October 18, 2004).

Let stand **Seventh Circuit's** ruling that employees exposed to chemicals working on a moored riverboat casino on a navigable river were not "seamen" and therefore not entitled to bring Jones Act claims. Riverboat casino indefinitely moored to a dock is not a vessel in navigation, although it is classified as a passenger vessel by the Coast Guard. The circuit court, 364 F.3d 854 (**7th Cir.** 2004)(rehearing and suggestion for rehearing *en banc* denied) had held that the purpose of the riverboat casino was "not to move or transport cargo or people, but merely to provide a legal venue under Illinois law for gambling."

[Topics 1.4.3 Jurisdiction/Coverage—LHWCA v. Jones Act—"Vessel"—"In Navigation;" 1.4.3.1 Jurisdiction/Coverage—LHWCA v. Jones Act—"Vessel"—Floating Dockside Casinos]

B. U.S. Circuit Courts of Appeals

[Ed. Note:** The following case is included for informational value only.**]

Carter v. Tennant Co., ___ F.3d ___ (No. 03-2791)(**7th Cir.** September 13, 2004).

Here the plaintiff's suit for wrongful discharge in retaliation for making a workers' compensation claim was found to have been properly dismissed by the district court since the plaintiff was found to have given dishonest answers to a health history questionnaire. He had not told the present employer about his previous injury or on-going medical care and benefits. The Plaintiff had also argued that his Privacy Act rights were violated and that, therefore, his discharge based on incorrect answers should be voided. However, the circuit court noted that the employer had asked if he had "ever had any occupational injuries, accidents, or illnesses;" "lost time from work for a work-related injury or illness;" or saw "a medical doctor for any work-related injury/illness." The court found that such questions were not in violation of the statute which specifically barred employers from inquiring "whether that prospective employee has ever filed a claim for benefits under the state workers' compensation act or Workers' Occupational Diseases Act or received benefits under these Acts."

[Topic 48(a) Discrimination Against Employees Who Bring Proceedings]

Tarver v. BO-MAC Contractors, Inc., ___ F.3d ___ (No. 03-61028)(**5th Cir.** September 21, 2004).

Situs was found to be absent where two barge slips were being built on vacant dry land near the intracoastal waterway. The slips had been dug but the holes were separated from the waterway by a dirt wall. The claimant was seriously injured during the construction project while working on the land side of the excavation when an 80-foot beam came loose and pinned him to construction scaffolding. Finding that there was no jurisdiction, the Fifth Circuit reiterated its position that "Whether an adjoining area is a § 903(a) situs is determined by the nature of the adjoining area *at the time of injury*." The court also noted its exception to this general rule (where a construction site—although not serving a maritime purpose—was carved out of a covered situs and promised to support navigation in the future, there would be a finding of situs), but found that in the instant case there was not a covered situs as the area had not yet been used for a maritime purpose.

[Topic 1.6.2 Jurisdiction/coverage—Situs—"Over land"]

Harkins v. Riverboat Services, Inc., ___ F.3d ___ (No. 03-3624)(**7th Cir.** October 6, 2004).

In a Fair Labor Standards Act (FLSA) case, the **Seventh Circuit** affirmed the dismissal of a suit for overtime/retaliatory discharge where the plaintiffs were not protected by the FLSA because they were considered seamen within the seaman's exemption to the FLSA.

The workers were part of the riverboat casino's "marine crew" and were responsible for the operation of the ship and the ship's passengers. However, most of the plaintiffs were not directly involved in navigation or engine-room work and spent much of their time doing the kind of housekeeping chores that they would have done in a casino that was on land. The riverboat in question spent at least 90 percent of its time moored to a pier and when it did cruise, only cruised for a maximum of four hours at a time. Realistically, the lives of the workers differed only slightly from that of ordinary casino workers.

The FLSA exempts from its overtime provisions persons employed as seamen. 29 U.S.C. § 213(b)(6). The plaintiffs argued that they were not seamen because they do not perform the distinctive work of seamen and "do not work on a real ship but on a kind of glorified houseboat." However, after examining the jurisprudential definition of "seaman" and noting the terse language of the statute ("any employee employed as a seaman") under the FLSA, the court found that only two points emerged with any clarity from the cases: the employee must perform maritime-type work on a ship that is within the admiralty jurisdiction; and decisions interpreting the term "seaman" in other statutes do not necessarily control meaning in the FLSA.

The court stated that "when persons employed on a ship, even so a typical a one as an Indiana gambling boat, are classified as seamen for purposes of entitlement to the special employment benefits to which seamen, including therefore these plaintiffs, are entitled, a presumption arises that they are seamen under the FLSA as well." ***[ED. NOTE:*** *However, had the plaintiffs filed seamen claims, they would not necessarily be be entitled to seamen's special benefits in some circuit courts.****]***

[Topic 1.4.1 Jurisdiction/Coverage—LHWCA v. Jones Act—Generally]

B. Federal district courts

Anastasiou v. M/T World Trust, ___ F.Supp 2d ___ (02 CV 1917 (ILG))((E. Dist. NY Oct. 1, 2004).

This is an Order Denying A Motion for a Summary Judgment. The plaintiff was the sole employee and owner of a company called Maritech Electronics. He slipped and fell, breaking his leg on a ramp shortly after boarding a vessel on which he was supposed to conduct an annual radio safety survey. The defendants allege entitlement to a Summary Judgment, arguing that the plaintiff is covered under the LHWCA and that his negligence claim does not on its face disclose any negligence on the part of the vessel.

The court found that the plaintiff satisfied both pre- and post-1972 LHWCA amendment tests for coverage. The plaintiff had alleged that he did not fall under the protections of the LHWCA because his work in conducting the radio survey was not an "integral or essential part of loading or unloading a vessel." The court found that the plaintiff misread pertinent case law and that the Second Circuit has held that an individual satisfies the status test where he has "a significant relationship to navigation or to commerce on navigable waters." The court noted that the LHWCA "clearly divides maritime workers into two mutually exclusive categories: seamen, on the one hand, and longshoremen, harbor workers and all other employees entitled to protection under the Act, on the other hand." The court pointed out that in rare instances longshoremen and harbor worker type workers not covered by the LHWCA ["Sieracki seamen"] may avail themselves of the duty of seaworthiness.

The court equally found that the plaintiff was not entitled to pursue an action under 905(b) since his claim on its face admitted that the vessel was built to American Bureau of Shipping standards. His claim also failed to put forward any evidence that

there was constructive knowledge by the owners of any danger associated with the ramp. Finally, the court noted that in any event, the plaintiff failed to show that any negligence created a genuine issue of material fact since he did not show that the ship owner's duty of care to an individual such as the plaintiff (an invitee on board to perform navigational related work) had been breached.

[Topics 1.4.3 Jurisdiction/Coverage--Vessel; 1.7.1 Status—"Maritime worker" (Maritime Employment"); 1.7.4 Self Employed Worker; 1.9 Maritime Employer; 5.2 Exclusiveness of Remedy and Third Party Liability--Third Party Liability—Generally]

C. Benefits Review Board

Maumau v. Healy Tibbits Builders, Inc., (Unpublished)(BRB Nos. 03-0830 and 04-0311)(Sept. 8, 2004).

The Board upheld the ALJ's determination that in a Section 4(a) subcontractor case, where the subcontractor fails to secure compensation, the general contractor is liable for attorney fees. While Section 4(a) mentions only "compensation," it must be read in conjunction with Section 5(a), under which an employer, as the general contractor, is liable for the benefits awarded to claimants because of its subcontractors. Since the subcontractor failed to comply with the insurance coverage requirements of the LHWCA, the employer must be treated as the "employer" for compensation purposes. The ALJ concluded that, as is the case with any employer liable for compensation under the LHWCA, it is additionally liable for an award of an attorney's fees if the provisions of Section 28(a) or (b) are satisfied. The Board affirmed this analysis and interpretation.

[Topic 4.1.1 Compensation Liability—Contractor/Subcontractor Liability]

Tahara v. Matson Terminals, Inc., (Unpublished)(BRB No. 03-0860)(September 28, 2004).

The Board affirmed, albeit on other grounds, the ALJ's compensation award during the period the claimant was in the state and federal witness protection programs. The Board found that the employer did not establish that the claimant was able to perform suitable alternate employment while the claimant was enrolled in the witness protection program. The claimant's testimony was uncontradicted that he was not allowed to work by the state and federal authorities during his time in the programs. Further, it was uncontested that his enrollment in the programs was related to the circumstances surrounding his work injury. Under these circumstances, the claimant was found to be entitled to compensation for total disability as the employer could not meet its renewed burden of proof after claimant was forced to leave suitable alternate

employment through no fault of his own. The Board found that the facts in this case were analogous to those cases where a claimant is entitled to total disability compensation while participating in a Department of Labor-sponsored vocational rehabilitation program that precludes him from working. *See, e.g. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F3d 286, 36 BRBS 85(CRT) (**4th Cir.** 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (**5th Cir.** 1994); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003).

Citing *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (**9th Cir.** 1988), 21 BRBS 122(CRT), the Board found that this holding, that the claimant was entitled to total disability benefits due to his inability to work while he was in the witness protection programs, is consistent with **Ninth Circuit** case law. In *Hairston*, the court held that suitable alternate employment was not established by a position at a bank that the claimant physically could perform, as the job was not realistically available because the claimant had a criminal record. "In this case, no jobs were realistically available to claimant while he was in the witness protection programs."

The Board also affirmed the ALJ's finding that the state stipend the claimant received during his participation in the state witness protection program does not establish that he had a post-injury wage-earning capacity. The ALJ correctly rejected the employer's contention that the $1,200 to $1,400 per month stipend was a wage. "The [ALJ] correctly reasoned that the stipend was paid by the state and not an employer and that the stipend was not received pursuant to a contract for hire; these conditions are required for sums to constitute wages under the plain language of Section 2(13). The [ALJ] found that the stipend is analogous to unemployment compensation, which also is not a wage under Section 2(13). Moreover, there is no evidence that the state stipend was subject to tax withholding." (Citations omitted.)

[Topics 2.13 Definitions—"Wages," 8.9.1 Wage-Earning Capacity—Generally]

McAfee v. Bath Iron Works Corp., (Unpublished)(BRB No. 03-0611)(Oct. 8, 2004).

The Board upheld the ALJ's denial of temporary partial disability compensation for the period during which the claimant would not cross a picket line during a strike to work at his light duty job. The Board stated that it agreed with the ALJ's statement that the LHWCA cannot "be stretched to provide compensation to a worker whose loss of wages was attributable not to his injury but rather due to a decision to participate in a strike against the worker's employer."

[Topics 8.2 Extent of Disability--Partial Disability/Suitable Alternate Employment; 8.2.4.8 Extent of Disability—Jobs in employer's facility]

Mai v. Knight & Carver Marine, (Unpublished)(BRB No. 04-0183)(Oct. 15, 2004).

This case contains a discussion of the "adverse inference rule." Here the Board rejected the claimant's contention that an adverse inference should have been drawn based on the employer's failure to produce the claimant's time cards, which the claimant alleges would have shown maritime employment:

> "Such an inference cannot substitute for claimant's failure to establish an essential element of his claim, namely, that he engaged in maritime employment. Moreover, employer correctly contends that claimant could have obtained this evidence through discovery, but apparently made no attempt to do so."

[Topics 23.1 Evidence—APA—Generally; 23.7 Evidence—ALJ May Draw Inferences Based on Evidence Presented; 20.2.1 Presumptions—Section 20(a)—Prima Facie Case]

Harris v. Elmwood Dry Dock & Repair, (Unpublished) (BRB No. 04-0171)(Oct. 19, 2004).

At issue in this Section 20(a) case was whether the death of a deceased worker was causally related to his employment. He died of septic shock caused by aeromanas hydrophilia. Aeromonas hydrophilia is a bacterium commonly found in fresh water. Aeromonas hydrophilia can enter the bloodstream from a cut or puncture would and contact with fresh water, by ingestion from drinking water into the gastro-intestinal tract, or by aspiration directly into the lungs. Aeromonas hydrophilia may cause skin and soft tissue infection at the site of the cut or would, and intestinal tract infection. In rare cases it causes pneumonia or sepsis.

[Topics 2.2.18 Definitions—Representative Injuries/Diseases; 20.3 Presumptions—Employer Has Burden of Rebuttal with Substantial Evidence]

Spooner v. ADM/Growmark River System, Inc., (Unpublished)(BRB No. 04-0165)(Oct. 20, 2004).

When a claimant, who resumed suitable alternate employment at his employer's facility was later discharged from that position due to his own misfeasance (violating company policy regarding alcohol abuse), the employer was not required to establish the availability of suitable alternate employment on the open market. The Board

distinguished this case from *Brown v. Rriver Rentals Stevedoring, Inc.*, (Unpublished) (BRB No. 01-0770)(June 17, 2002)(Where a worker is discharged from an unsuitable job at the employer's facility due to his own misfeasance, employer must show suitable alternate employment.)

[Topic 8.2.4.7 Suitable Alternate Employemnt—Factors affecting/not affecting employer's burden]

D. Other jurisdications

Hooker v. Westinghouse Savannah River, Co., ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004).

Here the ARB over-turned an ALJ decision (granting a summary motion) on the procedural grounds of lack of notice to a pro se complainant. The ARB based its holding on *Roseboro v. Garrison*, 528 F.2d 309 (**4th Cir.** 1975)(Before entering summary judgment against a pro se litigant, the district court must advise the litigant 'of his right to file counter-affidavits or other responsive material and alert the litigant to the fact that his failure to so respond might result in the entry of summary judgment against him). Notably, the complainant here did file a response to the motion and asked for additional time to further answer the motion. The ALJ granted the request and subsequently advised the complainant twice of the need to respond further and twice extended the time for the complainant to do so. The complainant did not respond further and the ALJ granted summary judgment because the complainant did not produce sufficient evidence that the respondent constructively discharged or blacklisted him. The ARB reversed, reasoning that the complainant "was pro se and the ALJ did not notify him pursuant to *Roseboro*."

[Topic 19.4.2 Procedure—Summary Decision]

Hines v. Georgia Ports Authority, ___ S.E. 2d ___, 2004 WL 2282948, (Ga. S.Ct. Oct. 12, 2004).

An injured longshoreman working on a vessel docked at the Georgia Ports Authority terminal can sue the Ports Authority under maritime law. The Ports Authority is not entitled to immunity under the Eleventh Amendment. The state court distinguished this holding from state court jurisprudence which held that an organization is an agency of the state for purposes of state-conferred immunity. The state supreme court held that the Ports Authority was immune under the state constitution but that admiralty law preempted that finding since the Authority was self-sufficient and did not rely on the state treasury. ***[ED. Note:*** *The Board previously dodged the issue of sovereign immunity in Fitzgerald v. Stevedoring Services of America, 34 BRBS 202 (2001). See also Vierling v.*

Celebrity Cruises, Inc., 339 F.3d 1309 (11th Cir. 2003), denied rehearing, 87 Fed. Appx 717 (table) (Oct. 27, 2003)(Everglades Port Authority lacked immunity since it had an anticipated and actual history of financial and operational independence.) citing Hess v. Port Authority Trans-Hudson Corp, 513 U.S. 30 (1994).]

[Topic 2.8 Section 2(8)--State]

Watson v. Indiana Gaming Co., (Unpublished)(No. 2003-24)(E.D. Kentucky September 21, 2004).

In this summary judgment matter, the federal district court found that a card dealer on an indefinitely moored riverboat casino is not a Jones Act seaman since the vessel was not in navigation for Jones Act purposes. The court reasoned that the permanently moored vessel no longer served a maritime purpose and no longer had any relationship to traditional maritime activity such as transporting cargo or people.

[Topics 1.4.3. Jurisdiction/Coverage—Vessel—"In Navigation;" 1.4.3.1 Jurisdiction/Coverage—Vessel--Floating Dockside Casinos]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *U.S. Steel Mining Co. v. Director, OWCP [Jones]*, ___ F.3d ___, Case No. 03-13526 (11th Cir. Sept. 28, 2004), a case arising under the regulations in effect prior to the 2000 amendments, the court adopted the Director's "one element" standard in determining whether Claimant established a "material change in conditions" under 20 C.F.R. § 727.309 (2000). The court stated the following:

> This standard establishes a simple and uniform approach to material change determinations, protects the integrity of the first denial from the distant, searching eyes of hindsight, and respects the principles of *res judicata*. The Director's standard gives full credit to the *finality* of the original denial, but plainly recognizes that pneumoconiosis is a latent a progressive disease, and that a miner's condition can change over time.

(emphasis in original).

Employer then urged that that court find "that the ALJ erred by failing to properly weigh all of the medical evidence together in determining whether a preponderance of the evidence supported a finding of pneumoconiosis" as is required by the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). The Eleventh Circuit noted that *Compton* was "not binding authority" but, even so, the administrative law

judge reviewed and weighed "all of the x-ray evidence, as well as all of the medical opinion evidence" in concert.

Finally, the court cited to the amended provisions at 20 C.F.R. § 718.204(c)(1) (2001), that pneumoconiosis must be a "substantially contributing cause" to the miner's total disability, with approval. The court held that these amended regulatory provisions are consistent with its case law and the administrative law judge properly applied the amended provisions.

[**material change in conditions; weighing all evidence together to establish pneumoconiosis; application of amended provisions on disability causation**]

In *Eastern Assoc. Coal Corp. v. Director, OWCP [Duelley]*, Case No. 03-1604 (4th Cir. July 29, 2004) (unpub.), the court held that, where an employer fails to establish "good cause" for its failure to timely controvert a claim, then it cannot seek to have the merits of the claim reconsidered by filing a petition for modification. The court reasoned that an employer "may not use a motion for modification to circumvent the consequences of its failure to file a timely controversion." The only issue properly considered on modification under the circumstances was whether the adjudication officer properly found that "good cause" was not established for failure to timely controvert the original claim.

[**failure to timely controvert, modification precluded**]

B. Benefits Review Board

In *Parsons v. Wolf Creek Collieries*, 23 B.L.R. 1-__, BRB No. 02-0188 BLA (Sept. 30, 2004) (en banc), Employer challenged the administrative law judge's determination that pneumoconiosis is latent and progressive in the absence of further coal dust exposure. Employer maintained that "claimant must prove by a preponderance of the evidence that he suffers from one of the rare forms of (pneumoconiosis) that could, and in fact did, progress." The Board disagreed and reasoned as follows:

> [W]hile the amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity, the regulations and the *NMA* decision[1] do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. (citations omitted). As we explained in *Workman v. Eastern Assoc. Coal Corp.*, ___ B.L.R. ___, BRB No. 02-0727 BLA (Aug. 19, 2004) (order on recon.) (en banc), because the potential for

[1] *Nat'l. Mining Ass'n. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

> progressivity and latency is inherent in every case, a miner who proves the current presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it previously was not, has demonstrated that the disease from which he suffers is of a progressive nature.

The Board further noted that Employer had not produced "the type and quality of medical evidence that would invalidate the regulation at 20 C.F.R. § 718.201 (2001)."

With regard to the medical merits of the claim, the Board held that the administrative law judge improperly accorded less weight to the opinion of Dr. Tuteur solely because of his status as a consulting physician. Moreover, it was improper to "mechanically" accord greater weight to the opinion of Claimant's treating physician. In this vein, the Board noted that "[w]hile a treating physician's opinion may be entitled to special consideration, there is neither a requirement nor a presumption that treating or examining physicians' opinions be given greater weight than the opinions of other expert physicians."

The Board also held that the administrative law judge improperly accorded greater weight to a physician's opinions based on his "excellent qualifications" where, as noted by Employer, the physician's qualifications were not in the record. As a result, the Board directed that the administrative law judge follow "proper procedures for taking judicial notice of such qualifications."

[**latent and progressive, claimant's burden; treating and consulting physicians**]

In *Boden v. G.M. & W. Coal Co.*, 23 B.L.R. 1-__, BRB No. 04-0286 BLA (Oct. 22, 2004), the Board held that a duplicate survivor's claim was properly denied. The Board noted that "[b]ecause the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of death, *i.e.*, whether the miner's death was due to pneumoconiosis, the administrative law judge properly found that entitlement was precluded."

[**denial of duplicate survivor's claim**]

In *Anderson v. Kiah Creek Mining Co.*, BRB No. 03-0828 BLA (May 24, 2004) (unpub.), the Board affirmed the administrative law judge's order granting withdrawal of the miner's claim under 20 C.F.R. § 725.306 (2001) as interpreted in *Lester v. Peabody Coal Co.*, 22 B.L.R. 1-183 (2002)(en banc) and *Clevenger v. Mary Helen Coal Co.*, 22 B.L.R. 1-193 (2002)(en banc). With regard to medical evidence developed in connection with the withdrawn claim, the Board held that such evidence would not be included with

the filing of any additional claims by the miner. However, the Board stated that a party would not be "precluded from submitting the evidence developed in (the withdrawn) claim for inclusion in a new claim record, subject to the evidentiary limitations or with a showing of good cause for its inclusion."

[**evidence submitted in conjunction with withdrawn claim**]