Case Values and Case Credits

IN

Longshore and Harbor Workers' Compensation Act Claims

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CASE VALUES

EQUATION VARIABLES IN LHWCA CASES

Most cases arising under the Longshore and Harbor Workers' Compensation Act raise issues concerning the "nature and extent of disability." This vague category is the source of almost all cases tried before the Office of Administrative Law Judges. In reality, the phrase "nature and extent of disability" describes basic scheduled and general injury equations used in calculating the value of LHWCA cases (Appendix D). Once the equations and variables are understood, the practitioner has a broad framework for understanding applicable case law and litigating longshore cases.

A. The Scheduled Injury Equation

The table of scheduled disabilities in the LHWCA is set forth in 33 U.S.C. §908(c)(1)-(20). Each scheduled injury carries a certain number of weeks under the schedule (Appendix A). The basic scheduled injury is depicted in the following equation:

(1) AWW/CR = MMI
(2) CR x # wks. in sched. x % of PPI = $ - unless PEPCO.

The scheduled injury equation is basically a multiplication equation with five key variables: (1) Average Weekly Wage/Compensation Rate, (2) Date of Maximum Medical Improvement, (3) Percentage of Permanent Physical Impairment, (4) Number of Weeks in the schedule found in 33 U.S.C. §908(c)(1)-(20) and (5), a PEPCO exception.

Visualizing scheduled injuries as equations helps in several ways. First, it shows that scheduled injuries are driven by a claimant's average weekly wage. It is always the first equation variable. It controls how much money claimant will receive until reaching maximum medical improvement. It also controls half of the value of claimant's case upon reaching maximum medical improvement. The rest of the case value is dictated by the impairment rating assessed under the Guides to the Evaluation of Permanent Impairment of the AMA, 4th Edition, and the schedule. (33 U.S.C. §908(c)(1)-(20)). At each step in the scheduled injury equation a multiplication variable impacts case value.

B. The General Injury Equation

Sections 33 U.S.C. 908(c)(21) and 33 U.S.C. 908(h) of the LHWCA describe how general injuries are treated. The basic general injury equation is as follows:

(1) AWW/CR = MMI
(2) AWW - Resid. WEC = LWEC x 2/3 = $

The general injury equation also begins with the claimant's average weekly wage. While the scheduled injury equation is a multiplication equation, the general injury equation is a subtraction equation. Upon reaching maximum medical improvement the inquiry turns to claimant's permanent physical impairment, physical restrictions and, ultimately, claimant's residual wage earning capacity. The residual wage-earning capacity variable is the most complex part of the basic LHWCA equations. It combines medical, vocational and economic considerations (Appendix D).

Reference to the basic equations allows counsel to focus on the important elements of proof in a LHWCA case. Counsel should use the basic equations to fill in the variables as a litigated case progresses. In analyzing a reported case, counsel should use the basic equations as a shorthand method of identifying the issues decided by the court.

The goal of each party in a litigated LHWCA case is to control as many variables as possible. Thus, the claimant generally seeks a high average weekly wage, a late date of maximum medical improvement, a high percentage of permanent physical impairment, severe physical restrictions, and a low residual wage earning capacity with a corresponding substantial LWEC. On the other hand, the employer seeks a low average weekly wage, an early date of maximum medical improvement, no permanent physical impairment, no physical restrictions and no loss of wage-earning capacity. The Administrative Law Judge (AU) in a formal decision and order adopts certain equation variables and thereby resolves disputes regarding case value.

Claimant credibility, although not part of the basic equations, is critical in influencing which variables an ALJ adopts in a final decision and order. Claimant credibility impacts each part of the equation. Assume AWW is in issue. Assume further that the claimant does not work "substantially the whole of the year." An incredible claimant with a spotty work history suffers by application of the credibility factor. Because the claimant is incredible, the All in all likelihood determines that claimant's AWW is low. Since the claim is "wage driven," a poor result awaits the claimant regardless of the medical evidence. Similarly, claimant credibility impacts which medical opinion the All adopts when a difference of opinion occurs between physicians who have treated or examined claimant. Finally, claimant credibility is critical in cases involving psychiatric claims. A credible claimant uses the Section 20(a) presumption to build a case based, in part, upon an underlying psychiatric component. Conversely, the credibility factor likely precludes a psychiatric claim by an incredible claimant. The importance of claimant credibility extends as well to vocational rehabilitation issues.

CASE CREDITS

AGGRAVATION OR REDUCTION ISSUES

While the parties should view LHWCA cases as basic equations with variables, the cases often involve additional factors. The employer needs to focus at all times on issues which can reduce claim exposure. These reduction issues arise primarily when a claimant suffers an aggravation of a preexisting condition or re-injury. Claims under the LHWCA involve at least four rules of law that interact where aggravated injuries are involved:

- the "aggravation" rule;
- Section 908(f) "second injury" or "special fund";
- the "credit doctrine"; and
- Section 914(j).

See Blancbette v. OWCP, 998 F.2d 109, 1994 AMC 1513 (2nd Cir. 1993); Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 508 (2nd Cir. 1990), overruled in part on other grounds by Director, OWCP v. General Dynamics Corp., 982
F.2d 790, 793-95, 1993 AMC 2250 (2nd Cir. 1992).

A. Aggravation Rule

In workers' compensation law:

[T]he aggravation rule is a doctrine of general workers' compensation law which provides that, where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable.

Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986) (*en bane*); Blanchette v. OWCP, supra; See generally, 1A. Larson, Law

of Workmen's Compensation §12.20 (1982); 2 id. §58.10.

In Nash, supra, the Fifth Circuit finds the aggravation rule for LHWCA cases to be derived from Sections 903, 902(10) and 908(f) of the Act (p. 517).

Picking up the statutory construction theme, the court in Nash makes note of "well established policies and rules of construction to employ in construing this Act of workers' compensation" (p. 518) and cites Bludworth Shipping. Inc.. v. Lira, 700 F.2d 1046, 1047 (5th Cir. 1983) for the proposition that "the dominant interest of Congress in enacting the LHWCA was to help longshoremen." All preexisting impairment should be claimed; not just that for which compensation was previously claimed and compensated nor just that for which no claim was made. In fact, the Fifth Circuit also notes that the court has in the past consistently applied the aggravation rule in LHWCA cases. Nash, supra, at 516-517.

What the claimant therefore should seek in a LHWCA claim involving prior impairment to the part of the body injured upon which the claim is based is a single complete recovery for his injuries. (Nash, supra, at 518-519).

This rule standing alone, however, would create a disincentive for employers to hire or retain handicapped workers (and, perhaps, a disincentive for admiralty proctors to practice on the defense side of LHWCA claims). In recognition of this problem, Congress enacted §908(f) of the Act and the Benefits Review Board created the credit doctrine. See Blanchette, supra, at 112-113.

B. Second Injury or Second Injury Fund or Special Fund or Section 8(f) [33 USCA §908(f)] Claims

Second Injury Fund cases play an important role in the LHWCA scheme if for no other reason than the employer and its carrier, by establishing a Second Injury Fund case, limit their compensation exposure.

A recent case, Reich v. Bath Iron Works Corp., 42 F.3d 74, 1995 A.M.C. 2110 (1st Cir. 1994), provided a bit of a history lesson about the purpose of the Second Injury Fund. The court notes that in recent years the main use of the special fund has been to encourage employers to hire workers who have suffered a previous permanent partial disability. The employers, concerned that a worker who suffered a new disability might impose extra liability on the employer where the first injury contributed to the severity of the second--for example, the loss of an eye by a worker already blind in one eye, would be encouraged to hire such an employee who was already blind in one eye--because the special fund not the employer would be liable for the so-called second injury compensation payments beginning after 104 weeks of employer payments. In 1972, when Congress adopted an employer assessment device to support the special fund, it also greatly enlarged the scope of the fund's liability by inter alia extending the fund's liability retroactively to provide some coverage for some second injuries that had occurred prior to the 1972 amendments. Between 1972 and 1984, Congress discovered employers were "dumping" as many cases as possible into the §8(f) basket. This was because the employer not only avoided compensation liability after 104 weeks but unexpectedly the affect was to lower the employer's future formula payments to the special fund below the level that would have otherwise had been applied. In 1984, Congress adopted a new formula under §944(c)(2) to attribute to the employer payments by the fund on account of double injury employees to the extent that such payments increased the employer's assessment under the second half of the formula. This second half represents only 50 per cent. of the final assessment; thus, the employer gets some help when the fund takes over compensation

and presumably the employer retains some incentive to hire the partially disabled, but the employer does see its future assessments rise somewhat as the employer transfers responsibility to the special fund. This was done to dissuade the dumping of cases into the fund. The court does not, however, provide any analogies about the results from 1984 to 1993.

It should also be noted that Congress intended in §8(f) for the employee to compensate the disabled employee for the entire second (work-related) injury. Director, OWCP v. Bethlehem Steel Corp., 868 E2d 759 (5th Cir. 1989); Blanchette v. OWCP, supra.

The language of §908(f) is as follows: (f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)-(20)of this section, the employee has a permanent partial disability and the disabilities found not to be due solely to that injury, and such disabilities materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

(B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this chapter prior to cessation of such payments.

(3) Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the

employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

The United States Supreme Court, in one of their infrequent forays into a Second Injury Fund case in 1995, provided a lesson for practitioners on both sides of the docket in statutory construction, and, indeed, in the value of reliance on years of consistent judicial construction of the statute followed by Congressional re-enactment of the language given such consistent judicial construction. Metropolitan Stevedore Co. v. Rambo, 115 S.CT.. 2144, 132 L.Ed. 2d 226, 1995 A.M.C. 1872 (1995).

In Rambo, the Supreme Court said the question is whether a party may seek modification on the ground of "change in conditions" when there's been no change in the employee's physical condition but rather an increase in the employee's wage-earning capacity due to the acquisition of new skills.

This was a Second Injury Fund case in which the longshoreman, after an award for which the employer would pay a maximum of 104 weeks and then the special fund would make the later payments, began attending crane school and obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. His earning capacity increased to more than three times his average weekly wage at the time of injury although his physical condition remained unchanged.

The employer sought modification of the award which they could do even when the special fund has assumed responsibility for payments [33 U.S.C. §922; 20 C.F.R. §702.148(b) (1944); lee also 33 U.S.C. §8(f)(2)(B)].

The Administrative Law Judge (All) agreed that an award may be modified based on changes in the employee's wage-earning capacity even absent a change in physical condition and after discounting wage increases due to inflation and considering the employee's risk of job loss and other employment prospects concluded he no longer has a wage-earning capacity loss and terminated his disability payments. The Benefits Review Board affirmed. The court of appeals for the Ninth Circuit reversed the Benefits Review Board holding that §22 authorizes modification of an award only where there has been a change in the claimant's physical condition. The Benefits Review Board had affirmed relying on Fleetwood v. Newport News Shipping and Dry Dock Co., 776 F.2d 1225 (4th Cir. 1985). This created a split in the circuits between the Fourth and the Ninth Circuits.

The Supreme Court reverses the decision of the Ninth Circuit. The Supreme Court said:

Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for "when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, 1992 AMC 2113, 2117 (1992); Demarest v. Manspeaker, 498 U.S. 184, 190 (1991).

The Court said that the longshoreman's view and that of the Ninth Circuit that the "change in conditions" means change in physical condition and does not include changes in other conditions relevant to the initial entitlement to benefits, such as a change in wage-earning capacity, cannot stand in the face of the language, structure, and purpose of the Act.

The Court engages in a statutory construction lesson. The Court points out that under §22 a party in interest includes an employer or carrier which has been granted relief under §8(f) "on the ground of a change in conditions

may apply for a review of the claim." The Court notes that the use of "conditions," a word in the plural, suggests that Congress did not intend to limit the bases for modifying awards to a single condition such as an employee's physical health. The Court says that the longshoreman's insistence on what seems to the court to be a "narrowly technical and impractical instruction" of the phrase "a change in conditions" is also inconsistent with the structure and purpose of the Act because, like most other workers' compensation schemes, the Act does not compensate physical injury alone but the disability produced by that injury. The Court says:

The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

The Court also makes short shrift of the longshoreman's argument that because Congress' reenactment of §22 as late as 1984 after decisions which construed the change in conditions language as argued by the longshoreman without change in the phrase must have been a Congressional endorsement to that approach; the Supreme Court said while they have relied on Congress' re-enactment of statutory language that has been given a consistent judicial construction, in particular where Congress was aware of or made reference to that judicial construction, the cases in the relevant period concerning §22 were based on a misreading of the McCormick decision by the Ninth Circuit in 1933 and therefore involved dicta not holdings. In a related argument by the longshoreman, the Supreme Court also swept aside the argument that the court was doing away with an accumulation of more than 50 years of dicta saying:

"[A]ge is no antidote to clear inconsistency with a statute," Brown v. Gardner, supra, at (slip op., at 7), and the dictum of Pillsbury and Burley Welding Works has not even aged with integrity, , e.g., Fleetwood v. Newport News Shipping and Dry Dock Co., 16 BRBS 282 (1984); LaFaille v. Benefits Review Board. U.S. Dept. of Labor, 884 F.2d 54, 62 (2 Cir. 1989); Avondale Shipyard. Inc. v. Guidry, 967 F.2d 1039, 1042, n. 6, 1993 AMC 304[DRO] (5 Cir. 1992) (dictum). Breath spent repeating dicta does not infuse it with life. The unnecessary observations of these Courts of Appeal "are neither authoritative nor persuasive." McLaren v. Fleischer, 256 U.S. 477, 482 (1921); cf. United States v. Estate of Connelly, 397 U.S. 286, 295 (1970).

Finally, the Court said:

We recognize only that an award in a nonscheduled-injury case may be modified where there has been change in wage-earning capacity. The change in actual wages is controlling only when actual wages "fairly and reasonably represent … wage-earning capacity." LHWCA §8(h), 33 U.S.C. §908(h). Otherwise, wage-earning capacity may be determined according to many factors identified in §8(h), including "any … factors or circumstances in the case which may affect [the employee's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." The circumspect approach does not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy. There may be cases raising difficult questions as to what constitutes a change in wage-earning capacity, but we need not address them here. Rambo acquired additional, marketable skills and the ALJ, recognizing that higher wages do not necessary prove an increase in wage-earning capacity, took care to account for inflation and risk of job loss in evaluating Rambo's new "wage-earning capacity in an open labor market under normal employment conditions." App. 66.

We hold that a disability award may be modified under §22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. Because Rambo raised other arguments before the Ninth Circuit that the panel did not have the opportunity to address, we

reverse and remand for proceedings consistent with this opinion.

The Fifth Circuit weighed in, in 1995, with a trap for the unwary employer as respects an additional exposure for the employee for asserting a Second Injury Fund case, attorney's fees pursuant to §28(b), even though the employer believes it has established its right to a maximum of 104 weeks compensation pursuant to §8(f). The court also provided a short lesson in statutory construction. Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 1995 A.M.C. 1517 (5th Cir. 1995).

The employer, Boland Marine, on two occasions sought relief under §8(f). On both occasions, the deputy commissioner recommended relief under §8(f), but the associate director found that compensability had not been established and denied the request. After the second rejection of its request for §8(f) relief, Boland filed a "notice of final payment or suspension of compensation payments" and discontinued paying benefits. A claim for benefits was then filed under the Act and after hearing the ALJ concluded that §8(1) of the Act was applicable to the case so as to limit the employer's liability to 104 weeks of compensation payments, but also held that since the claimant was successful Boland Marine was required to pay attorney's fees. When Boland contested the award of attorney's fees, the ALJ changed its decision and ordered the special fund to pay claimant's attorney's fees because the director of the Office of Worker's Compensation Programs had fostered litigation without reasonable grounds for doing so, a basis for awarding attorney's fees pursuant to §26 of the Act. The director appealed the order granting attorney's fees from the special fund to the Benefits Review Board (BRB), which found that the ALI erred in awarding fees against the special fund pursuant to §26 because the BRB said that it was Boland Marine's actions that necessitated a formal hearing regardless of the merit of the director's position in denying §8(f) relief. The BRB also noted that the special fund cannot be held liable for an attorney's fee under §28 but awarded the attorney's fees against Boland Marine because it terminated payments to Rihner, the claimant, notwithstanding Boland's stipulation to Rihner's entitlement to compensation at the hearing or its successful petition for relief under §8(f). The BRB vacated the ALJ's order granting attorney's fees from the special fund under §26 and held Boland Marine liable for the claimant's attorney's fees.

The Fifth Circuit held that §26 grants the power to assess costs only to courts, not to administrative agencies, and stated that, while in the past the BRB had assumed §26 allowed ALJs to assess costs, the plain meaning of the statute in this instance could not be disregarded to create rights not given or implied by the terms of the Act.

Boland Marine also asserted the director should be forced to pay the claimant's attorney's fees pursuant to Federal Rule of Civil Procedure 11. The Court finds, however, that because §26 controls the circumstances of a party continuing the proceeding without reasonable grounds (and incurring a sanction for costs including attorney's fees), the sanctioning procedure of the Federal Rules of Civil Procedure are not applicable to that conduct.

The Fifth Circuit also reviews the cases with respect to the award of attorney's fees under the American Rule used in federal courts "absent statute or enforceable contract, litigants pay their own attorneys" and the exceptions to the same. The court notes that, notwithstanding decisions that when a Congressional statute sets out the framework for the award of attorney's fees, the court should look at that statutory framework alone to determine whether sanctions should be awarded. The Supreme Court recently

indicated that, even if a statute governs the imposition of attorney's fees, the court may "resort to its inherent power to impose attorney's fees as a sanction for bad faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions." Chambers v. NASCO. Inc., 501 U.S. 32, 50, 111 S.CT.. 2123, 2135, 115 L.Ed.2d 27 (1991). Nonetheless, the Fifth Circuit concludes that the instant case is not a case in which the conduct of the director rises to the level of abuse warranting the use of the court's inherent power to sanction.

Finally, the Fifth Circuit affirmed the decision of the BRB ordering attorney's fees and expenses for the appeal to the claimant against Boland Marine because it determined from the record that regardless of whether Boland Marine was entitled to relief from the director under §8(f) it was Boland Marine's actions ceasing payment and contesting compensability for the underlying claim that required the claimant to hire an attorney to pursue his claim.

The Fifth Circuit says:

As the BRB noted, the fact that an "employer is discharged from some compensation due to the operation of Section 8(f) does not affect its obligation for attorney's fees under Section 28(b)." see Henry v. George Hyman Const. Co., 749 F.2d 65, 69 (D.C. Cir. 1984) ("a claimant has no interest in the source of compensation") (citing, inter alia, Price v. Greyhound Bus Lines. Inc., 14 B.R.B.S. 439, 440 n. 1 (1981), dismissed for lack of subject matter jurisdiction, No. 81-1934 (4th Cir. Jan 4, 1982), cert. denied, 459 U.S. 831, 103 S.CT.. 70, 74 L.Ed.2d 70 (1982); Creasy v. Bateson, 14 B.R.B.S. 434, 437 (1981).

This is a catch-22 case that demonstrates that the employer must take care in contesting any aspect of a claim where the bottom-line issue for the employer is a determination that §8(f) applies to the claim.

In the nuts and bolts category of recent Second Injury Fund cases where the contest turned on the proof of the two injuries and the application of the statute to the proof, the Second, Fourth and Ninth Circuits have provided instructional decisions (and additional lessons in statutory construction).

In Sealand Terminals. Inc. v. Gasparic, 7 F.3d 321, 1994 A.M.C. 1516 (2nd Cir. 1993), the ALJ denied §8(f) relief to Sealand; the BRB affirmed; and the Second Circuit affirms. This was in the face of Sealand's argument that the claimant suffered from three pre-existing permanent partial disabilities, specifically, two bad knees and a bad back. The Court notes that Sealand failed to demonstrate to the AU that the work-related accident alone would not have caused his permanent disability or partly. The Court agreed with the BRB that the claimant's back condition was not "manifest" to Sealand prior to the accident as apparently argued by Sealand that the claimant's back condition could have been discovered through the use of x-rays and, as the Court said, hardly renders the condition manifest to Sealand. The Court also declined Sealand's invitation to join the Sixth Circuit in abandoning the §8(1) requirement that the employee's pre-existing condition be manifest to the employer saying that the manifest requirement is supported by sound reasoning as well as an overwhelming weight of authority, citing Fifth, Ninth, Eighth, and Third Circuit cases.

Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 8 F.3d 175, 1994 A.M.C. 1811 (4th Cir. 1993), involved a machine installer at Newport News who first suffered a ruptured disc in the cervical area, had surgery, got a good result, and was able to return to work. Subsequently, he was struck in the lower back by a piece of falling grating and was diagnosed with a ruptured disc in the lumbar spine area, had surgery, and after a prolonged recovery returned to light duty work at Newport News. After a long period

of being off work and doing light duty work, he was referred to rehabilitation and went to work at Hampton Sheet Meal in a job that was comfortably within his disability restrictions. Claimant filed a request for compensation benefits under the Act, but after determining the date of maximum medical improvement and permanent partial disability the ALJ ruled that Newport News was entitled to a reduction in the benefits it was required to pay claimant pursuant to §8(f); the director appealed the ALJ's decision; the BRB affirmed the All's decision. On appeal to the Fourth Circuit, one of the issues was whether the Board erred as a matter of law in determining Newport News' entitlement to §8(f) relief by applying an incorrect standard with respect to the word "disability" in §8(f). Newport News' position was that the word "disability" must be equated with "impairment." The director's position utilized the statutory definition of "disability" to construe §8(f). The Act defines "disability" as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The court rejects both parties' constructions of §8(f). The court concludes that, when an employee is permanently partially disabled but not totally disabled, §8(f) requires the employer to make an additional showing that the ultimate permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." The Fourth Circuit cites a Fifth Circuit case, Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990) (recognizing that a "heavier burden" is placed on the employer to obtain section 8(f) relief in the case of a permanently partially disabled employee). The Fourth Circuit requires that the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. The employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a preexisting permanent partial disability an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. In the instant case, the All and the BRB failed to require a showing of this "materiality" prong of the contribution element, and the court notes that Newport News put on no evidence to that affect. Therefore, the court reversed and remanded holding that, by not applying the materiality prong component of the statutory standard, the All and the BRB erred as a matter of law in awarding §8(f) relief to Newport News.

Lastly, LP. Paup Co. v. Director, OWCP, 999 F.2d 1341, 1994 A.M.C. 1809 (9th Cir. 1993) is a Second Injury Fund case where at the hearing the compensation carrier and the claimant stipulated that the claimant's disability was a combination of his prior non work-related injury to his left hand and his work-related injury to his back, resulting in a permanent and total disability. There was no dispute that the claimant had a pre-existing permanent partial disability that was manifest to the employer. The compensation carrier contended that the claimant's disability was not due solely to his work-related back injury. The BRB had reversed the All's ruling that the employer was entitled to §8(f) relief, because there was not sufficient evidence in the record to support the AL.T's determination that the claimant's hand condition contributed to his permanent total disability. The Ninth Circuit concludes that the stipulation between the claimant and the compensation carrier did not constitute substantial evidence with respect to the prior permanent partial disability because the director did not participate. The court says the director has the authority to administer

the special fund. It therefore follows that agreements between an employer and a claimant that affect the liability of the special fund cannot be used against the Director, The employer argued that by not appearing at the hearing the director waived the right to argue the stipulation did not constitute substantial evidence, but the court concluded to so hold that the director waived the right to challenge the stipulation not agreed to would have the affect the foreclosing the director's right of appeal. This conclusion would be contrary to established precedent according to the court that the director has the right to petition for review of any decision adversely affecting the special fund. In reviewing the record with respect to the claimant's prior disability, the court talks about substantial evidence and says:

The court also points out that the employer must demonstrate that the second injury alone did not cause the claimant's permanent total disability, stating:

It is not sufficient if the evidence indicates only that his two injuries create a greater disability than would his back injury alone. If the later injury was enough to totally disable [claimant], it is not relevant that his preexisting hand injury made his total disability even greater.

Included in the appendices is a recent ALJ decision underscoring the danger to an employer's 8(f) claim posed by Two "R" Drilling Co, EP, Paup Co. and Director, OWCP v. Luecitelli, 964 F.2d 1303 (2nd Cir. 1992). The Sikes opinion exemplifies a recent trend in which the employees 8(f) petition is denied because "the employer has failed to establish the third element for 8(f) relief as it has not shown that the claimant's work injury alone would not have caused the claimant's total disability." Roy L. Sikes v. AAFES and Director, OWCP, Case No. 94-LHC-2103 (Thomas M. Burke, ALJ, Decision and Order, 01/31/96) (Appendix E).

C. Credit Doctrine

The credit doctrine originates from both statute and case law. 33 U.S.C. §903(e) provides that:

Any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 . . . shall be credited against any liability imposed by this chapter.

On its face, Section 903(e) does not apply to previous compensation payments received pursuant to the LHWCA. Rather, Section 903(e) only applies when prior compensation is paid under a state workers' compensation Act or the Jones Act.

The credit doctrine affects the impact of the aggravation rule, and it has been developed in a series of Benefits Review Board decisions. See Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986) (en banc); Director, OWCP v. Gen. Dynamics. Corp., 900 E2d 506, 509 (2nd Cir. 1990). The doctrine operates to credit an award with the amount of any prior compensation paid claimant for a particular disability. Gen. Dynamics Corp., supra, at 519; Nash, supra, at 522. It does not permit an examination of what could have been or should have been compensated at the time of an earlier injury. The sole purpose of the credit doctrine is to prevent double recoveries where the worker has been actually compensated for disability to the same member at a previous point in time. See Nash, supra, at 548.

1. Credit in scheduled injury cases

In Strachan Shipping Co. v. Nash, supra, the Fifth Circuit confirmed that the credit doctrine applies to previous LHWCA benefits paid to a claimant. Read strictly, Nash only applies to "scheduled" injuries. The issue in Nash was whether the employer could receive

credit for compensation attributable to an earlier injury for which the injured longshoreman in fact did not, but could have, received compensation. The Fifth Circuit rejected employer's argument and held:

The credit doctrine, providing that an employer is not liable for any portion of an employee's disability for which the employee has received compensation under the LHWCA does not apply where no benefits were actually received. Therefore, if the later injury is one to a scheduled member, and if the injured employee previously received LHWCA monies, state workers' compensation benefits or Jones Act benefits, the employer can benefit from the credit doctrine.

In the dissent in Nash (where the claimant had an uncompensated 20 per cent. permanent partial disability, a subsequent 10 per cent. permanent partial disability that was compensated, and in the instant case a 4 per cent. permanent partial disability aggravation by injury with a different employer), Judge Williams felt the effect of the majority opinion was to discourage the hiring of those who already have a permanent partial disability which has been compensated because "prior settlements or payments are not binding and their adequacy can be reopened in the event of an additional injury." Nash, supra, at 524.
It appears that while the majority and dissent in Nash were of the opinion inquiry should not be made into the "if or buts," See Don Meredith, payments are not binding and their adequacy can be reopened in the event of an additional injury." Nash, supra, at 524.

It appears that while the majority and dissent in Nash were of the opinion inquiry should not be made into the "if or buts," See Don Meredith, Monday Night Football, of the prior disability the majority resolved the issue by allowing a dollar credit for prior compensation paid, while the dissent would have, because of §§908(f) and 908 (i)(3) of the Act, held the prior settlement and payment ended all issues between the parties for the claimant's prior, 30 per cent permanent partial disability (with the second injury compensating beyond 104 weeks), and the subsequent employer (Strachan) could only be liable for the claimant's aggravation injury of 4 per cent. permanent partial disability. Obviously, the majority decision results in more money for claimant. Defense attorneys might, however, want to review the details of prior settlements to see to what extent all prior impairment could be said to have been compensated and revisit the fundamental law point made by Judge Williams that settlements of disputed claims settled all the issues between the parties. See §908(i)(3).

2. Credit in general injury cases

In ITO Corporation v. Director, OWCP, 883 F.2d 422 (5th Cir. 1989), the Fifth Circuit refused to extend the rationale of Nash to a general injury. In ITO Corp., the later employer faced a total and permanent disability award. Claimant originally injured his back while working for Ryan-Walsh Stevedoring Co. on March 14, 1980. Claimant returned to work. On October 26 and 27, 1981, claimant worked for Atlantic and Gulf Stevedores (ITO). On October 30, claimant worked for Interocean Stevedoring Co. By the end of his work day on October 30, claimant had severe back pain.

Claimant and Ryan-Walsh settled their controversy stemming from the March 1980 injury for a lump sum payment of $20,000. IA at 424. Claimant thereafter sought compensation and medical benefits from ITO and Interocean. ITO was held to be the responsible employer and claimant was awarded permanent and total disability benefits. ITO appealed contending that it was entitled to a credit for the $20,000 Ryan-Walsh settlement.

The Fifth Circuit held that ITO's reliance on Nash was misplaced because Nash was clearly distinguishable. In Nash the issue was the

extent of credit due to the later employer when the employee experienced successive injuries to compensate for "some" of those injuries by a previous employer. In ITO Corp., the Fifth Circuit noted:

Here, the second employer, adjudged responsible for total permanent disability, seeks a credit for sums paid by an earlier employer for permanent partial disability due to injury of a non-scheduled member. Nash therefore does not control this case. The credit doctrine was developed to prevent double recoveries where the worker has been previously compensated for the same disability. We are persuaded that ITO failed to demonstrate that this award duplicates the recovery Aples (claimant) made against Ryan-Walsh. 833 F.2d at 426, 427.

Clearly, there is a different application of the credit doctrine to scheduled and general injuries. Why the difference? First, in successive general injuries, employers are entitled to seek the benefits of the Second Injury Fund. Second, recall that when one analyzes scheduled injuries, loss of wage earning capacity is not germane. A claimant who receives a general award for a partial loss of wage earning capacity and who thereafter is permanently and totally disabled in fact does not reap the benefits of a double recovery.

Lastly, to revisit our statutory construction theme in a credit case, the standard of review was discussed in Director, OWCP v. Gen. Dynamics Corp., supra, at 519, and the court noted that while the Supreme Court has suggested that the Benefits Review Board's decisions are not entitled to special deference from a reviewing court because it performs only an adjudicatory function and is not charged with administering the Act, it is less clear whether the Director's interpretations are entitled to special deference, because the Director is charged with administering the Act. While the Supreme Court has not directly addressed the issue [See, Director, OWCP v. Gen. Dynamics, 982 F.2d 790, 794 (2nd Cir. 1992) for a discussion by the Supreme Court of deference cases relative to other acts], the Second, Fifth, Sixth, Seventh and Ninth Circuits have assumed that the Director's interpretation of statutes is entitled to special deference. When confronted with the Director's interpretation of the Act, one may not want to be too quick to defer to the Director, For example, when the Director appears as a litigant in an adversarial proceeding before the Board, it would be inappropriate to grant special deference to the Director's litigating position. Williams Bros.. Inc. v. Fate, 833 F.2d 261 (11th Cir. 1987).

D. Section 914(j) [33U.S.C.A. 914(j)]

Section 914(j) of the Act provides: "If an employee has made advance payments of compensation, he should be entitled to be reimbursed out of any unpaid installment or installments of compensation due." "Informal award" payments made to a potential LHWCA claimant and subsequently claimed as a credit in the LHWCA proceeding can be a trap for the employer.

In Director, OWCP v. Gen. Dynamics Corp—supra, claimant had a hearing loss of 63.30 per cent., 56.9 per cent. of which occurred prior to his employment by General Dynamics. After going to work for General Dynamics, he made an initial claim (1979) and General Dynamics informally paid him $16,179.47. He then made a second claim (1983) for hearing loss. The Benefits Review Board found that the 1979 claim remained open and merged it into the 1983 claim because the 1979 claim had never been adjudicated. The court affirmed the Benefits Review Board who, in effect, eliminated the 1979 claim, leaving only the 1983 claim extant, and treated the $16,179.47 in 1980 as a voluntary payment in advance of an award and credited General Dynamics for it.

In Blanchette v. OWCP, supra (General Dynamics was the employer), however, where the court had two claim situations similar to

the foregoing General Dynamics' case, the court received the claims in the posture of second injury claims where the employee was contending that not only were the claims Second Injury Fund claims, but the employer was entitled to a credit for its voluntary payments to the two claimants for their first claims. The court determined, however, that the Second Injury Fund is entitled to the credit because neither employee had a disability prior to their employment with General Dynamics and the payments made by General Dynamics were compensation for hearing losses suffered on the job. Since Congress intended the employer to compensate the disabled employee for the entire second (work-related) injury, this intention would be thwarted if General Dynamics' initial payments were applied as a credit against its liability for the injuries that resulted in their second claims. General Dynamics obtained all the relief appropriate for its prior payments by having those payments reduce the total awards due on the claims of the two employees. This result is based upon application of the credit doctrine rather than §914(j).

It would appear, however, that the employer would always want to have the credit rather than have the Second Injury Fund receive a gratuity. See, Director, OWCP v. Gen. Dynamics, supra, at 512.

CONCLUSION

Most litigated LHWCA claims involve the basic scheduled and general injury equations set forth in the case value section of this paper. The bulk of reported LHWCA cases discuss how an ALJ or a court has resolved a dispute over equation variables. Use of the framework provided in the body of this paper will assist counsel in understanding the issues being litigated in a given case. In addition to the basic issues of case value, the employer must carefully examine a case for aggravation or reduction issues. The credit doctrine and Section 8(1) are available methods for reducing the employer's compensation exposure. Recent case law regarding reduction issues has been analyzed herein to assist counsel in litigating cases. Particular attention should be paid by defense counsel to the Section 8(f) portion of the article since a series of appellate decisions restricting 8(f) relief have been identified.