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QUARTERLY SUMMARY: LONGSHORE & HARBOR WORKERS' COMPENSATION ACT CASELAW

Decisions published in LEXIS through May 31, 2026;
Decisions posted by BRB at https://www.dol.gov/brb/decisions.htm:
published through 03/20/2026; unpublished through 03/31/2026
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Appeals – Other

No equitable tolling to save untimely appeal when attorney did not notify district director of his change of address. *Sansone v. Ports America, Inc.*, 2026 DOLBRB LEXIS 42 (BRB 24-0452, 2/17/26) (unpublished).

On July 31, 2024, the ALJ issued a Decision and Order. The order was filed on August 1, 2024. On September 4, 2024, claimant filed a Notice of Appeal. On September 11, 2024, employer filed a motion to dismiss, contending the appeal was untimely. Claimant's attorney did not specifically assert he did not receive the order, but he reported he had recently moved offices, was without postal delivery service and internet "for a substantial period of time, and did not know when he had been served with the order because it was sent to his prior address. The Board held the appeal was untimely. Not knowing when the order was received is not the same as not having been served with the order.

In *Dominguez v. Bethlehem Steel Corp.* 59 BRBS 53 (2025), the Board held §21(a) of the Act was a claim processing rule, subject to ordinary rules of waiver and forfeiture. As such, it is presumptively subject to equitable tolling, but a litigant seeking equitable tolling bears the burden of establishing he has been pursuing his right diligently and some extraordinary circumstances stood in his way. Garden variety claim for excusable neglect does not warrant equitable tolling. The attorney's failure

to notify the district director of his change in location is not an extraordinary circumstance sufficient to warrant application of the equitable tolling doctrine.

Appeal timely when claimant mailed the notice to the wrong government office within thirty days of date the order was filed. Presumption not rebutted. *Muhsin v. General Dynamics Corporation,* 2026 DOLBRB LEXIS 40 (24-0312, 3/27/26) (unpublished).

The District Director served the ALJ's Decision and Order on February 7, 2024. On February 28, 2024, claimant mailed a letter, postmarked March 6 and addressed to the "Clerk of the Appellate Boards (OCAB), stating he was filing an appeal. He also sent a copy of the letter to the Virginia Workers' Compensation Commission and to employer's counsel, which both received on March 12, 2024. On March 28, 2024 employer sent a copy of claimant's appeal letter to the OALJ, objecting to the late filed request. On April 4, 2024, claimant sent another appeal letter to the Clerk of the Board at the DOL, which the Board received on April 10. The Board held the appeal was timely.

A notice of appeal filed with any other government office and forwarded to the Board will be considered if filed with the Clerk as of the date it was received by the other office. If the notice is mailed and would be untimely based on the date the Board received it, it may be considered filed as of the date it was mailed. Untimely appeal is an affirmative defense, and nothing supports employer's burden. The postmarked envelope to employer's counsel supports the inference the appeal was timely, under a reasonable assumption claimant mailed the correspondence the same day as the appeal.

Average Weekly Wage - §10(c)

Under §10(c), average weekly wage can be based on blended earnings. *Schindler v. Kellogg, Brown, and Root Services*, 2026 DOLBRB LEXIS 16 (BRB 23-0323, 23-0323A, 2/12/26) (unpublished).

Clamant worked in Iraq for employer as an environmental coordinator between December 2004 and April 2005. His duties included handling and securing chemical storage containers and overseeing burn pits that functioned as trash disposal for plastic materials, spent ammunition, construction waste, and medical debris. Claimant contended burn pits exposed him to copious amount of smoke and hazardous fumes. After an initial appeal and remand, the ALJ found claimant's lung cancer compensable and awarded TTD from November 15, 2011 to February 22,

2012 (from the date his lung was surgically removed until he recovered from surgery and returned to full time work). The post injury work, per claimant, was mainly office work in the environmental field. The ALJ concluded claimant's injury was an occupational disease and date of awareness was in March 2018. He calculated claimant's average weekly wage under §10(a), using earnings from 2017. Claimant appealed the AWW calculation and disability findings.

The Board held the ALJ erred in applying §10(a) because claimant was a seven day a week worker and instructed the ALJ, on remand, to calculate average weekly wage per §10(c).

Claimant, relying on *Albonajin v. AECOM*, 56 BRBS 21 (2022), argued the ALJ should consider earnings from Iraq employment in 2005 to account for periods of lost economic choice. The Board held the ALJ was not limited to the wage actually earned during any single period if those wages did not fairly reflect earning capacity. Rather, the ALJ may consider prior earnings, the nature and continuity of employment, the availability of work, and the wages of similarly situated employees, so long as the resulting figure reasonably represents the claimant's capacity to earn. On remand the ALJ must consider all evidence relevant to claimant's earning capacity, including overseas contract employment and associated wages, address whether claimant's occupational condition foreclosed his ability to return to overseas contract employment prior to his diagnosis, and explain whether and how this asserted loss of employment opportunity affected the assessment of earning capacity under §10(c).

Causation - §20 Presumption

Presumption not rebutted. *Muhsin v. General Dynamics Corporation,* 2026 DOLBRB LEXIS 40 (24-0312, 3/27/26) (unpublished).

Claimant invoked the §20(a) presumption that the ongoing right knee condition from a January 7, 2020 injury was related to his work injury. Dr. Carter opined his work-related contusion could have caused a transient increase in swelling, but this acute injury should essentially be resolved, and most of claimant's ongoing symptoms were related primarily to the underlying pre-existing osteoarthritis. Dr. Forest agreed with Dr. Carter's opinion that a work-related contusion should not affect claimant two years after the injury. Dr. Cohen opined the work-related contusion exacerbated preexisting osteoarthritis and likely caused existing chondral lesions to become symptomatic, but if he had arthroscopy followed by PT and work conditioning for eight weeks, he likely would be at maximum medical

improvement with subsequent treatment not related to the work accident. The ALJ concluded employer rebutted the presumptions, and the work-related knee contusion resolved by June 2, 2020. Claimant appealed. The Board reversed.

An equivocal opinion as to etiology is insufficient to support rebuttal. Employer must produce evidence the condition was not permanently aggravated by the work injury. Physicians here did not satisfy that standard. Dr. Carter opined most of claimant's ongoing symptoms were related primarily to the preexisting arthritis and the work-related injury should be essentially resolved. Dr. Cohn did not state if claimant's condition, without recommended surgery, remained due to a work-related exacerbation or was due solely to the preexisting arthritis. Dr. Forest's opinion was equivocal because he did not explain how he determined claimant's ongoing right knee condition was not related to the injury.

Hearings – Other

Time to file a motion for reconsideration governed by 29 CFR §18.93, not FRCP 59(e). *Qualls v. SSA Terminals, LLC*, 2026 DOLBRB LEXIS 20 (BRB 24-0261, 2/27/26) (unpublished).

The ALJ issued an attorney fee order on February 15, 2024. Twenty-seven days later, claimant's attorney filed a motion for reconsideration, relying on FRCP 59(e), which allows 28 days to file a motion to alter or amend a judgment. On March 19, 2024, the ALJ issued an Order Denying Reconsideration, concluding OALJ Rule 29 CRF §18.93 had a ten day deadline. The Board affirmed. Rule 59(e) does not apply because there is a specific OALJ rule governing this subject. *Zumwalt v. Nat'l Steel & Shipbuilding Co.* 52 BRBS 17, 21 (2018).

Medical Services - Other

Medical marijuana does not qualify as reasonable and necessary treatment under the LHWCA. *Garcia v. Director, OWCP,* 169 F.4th 111 (2nd Cir., 2026).

Claimant, receiving PTD, sought reimbursement for payment of medical cannabis infused cookies and edibles obtained as medical treatment prescribed by claimant's Puerto Rico doctor. Puerto Rico law allows for the prescription of medical marijuana, and claimant's doctor characterized marijuana edibles as one of the only treatments that best works for the patient. Employer refused reimbursement. The ALJ held marijuana remained a controlled substance under federal law and could not constitute

reasonable and necessary medical treatment under the LHWCA. The Board affirmed.

The Controlled Substance Act ["CSA"], 21 USC §801 *et seq*., places all substances which in some manner are regulated under federal law into one of five schedules. Marijuana is classified as a Schedule I controlled substance, so under federal law it "has no currently accepted medical use in treatment in the United States." *United States v. Oakland Cannabis Buyers' Coop*, 532 US 483, 491 (2001) (holding there is no medical need defense for the manufacture and distribution of Schedule 1 controlled substances) (quoting 21 USC §812(b)(1)(B)). This claim arises under a federal act, so the ALJ must accept the CSA as binding federal law in discerning whether marijuana constitutes medical care which is recognized as appropriate for the medical profession for the care and treatment of the injury. Through the CSA classification, the government has explicitly recognized marijuana has no currently accepted medical use in treatment in the United States.

Permanent Disability – Post Injury Factors

Disability did not end when the job at injury was not available. *Woolum v. Arma Aviation*, 2026 DOLBRB LEXIS 66 (BRB 24-0064, 25-0164, 25-0193, 3/5/26).

The ALJ concluded claimant's nasal and sinus conditions, but not psychological conditions, were compensable, related to fumes from burn pits when working in Kabul, Afghanistan. The nasal and sinus conditions were not at maximum medical improvement and prevented him from working in Kabul. Claimant left his employment on October 15, 2020, returned to the United States, and on April 11, 2021 began working as an aircraft mechanic for a different employer. On August 30, 2021 the United States Forces withdrew from Afghanistan. The ALJ awarded TTD from October 15, 2020 through April 10, 2021, and TPD thereafter. On appeal, employer, based on *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), argued claimant had no wage loss because the U.S. withdrawal from Afghanistan eliminated the availability of work in Afghanistan. The Board rejected employer's argument.

In *Kubin* the ALJ awarded the claimant, a professional football player, a higher award for the presumed duration of his football career, which was cut short due to the work injury, and a lower award for his post-football career. *Kubin* was not applicable because neither party contested the ALJ's decision to fashion separate awards. The controlling case was *Raymond v. Blackwater Sec. Consulting, LLC*, 45 BRBS 5 (2011), *aff'd sub. nom. Blackwater Sec. Consulting LLC v. Director, OWCP*, 503 Fed. App'x. 498 (9th Cir. 2012), *cert.*

denied, 571 US 817 (2013). That case held there is only one average weekly wage per injury on which disability benefits will be based, and post injury events generally are not relevant in determining average weekly wage. The 9th Circuit said the Act did not grant the ALJ any discretion to recalibrate claimant's average weekly wage at time of injury based on future events that would have changed that wage regardless of injury.