BRB No. 94-3924
Case No. 93-LHC-1243
OWCP No. 07-0116230

RALPH G. BEACH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NOBLE DRILLING CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	ORDER ON RECONSIDERATION *EN BANC*

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) timely moves for reconsideration of the Board's Order dated September 22, 1994, dismissing employer's appeal as untimely. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has filed a response to the motion, urging that it be denied. For the reasons stated below, we deny the motion for reconsideration.

In this case, the administrative law judge's Decision and Order was filed in the office of the district director[1] on August 2, 1994. The Board received employer's notice of appeal on September 6, 1994, but noted that the date of mailing was September 2, 1994. Considering the notice of appeal to have been filed on September 2, the Board dismissed the appeal for lack of jurisdiction as it should have been filed by September 1, 1994, in order to be timely. 33 U.S.C. §921(a); 20 C.F.R. §§802.205, 802.221.

The certificate of filing and service attached to the administrative law judge's Decision and Order shows service by certified mail on August 2, 1994, on claimant, his attorney, carrier and its attorney, at the correct addresses. In the motion for reconsideration, employer's counsel maintains that he received, by certified mail, a copy of the administrative law judge's Decision and Order no earlier than August 5, 1994, and that the 30-day period for filing an appeal should run from the date

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute, and shall be used in this order except when the statute is quoted.

of his receipt. Thus, employer maintains that its appeal filed on September 2, 1994, is timely.

Employer advances several arguments in support of its contention that actual receipt of the decision and order is required before "service" is effected. Employer first contends that the decision of the United States Court of Appeals for the Ninth Circuit in *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31 (CRT) (9th Cir. 1993), stands for the proposition that "service" requires "actual receipt." Employer also contends that the *Nealon* court "requires" the Department of Labor to administer the procedural rules of the Longshore Act consistent with those of the Black Lung Act. In this regard, employer contends that the decisions in *Old Ben Coal Co. v. Jones*, 897 F. 2d 900, 13 BLR 2-360 (7th Cir. 1990), and *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 13 BLR 2-177 (4th Cir. 1989), also require actual receipt of the administrative law judge's decision before the 30-day appeal period begins to run. Employer further contends that Rule 6(e) of the Federal Rules of Civil Procedure allows three additional days to be added to the end of the prescribed period so that its notice of appeal is timely.

Section 21(a) of the Act, 33 U.S.C. §921(a), states that a compensation order shall become effective when filed in the office of the district director, and unless an appeal is filed with the Board, shall become final 30 days after it is filed. In *Nealon*, the certificate of service indicated service on the parties by certified mail, but claimant contended that neither he nor his attorney received the order by certified mail. The district director was unable to locate a certified mail receipt. The court considered the question of whether the Longshore Act requires service on the parties before the order is deemed to be "filed." The court first addressed the language of Section 19(e) of the Act, 33 U.S.C. §919(e),[2] and stated that although this section requires that the order be submitted to the district director and served on the parties, it is ambiguous as to whether service is required before the order may be considered filed. *Nealon*, 996 F.2d at 970, 27 BRBS at 35 (CRT). The court next considered the regulation at 20 C.F.R. §702.349,[3] and found it, too, to be ambiguous in that "filing"

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[2]Section 19(e) of the Act, 33 U.S.C. §919(e), states:

> The order rejecting the claim or making the award . . . shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

[3]Section 702.349 states, in pertinent part,

> Upon receipt [of the administrative law judge's decision], the district director . . . shall formally date and file the . . . compensation order (original) in his office. . . . and the district director shall, on the same day as the filing was accomplished, send by certified mail a copy of the compensation order to the parties and to representatives of the parties, if any. Appended to each such copy shall be a paragraph entitled "proof of service" containing the certification of the district director that the copies were mailed on the date stated, to each of the parties and their representatives....

does not specifically include the "service" requirement. *Id.*, 996 F.2d at 971, 27 BRBS at 37 (CRT). Finding no reason to treat Longshore and Black Lung cases differently, however, the court stated that, consistent with cases interpreting the Black Lung regulation, 20 C.F.R. §725.478,[4] the parties must be served by certified mail before the decision and order is considered to be "filed." *Id.*, 996 F.2d at 972, 27 BRBS at 38-39 (CRT). The court thus held that the 30-day appeal period in Longshore cases does not begin to run until the decision and order is "filed" and that "filing" as used in Section 19(e) of the Act and Section 702.349 of the regulations encompasses service on the "parties," *i.e.*, claimant and employer, by certified mail.[5]

Contrary to employer's contention, the court in *Nealon* did not equate "service" with actual receipt. Rather, it stated that "filing" is not accomplished unless the parties are served by certified mail. *See Stevedoring Services of America v. Director, OWCP*, 29 F.3d 513, 28 BRBS 65 (CRT)(9th Cir. 1994)(*Nealon* held that "filing" under Sections 19(e) and 21(a) means both filed in the office of the district director and served on the parties). It remanded the case for an evidentiary hearing to determine if the claimant was served with the decision and order, and if so, the date on which service was made. Moreover, the facts in this case are not the same as the facts in *Nealon* in that there is no allegation of improper service on any *party*. *See Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), *aff'd*, ___ F.3d ___, No. 94-3026 (3d Cir. Dec. 7, 1994)(Board notes there is no allegation of improper service of the decision and order; employer therefore is liable for a Section 14(f) penalty for late payment of benefits). Rather, employer's *counsel* is alleging he did not receive the decision and order by certified mail, until three days after it was filed and served. Given that the decision and order was properly served on the parties in this case, the time for filing a notice of appeal runs from the date the decision and order was "filed" in the office of the district director on August 2, 1994.

Employer next contends that the cases cited above interpreting the Black Lung regulation at 20 C.F.R. §725.478 require that the decision actually be received before "filing" can be accomplished, and that the court in *Nealon*, by reading the Longshore and Black Lung regulations in

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[4]Section 725.478 states, in pertinent part,

> On the date of issuance of a decision and order... the administrative law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date,...the decision and order shall be considered to be filed in the office of the [district director].

[5]This is in comparison to the holdings in *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983), and *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989), wherein the courts held that under 20 C.F.R. §702.349, "filing" does not require proper service on *counsel* for a party. The *Nealon* court stated that *Gee* and *Mann* assumed that "filing" includes service on the claimant and the employer. *Nealon*, 996 F.2d at 971, 27 BRBS at 36 (CRT). *Cf. Sea-Land Service, Inc. v. Barry*, ___ F.3d ___, No. 94-3026 (3d Cir. Dec. 7, 1994) (Citing *Jeffboat*, court states that proper mailing is not part of "filing" under the Act and regulation).

a consistent manner, in effect, incorporated this requirement into the Longshore Act.[6] The cases cited by employer, however, do not stand for the proposition suggested.

In *Jones*, 897 F.2d at 900, 13 BLR at 2-360, the employer was sent a copy of the administrative law judge's decision by regular mail, and never received it. Over two years later, after an inquiry about payment of benefits, employer requested a copy of the decision, and then filed an appeal within 30 days of its receipt of the decision. The Board dismissed the appeal, finding that improper mailing did not toll the 30-day time limit. The United States Court of Appeals for the Seventh Circuit stated that 20 C.F.R. §725.478, which implements Section 19(e) of the Longshore Act, "clearly conditions 'filing' upon service of the decision on all parties by certified mail." *Jones*, 897 F.2d at 902, 13 BLR at 2-363. Because of the improper service, the 30-day period was tolled until employer had actual knowledge of the adverse decision. *Id.*, 897 F.2d at 903, 13 BLR at 2-364.

In *Looney*, 892 F.2d at 366, 13 BLR at 2-177, the administrative law judge's decision was "issued" on November 23, 1988, and the service sheet did not indicate whether it was sent out by certified or regular mail. The district director received a copy on December 2, 1988, and counsel for employer received it on November 28, 1988; it filed its appeal on December 27, 1988. The Board dismissed the appeal as untimely. The United States Court of Appeals for the Fourth Circuit reversed, stating that the record does not establish that the decision was sent to employer by certified mail, which is a statutory and regulatory requirement, and that employer filed its appeal within 30 days of its actual receipt of the decision.[7] *Looney*, 892 F.2d at 369, 13 BLR 2-183. *Accord*

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[6]We do not accept the premise that the Longshore and Black Lung regulations are to be accorded the same interpretation, and that, therefore, the Black Lung case law is to be applied. As previously noted, *see* notes 3 and 4, *supra*, the regulations at 20 C.F.R. §702.349 and 20 C.F.R. §725.478 contain different requirements for filing and service. In conjunction with Section 725.364, 20 C.F.R. §725.364, which states that "notice ... of any administrative ... decisions ... shall be sent to the representative" of a party, the Third Circuit has interpreted "filing" under the Black Lung regulation as including service on all parties and their counsel. *Patton v. Director, OWCP*, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985). In *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT)(7th Cir. 1989), the Seventh Circuit stated that the Longshore regulation, 20 C.F.R. §702.349, does not include service as part of filing. *See also Old Ben Coal Co. v. Jones*, 897 F.2d 900, 13 BLR 2-360 (7th Cir. 1990). The *Jeffboat* decision notes that, in implementing the Black Lung Act, the Secretary of Labor is empowered to modify by regulation provisions of the Longshore Act incorporated into the Black Lung Act, *see* 30 U.S.C. §932(a), a power he does not have when promulgating regulations under the Longshore Act. Thus, the regulations implementing Sections 19(e) and 21(a) of the Longshore Act need not contain identical requirements for "filing" to be effected in Black Lung and Longshore cases. *Jeffboat*, 875 F.2d at 664, 22 BRBS at 82 (CRT). The Ninth Circuit in *Nealon* did not discuss this aspect of *Jeffboat* in stating that the holding in *Jeffboat* was not inconsistent with its holding. *See* note 5, *supra.*

[7]Although the Fourth Circuit did not rest its decision on this fact, it also noted that the decision was not filed in the office of the district director until December 2, 1988, and that the appeal was

Youghiogheny & Ohio Coal Co. v. Benefits Review Board, 745 F.2d 380, 7 BLR 2-34 (6th Cir. 1984); *see also Patton v. Director, OWCP*, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985) (proper service on *counsel* is required under 20 C.F.R. §§725.364 and 725.478 and 30-day appeal period is tolled until this time). Although the court stated that, if necessary in a particular case, it might condition the running of the 30-day period upon the appealing party's actual receipt of the decision by regular mail, it did not find it necessary to do so in the case before it. *Looney*, 892 F.2d at 369, 13 BLR 2-183.

Recently, the Fourth Circuit was faced with the issue it reserved in *Looney*. In *Dominion Coal Corp. v. Honaker*, 33 F.3d 401 (4th Cir. 1994), the administrative law judge's Decision and Order denying benefits was sent by regular mail to claimant's counsel and employer's counsel on January 15, 1988. A copy also was sent to claimant by regular mail, but was mailed to claimant's former address. The decision was filed in the office of the district director on February 2, 1988.

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filed within 30 days of this date. *See Trent Coal, Inc. v. Day*, 739 F.2d 116, 6 BLR 2-77 (3d Cir. 1984) (30-day period in Black Lung cases runs from the date the administrative law judge's decision and order is actually filed in the district director's office rather than on the date the administrative law judge issues and serves the decision under 20 C.F.R. §725.478). It should be noted that while the administrative law judge in a Black Lung cases "issues" his decision and serves it on the parties, 20 C.F.R. §725.478, different procedures are followed in Longshore cases. The administrative law judge in a Longshore case transmits his signed decision to the district director, who files the decision and serves it on the same day. 20 C.F.R. §702.349.

Claimant's counsel received the adverse decision on January 20, 1988, and wrote a letter to claimant informing him of the decision and withdrawing as his representative. Claimant contended he did not receive a copy of the administrative law judge's decision, but he did receive the letter from his attorney. He picked up his file, which did not contain a copy of the administrative law judge's decision, from his attorney's office in early February, and on March 4, claimant picked up a copy of the decision. Claimant's new attorney filed a notice of appeal with the Board on March 8, 1988. *Id.*, 33 F.3d at 402-403.

The Board denied employer's motion to dismiss the appeal as untimely, reasoning that the administrative law judge's decision had not been sent by certified or registered mail. The Court of Appeals reversed the Board's finding that claimant's appeal was timely filed, holding that as claimant's attorney received a copy of the decision on January 20, and claimant became aware of the decision a few days later, the appeal had to be filed within 30 days of the February 2, 1988 filing date. *Id.* at 404-405. The court stated

> [T]he purpose of the registered or certified mail process is to avoid the exact question raised here, whether the party received notice of the decision. When the record establishes actual notice, the purpose of the statutory certified mail requirement has been met. Thus, we hold that the 30-day time period for taking an appeal begins with the date when both actual notice is accomplished, if registered or certified mail is not used, and the administrative law judge's decision is filed with the [district director].

Id. at 404.

In each of these cases, including *Nealon*, there was an indication of improper service, in that the administrative law judge's decision was not sent by certified mail. Such is not the case here. Employer's attorney merely attests that he did not receive his copy until at least three days after the Decision and Order was "filed" in the office of the district director and "served" on the parties and their counsel by certified mail. This allegation is not sufficient to bring this case within the scope of *Nealon,* and the cases arising under the Black Lung Act. First, the inquiry under the Longshore Act does not concern service on counsel. *See, e.g., Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989). Furthermore, in light of the decision in *Honaker*, it is clear that a party's actual receipt of a decision is relevant only when the decision is not served by certified or registered mail. In this case, there is no allegation that the administrative law judge's decision was not served on the parties by certified mail on August 2, 1994, when the decision was filed in the office of the district director. The appeal therefore had to be filed by September 1, 1994. Thus, we reject employer's contention that the decision and order is not deemed "served," and therefore "filed," until it is actually received on the facts of this case.

We disagree with our dissenting colleague that the courts have equated "service" with "actual receipt." "Service" is accomplished upon the mailing of a decision by certified or registered mail. Only when this "service" is not accomplished does the inquiry turn to a party's actual receipt of the decision. *Honaker*, 33 F.3d at 404. Moreover, counsel does not allege that the decision was

not postmarked until August 5, 1994. He merely attests that he did not receive it until that date at the earliest and this consideration is irrelevant given that the decision was properly mailed. *See* Affidavit of William F. Jordan.

Employer next contends that Rule 6(e) of the Federal Rules of Civil Procedure applies to add three days on to the end of the 30-day filing period. We disagree. Rule 6(e) states:

> Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Fed. R. Civ. P. 6(e). Pursuant to Rule 81(a)(6), Fed. R. Civ. P. 81(a)(6), the Rules "apply to proceedings for enforcement or review of compensation orders" under Sections 18 and 21 of the Act, 33 U.S.C. §§918, 921, except to the extent that matters of procedure are provided for in the Act. A leading treatise on the subject of federal procedure states that the reference to "review" of compensation orders in Rule 81(a)(6) is outdated. 7-Pt.2 *Moore's Federal Practice* §81.06[5] (1994). Specifically, in light of the 1972 Amendments to the Act which created the Benefits Review Board to perform the review functions formerly performed by the United States district courts, the district courts now have enforcement powers only. *Id.;* 33 U.S.C. §§918, 921(d). Thus, the Rules are applicable to enforcement proceedings under the Act in the district courts and do not, by their terms, apply to administrative proceedings. *See Lauzon v. Strachan Shipping Co.*, 602 F.Supp. 661 (S.D.Tex. 1985), *aff'd*, 782 F.2d 1217, 18 BRBS 60 (CRT) (5th Cir. 1985); *see also* 33 U.S.C. §923(a). *But see* 29 C.F.R. §18.1 (Federal Rules of Civil Procedure apply to proceedings before the Office of Administrative Law Judges in any situation not provided for or controlled by the Rules contained in 29 C.F.R. Part 18, or by any other statute, executive order or regulation). In *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit held that Rule 11 does not apply to administrative proceedings under the Act. The court also stated that:

> Nothing in Rule 81(a)(6) suggests that it is intended to broaden the applicability of the Rules beyond that provided in Rule 1.[8] In other words, Rule 81(a)(6) simply indicates that when a proceeding under the LHWCA is had in the federal district courts, the Rules will apply as though it were an ordinary civil action.

Brickner, 11 F.3d at 891, 27 BRBS at 137 (CRT).

With regard to the applicability of specific rules in enforcement proceedings, the United States Court of Appeals for the Fifth Circuit, the circuit in which this case arises, has held that the Rules apply to an order based upon a Section 14(f) assessment as it is a supplementary default order

[8]Rule 1 states, *inter alia*, that the Rules govern the procedure in the United States district courts in all suits of a civil nature.

under Section 18. *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983). Thus, the court has held that Rule 6(a), which excludes intermediate Saturdays, Sundays and holidays from a time computation in cases where an action is required in under 11 days, applies to a determination of whether payment has been made within ten days after it becomes "due" and thus whether employer is liable for a Section 14(f) penalty. *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT), *on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); *see generally Barry*, 27 BRBS at 260. The court also has held, however, that Rule 6(e) does not apply to Section 14(f) because compensation is "due" upon the expiration of the ten-day period following the "filing" of the compensation order. *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60 (CRT) (5th Cir. 1985). *Accord Sea-Land Service, Inc. v. Barry*, ___ F.3d ___, No. 94-3026 (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993). The court also has held that Rule 4, requiring a summons and complaint, does not apply to Section 18 proceedings because Section 18 has its own procedural requirements. *Jourdan v. Equitable Equipment Co.*, 889 F.2d 637, 23 BRBS 9 (CRT) (5th Cir. 1989); *but see Williams v. Jones*, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1994) (Rule 4 is applicable to a proceeding under Section 21(d)).

There are two other reasons why Rule 6(e) is inapplicable to extend the time period for filing an appeal with the Board. In the first instance, the time for filing a notice of appeal pursuant to Section 21(a) of the Act runs from the date of *filing* of the compensation order, and not from the date of *service*. *Army & Air Force Exchange Serv. v. Hanson*, 250 F.Supp. 857 (D.Haw. 1966); 33 U.S.C. §§919(e), 921(a). Thus, Section 6(e), which extends the time for taking an action when the period runs from service of a notice or paper, is inapplicable. *Lauzon*, 782 F.2d at 1220, 18 BRBS at 63 (CRT); *see also Barry*, slip op. at 8-9. The fact that service by mail may also be required does not undermine this interpretation. *Id.; Hanson*, 250 F.Supp. at 858-859. *See also Welsh v. Elevating Boats, Inc.*, 698 F.2d 230 (5th Cir. 1983) (reaching this result under either Rule 6(e) or Rule 26(c) of the Federal Rules of Appellate Procedure).

More importantly, Rule 6(e) cannot be used to extend jurisdictional provisions, such as enlarging the time in which a notice of appeal must be filed. *Brohman v. Mason*, 587 F.Supp. 62 (W.D.N.Y. 1984); *Mays v. Memphis Light, Gas & Water Div.*, 517 F.Supp. 232 (W.D.Tenn. 1981); 2 *Moore's Federal Practice* §6.12 (1994). The 30-day appeals period provided for under the Act is jurisdictional in nature. *See generally Dawe v. Old Ben Coal Co.*, 754 F.2d 225, 7 BLR 2-118 (7th Cir. 1985); *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983); 20 C.F.R. §802.205(c). Even if the time for appealing an administrative law judge's decision were construed as running from the date of service, rather than from the date of filing, Rule 6(e) cannot be applied to extend the 30-day period. *See generally Hatchell v. United States*, 776 F.2d 244 (9th Cir. 1985). In *Whipp v. Weinberger*, 505 F.2d 800 (6th Cir. 1974), the appellee filed a notice of appeal with the district court 61 days after the Social Security Appeals Council's decision was mailed. The district court found that the 60-day limit ran from the time of actual receipt of the decision. In reversing, the United States Court of Appeals for the Sixth Circuit held that an appeal under the Social Security Act must be taken within 60 days after the *mailing* of the Appeals Council's decision, and thus that Rule 6(e) would apply in some circumstances. The court stated, however, that Rule 6(e) "has no application where, as in the present case, an extension of a time limit in effect would extend the

jurisdiction of the court." *Id.* at 801.[9] *See also* Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts....").

In sum, Rule 6(e) does not apply for three reasons. First, this case does not involve the Act's enforcement provisions but the statutory time periods addressed by Sections 19 and 21 of the Act. Second, the time for filing a notice of appeal runs from the date the decision is "filed," not from the date of service. Third, Rule 6(e) cannot be used to extend jurisdictional requirements. Therefore, we reject employer's contention that Rule 6(e) applies in this case, and as three additional days are not added onto the end of the 30-day period for filing an appeal, employer's appeal, filed on September 2, 1994, is untimely.

Accordingly, we deny employer's motion for reconsideration and we reaffirm the Board's Order of September 22, 1994, dismissing employer's appeal as untimely. 20 C.F.R. §802.409.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I do not think it is necessary to reach the issue of what constitutes filing or service under the Longshore and Harbor Workers' Compensation Act because there is another issue which must be addressed first and which is, I believe, dispositive. Employer argues that the 30-day appeal period to the Board (33 U.S.C. §921(a)) began to run when his *counsel* received from the district director the administrative law judge's decision and order sent by certified mail. No argument is advanced with

[9]In *Bowen v. City of New York*, 476 U.S. 467 (1986), the Supreme Court specifically held that the 60-day period for filing an appeal with the district court pursuant to 42 U.S.C. §405(g) is not jurisdictional, but constitutes a "period of limitations." The result of this holding is that the doctrines of equitable tolling and waiver may apply in appropriate circumstances.

respect to service on employer, only with respect to service on counsel.

The law is clear, however, that the Longshore Act does not require service on counsel, only on the parties, claimant and employer. 33 U.S.C. §919(e); *Ins. Co. of N. Am. v. Gee,* 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983). In *Gee*, the administrative law judge's decision and order were filed with the district director on November 30, 1981 and copies of the order were sent that day by certified mail to claimant and employer. Because counsel for the carrier, Insurance Company of North America (INA) did not receive a copy of the administrative law judge's order until March 4, 1982, INA argued that its appeal, dated April 1, 1982, was timely filed. The Benefits Review Board dismissed INA's appeal as untimely and INA appealed this dismissal to the Second Circuit.

In support of its argument, INA relied upon the regulation at 20 C.F.R. §702.349,[10] which required the district director on the date a compensation order is filed in his office to send copies of the order by certified mail "to the parties and to representatives of the parties, if any." The regulation further directed the district director to append to each copy a certificate of service that the "copies were mailed on the date stated, to each of the parties and their representatives...." Thus, INA contended, the 30-day appeal period did not commence until the district director had discharged his obligation in the case on March 4.

The United States Court of Appeals for the Second Circuit rejected INA's argument, holding

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[10]20 C.F.R. §702.349 (1982) provided:

> The administrative law judge shall, within 20 days after the official termination of the hearing, deliver by mail, or otherwise, to the office of the deputy commissioner having original jurisdiction, the transcript of the hearing, other documents or pleadings filed with him with respect to the claim, together with his signed compensation order. Upon receipt thereof, the deputy commissioner, being the official custodian of all records with respect to such claims within his jurisdiction, shall formally date and file the transcript, pleadings, and compensation order (original) in his office. Such filing shall be accomplished by the close of business on the next succeeding working day, and the deputy commissioner shall, on the same day as the filing was accomplished, send by certified mail a copy of the compensation order to the parties and to representatives of the parties, if any. Appended to each such copy shall be a paragraph entitled "proof of service" containing the certification of the deputy commissioner that the copies were mailed on the date stated, to each of the parties and their representatives, as shown in such paragraph.

This regulation is identical to the current regulation at 20 C.F.R. §702.349 (1994) with the exception of substitution of the title "district director" for "deputy commissioner."

that its appeal was untimely. The court held that the Longshore Act, 33 U.S.C. §921(a),[11] provides that the 30-day appeal period to the Benefits Review Board commences to run when a compensation order is filed in accordance with 33 U.S.C. §919(e).[12] That section directs that the compensation order be filed in the office of the district director and that a copy of the administrative law judge's order be sent by registered or certified mail to "the claimant and to the employer at the last known address of each." The court reasoned that although the regulation at 20 C.F.R. §702.349 requires service on the representatives of the parties, as well as on the parties, the "Secretary cannot by regulation place further conditions on the filing of an effective order." *Id.*, 702 F.2d at 414, 15 BRBS at 112 (CRT). The court explained that "[r]egulations promulgated pursuant to rulemaking authority conferred by statute assume the force of law only to the extent consistent with the statutory scheme they were designed to implement." *Id.* Because the mandate of the statute is clear, it cannot be modified by regulation. The court considered this particularly true where, as here, the statutory provision at issue determines the commencement of the appellate period.

[11]33 U.S.C. §921(a) provides:

> A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

[12]33 U.S.C. §919(e) provides:

> The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

The *Gee* court analogized the case before it to *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), in which appellant had contended that the Benefits Review Board's failure to comply with a regulation requiring service of an order on designated parties tolled the 60 days period for appeal to the circuit court. Judge Friendly, writing for the court, held that because Section 21(e) of the Act provides that an order of the Board becomes final 60 days after issuance unless a petition for review is filed, the statute means what it says and the Board's order had become final 60 days after issuance. Judge Friendly explained that the "policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it." *Id.* at 44, *quoted in Gee*, 702 F.2d at 414, 15 BRBS at 112 (CRT).

When confronted with a case essentially identical to *Gee*, the United States Court of Appeals for the Seventh Circuit arrived at the same conclusion as the Second Circuit, but by a different route. *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989). In *Jeffboat*, the administrative law judge's decision and order were filed in the office of the district director on August 14, 1987 and copies were sent to claimant and to employer Jeffboat, but not to Jeffboat's counsel. Not until September 23 did counsel learn of the decision and within 30 days he filed a notice of appeal. The Board dismissed his appeal as untimely and counsel appealed to the Seventh Circuit. In court, counsel argued that the filing required by Section 21(a) of the Act encompassed both filing the compensation order in the office of the district director and mailing copies to the parties and their representatives pursuant to Section 19(e) and 20 C.F.R. §702.349. The Seventh Circuit rejected this argument, holding that the regulation which directs that parties' representatives be served does not condition effective filing on mailing a copy to both the parties and their representatives.[13]

Thus, the courts are in agreement that a compensation order becomes final, whether or not the parties' representatives are served. *Jeffboat*, 875 F.2d at 664, 22 BRBS at 82 (CRT); *Gee*, 702 F.2d at 414, 15 BRBS at 112 (CRT). There is no authority to the contrary.[14] Accordingly, whether

[13]Since counsel's argument hinged on interpretation of the regulation, the court determined that it need not reach the question of whether the requirement of mailing to both the parties and their representatives was a reasonable construction of Section 19(e). The court recognized, however, that if neither employer nor its counsel were notified, "a question might be raised whether Jeffboat's loss of appeal rights deprived it of due process of law." *Jeffboat*, 875 F.2d at 664 n.6, 22 BRBS at 82 n.6 (CRT).

[14]In a Black Lung case, the United States Court of Appeals for the Third Circuit declared (2-1) that Section 19(e) was susceptible to alternative constructions, including requiring service on parties' counsel, and since the Secretary is authorized under the Black Lung Benefits Act to refine the procedural provisions of the Longshore Act, which the Black Lung Act incorporates, the regulation providing for service on the parties' legal representatives (20 C.F.R. §725.364) determines the proper construction of Section 19(e). *Patton v. Director, OWCP*, 763 F.2d 553, 558, 7 BLR 2-216, 2-224 (3d Cir. 1985). In his dissent, Judge Weis agreed with the Second Circuit's decision in *Gee* that the Secretary cannot by regulation place further conditions on the filing of an effective order. *Id.*, 763 F.2d at 561, 7 BLR at 2-230. *See also Wellman v. Director, OWCP*, 706 F.2d 191 (6th Cir. 1983).

or not the service provided in Section 19(e) requires, as the majority contends, merely sending a copy of the decision and order to the parties by registered or certified mail on the date that the decision and order is filed in the district director's office or, as the dissent maintains, actual receipt of the decision and order by the parties, there is no authority to require service on counsel. Since employer acknowledges that its appeal to the Board is untimely unless service on counsel commences the 30-day appeal period, its appeal must be dismissed.

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

The Decision and Order of the administrative law judge in this case was dated July 19, 1994, and was physically filed in the office of the district director on August 2, 1994. Section 21(a) of the Longshore Act, 33 U.S.C. §921, provides that the order shall become final unless an appeal is filed within 30 days. *See also* Section 802.205 of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.205. The appeal taken by employer to the Board apparently should have been filed no later than September 1, 1994. The notice of appeal was received by the Board on September 6, 1994, the Tuesday following the Labor Day weekend. The envelope, however, was postmarked September 2, 1994. The Board recognized this mailing date as the filing date based upon 20 C.F.R. §802.207(b) which provides that if the Notice of Appeal is mailed and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the appeal shall be considered to have been filed as of the date of mailing. This would be September 2, 1994. Since this was one day late, the Board dismissed the appeal as untimely.

The certificate of filing and service of the administrative law judge's Decision and Order shows service by certified mail on claimant, his attorney, carrier, and its attorney. There is no indication employer was served. Counsel for employer and its carrier acknowledges that the administrative law judge's order was filed with the office of the district director on August 2, 1994, but that service on counsel would not have been made prior to August 5, 1994. Counsel originally alleged that was the postmark date of the certified envelope received from the direct director. Counsel now alleges that the certified return receipt will show that August 5, 1994, was the date of service. *See* Affidavit of William F. Jordan. Employer contends that the 30-day period to file an appeal runs from the date the order is served and that, consequently, the September 2, 1994, mailing of the appeal was timely. Although Section 19(e) of the Longshore Act, 33 U.S.C. §919(e), specifies that the district director is to send a copy of orders by registered or certified mail to the claimant and employer, the employer is not taking issue with the fact that it, the employer, was not served, apparently conceding that service by certified mail on its counsel amounted to compliance. It is the date of service, and its effect, that is at issue in this case.

It is the employer's position that Sections 21(a) and 19(e) together of the Longshore Act provide that the 30-day period for the filing of an appeal of an administrative law judge's decision to the Board does not begin to run until the order is served on the claimant and the employer. This is set forth in counsel's letter of September 28, 1994, requesting reconsideration. As authority, employer cites *Nealon v. California Stevedore & Ballant Co.*, 996 F.2d 966, 27 BRBS 31 (CRT)(9th Cir. 1993). After noting and discussing ambiguities in the Act and applicable regulations, this is precisely what the *Nealon* court held. Citing decisions of other circuit courts, the United States Court of Appeals for the Ninth Circuit held that a compensation order must be served on claimant and employer before it can be deemed filed. In *Nealon*, the order was recorded in the office of the district director and allegedly served on the parties by certified mail on October 24, 1989. No record was found of certified mail return receipts and Nealon contended that neither he nor his attorney received the order by certified mail. Nealon's attorney contended that he first received a copy of the order on November 7, 1989, and that an appeal was taken within 22 days of that date. The Board ruled that service is not required prior to "filing" and that the notice of appeal by Nealon's attorney was filed 36 days after the order was recorded. It dismissed the appeal as untimely. The court in *Nealon* held that the 30-day period to appeal does not begin to run until the order is *served*. It reversed the Board and remanded the case for an evidentiary hearing to determine whether Nealon was *served* and, if so, the date on which *service* was made. I do not understand the comments of the majority when they state that the court in *Nealon* did not equate "service" with actual receipt but add in the next line that the court stated that filing is not accomplished unless the parties are served by certified mail. They repeat this thought by stating that *Nealon* held that filing under Sections 19(e) and 21(a) means both filed in the office of the district director and served on the parties. This appears to be a distinction without a difference.

Of interest is a subsequent decision of the Court of Appeals for the Ninth Circuit in *Stevedoring Services of America v. Director, OWCP*, 29 F.3d 513, 28 BRBS 65 (CRT)(9th Cir. 1994), involving the interpretation of Section 21(c) of the Longshore Act, 33 U.S.C. §921(c), which deals with appeals from a decision of the Board to a Court of Appeals. Section 21(c) provides a time limit of 60 days from the *issuance* of a Board order. The court held that the 60-day period for petitioning for judicial review commenced with the issuance of the Board decision, *i.e.*, when the decision is filed with the Clerk of the Board, regardless of actual notice to the petitioning party. The court noted that every circuit that has faced the definition of "issuance" in Section 21(c) has determined that it means filing with the Board's clerk and nothing more. On the other hand, the court in *Stevedoring Services* noted that every circuit that has decided whether filing under Section 21(a) required service on the parties has held that it does, citing *Nealon*, 996 F.2d at 966, 27 BRBS at 31 (CRT); *Jewell Smokeless Coal Corp. v. Looney*, 892 F.2d 366, 396, 13 BLR 2-177, 2-183 (4th Cir. 1989); *Patton v. Director, OWCP*, 763 F.2d 553, 556-557, 7 BLR 2-216, 2-222 (3d Cir. 1985); *Youghiogheny & Ohio Coal Co. v. Benefits Review Board*, 745 F.2d 380, 382, 7 BLR 2-34, 2-36 (6th Cir. 1984). In all four of the cases cited, the Courts of Appeals held that this 30-day period to file an appeal does not begin to run until service is made, reversing the Board in all four cases.

Also of interest are the cases referred to by the majority in footnote 5, namely *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT)(2d Cir. 1983), a Second Circuit case, and *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT)(7th Cir. 1989), a Seventh Circuit case. In *Gee*, copies of the administrative law judge's decision were served timely on claimant, her attorney,

employer, its attorney and on employer's insurance carrier. The carrier's attorney was not served until over three months later and he then filed an appeal within 30-days of service on him. The Board dismissed the appeal as being untimely. The Court of Appeals affirmed the dismissal. It noted that Section 19(e) of the Act specified service on claimant and the employer. It further noted that 20 C.F.R. §702.349, the applicable Longshore regulation, calls for service not only on claimant and the employer, but also on representatives of the parties, if any. The court held that the regulation referring to service on representatives was contrary to the clear wording of the statute and that the Secretary cannot by regulation place further conditions on the filing of an effective order. It affirmed the Board's dismissal since service was made on the claimant and employer and no appeal was filed within 30 days.

In *Jeffboat*, the Court of Appeals for the Seventh Circuit held that Section 19(e) of the Act was complied with since there was timely forwarding of copies of the order to claimant and employer, a corporation, although not to counsel for the employer, and no appeal was filed within 30 days. There were two issues the court said it need not reach, whether Section 702.349 also requires mailing to a party's representative and whether this "filing" contemplated in Section 21(a) required both filing in the office of the district director and mailing of copies to claimant and employer as required in Section 19(e). It did point out that this was Jeffboat's contention, that it was at least arguable, and, citing *Patton*, 763 F.2d at 553, 7 BLR at 2-216, stated that the configuration of Sections 21(a) and 19(e) strongly suggests that proper service is an essential part of the filing. It went on to say that it can assume without deciding that Jeffboat's interpretation *is the correct one* since both claimant and employer were timely mailed copies of the order. *Jeffboat*, 875 F.2d at 663-664, 22 BRBS at 80 (CRT).

The *Honaker* case, 33 F.3d 401, cited by the majority is really consistent with the four cases cited by the Ninth Circuit in *Stevedoring Services of America*. In those four cases, referred to *supra*, the courts noted that the decisions had been physically filed in the office of the district director but that the 30-day period to file an appeal did not begin to run until service was made on the aggrieved party. *Honaker* has a strange factual situation. In that case, claimant's counsel received a copy of the decision by regular mail on January 20, 1988. The decision, itself, was not officially docketed with the district director until February 2, 1988. It is not clear when claimant received a copy, but it was apparent that he did learn of it through his attorney, who gave him the file, after which claimant obtained other counsel. An appeal to the Board was not filed until March 8, 1988, which was 48 days after the original counsel received the decision and 35 days after filing with the district director.

The court in *Honaker* pointed out several things. First, an appeal by a claimant must be filed within 30 days after it is (1) filed in the office of district director, *and* (2) is served on the claimant. It further held that service on claimant's counsel satisfies the statutory requirement of Section 19(e) that claimant be served. It also held that "[w]hen the record establishes actual notice, the purpose of the statutory certified mail requirement has been met." *Honaker*, 33 F.3d at 404. The court then went on to state its holding "that the 30-day time period for taking an appeal begins with the date when both actual notice is accomplished, if registered or certified mail is not used, and the administrative law judge's decision is filed with the Deputy Commissioner." In summary, it held that since claimant's attorney had actual notice on January 20, 1988, and the decision was filed with the deputy commissioner on February 2, 1988, the appeal had to be filed by March 3, 1988. Since it

was not filed until March 8, 1988, it was deemed to be untimely.

In analyzing what the *Honaker* court said, and what it did, and what it held, it is clear that it recognized two requirements for the commencement of the 30-day appeal period: (1) a filing with the district director and (2) service on claimant by registered or, certified mail, or by actual notice. Both requirements must be met and then the running of the period begins. What the court did, in effect is hold that the period begins when the last of these two requirements is met. It could have commenced the period on January 20, 1988, when claimant's counsel received notice, but it did not. It commenced the period when the second requirement was met, the filing on February 2, 1988, with the district director. (Normally these events take place in the reverse order).

I agree with the authorities cited herein, that is, those Courts of Appeals that have decided the issue, that "filing" under Section 21(a) requires service on the parties and that the 30-day period to file an appeal does not begin to run until service is made. As the *Nealon* court pointed out, there was a difference in the wording of the pertinent regulations adopted by the Director under the Longshore Act as opposed to those under the Black Lung Act, with the Director contending that under the Longshore regulations the Act does not require service on the parties before a compensation order is deemed filed. As the court held, however, is that what is really controlling are the pertinent sections of the statute itself, namely Sections 19(e) and 21(a).[15] The *Nealon* court held that those sections of the statute require as a condition for the running of the period for the perfecting of an appeal that the administrative law judge's order be filed "as provided in Section 919," which in turn requires that the order be both 1) submitted to the district director and 2) served on the parties.

In this case everyone agrees that the administrative law judge's Decision and Order was physically filed in the office of the district director on August 2, 1994. Presumably the employer's appeal should have been filed with the Board on or before September 1, 1994. It was not received until September 6, 1994. Noting that the envelope containing the appeal was postmarked September 2, 1994, the Board recognized the mailing date as the filing date based upon 20 C.F.R. §802.207(b) which provides that if the notice of appeal is mailed and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the appeal shall be considered to have been filed as of the date of mailing. This would be September 2, 1994. The Board held this to be one day late and dismissed the appeal as untimely per Order of September 22, 1994.

On September 28, 1994, counsel for employer asked for reconsideration. He avers that his office could not have received a copy of the order prior to August 5, 1994, and that, therefore, the filing of an appeal with the Board on September 2, 1994, was within the 30- day limit. The majority states that counsel *merely* alleges that he did not receive his copy until three days after the Decision and Order was "filed" with the district director. He avers that if the Department of Labor reviews the date of the certified mail receipt, it will reflect
a date no earlier than August 5, 1994.

[15]These sections, of course, are also incorporated into the Black Lung Act.

Based on the analysis set forth herein, it is my view that the running of the 30-day period to file an appeal to the Board under Section 21(a) of the Act does not begin to run until the decision is filed with the district director and service is made, contrary to the majority's view. I respectfully dissent from their decision to deny the motion for reconsideration. I would do what the *Nealon* court did. It is conceded that service of the decision and order was made on counsel for the employer. However, I would remand this case to the Office of Administrative Law Judges for an evidentiary hearing to determine the date on which service was made.[16] The 30-day period to file an appeal would run from this date. If service was made on August 2, 1994, the same date as the filing, the appeal would appear to be untimely. This is based on the date of filing of the appeal to the Board on September 2, 1994. If not served until August 3, 4, or 5, 1994 or a later date, the appeal would appear to be timely.[17]

JAMES F. BROWN
Administrative Appeals Judge

[16]I note that the courts in both the *Nealon* and *Jeffboat* cases were aware that lack of service could raise a constitutional due process issue, but, on the facts of those cases, that issue was not raised.

[17]Based on the applicability of 20 C.F.R. §802.207(b), in determining the filing date to the Board to be the mailing date, I do not feel that it is necessary to discuss the applicability of Rule 6(e) of the Federal Rules of Civil Procedure.