

BRB No. 14-0341
Case No. 2013-LHC-01342
OWCP No. 14-151202

LARRY D. BARWICK)
)
 Claimant-Respondent)
)
 v.)
)
 CASCADE GENERAL)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LTD.)
)
 Employer/Carrier-) DATE ISSUED: July 9, 2014
 Petitioners)
)
 AIG/CHARTIS)
)
 Carrier-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) ORDER

Employer/Signal has filed a timely notice of appeal of the Order Identifying Issue, Reopening Discovery, and Requiring Briefing Re Same (2013-LHC-01342) of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). 33 U.S.C. §921(b); 20 C.F.R. §802.205. We hereby acknowledge this appeal and assign it the Board's docket number 14-0341. All correspondence relating to this appeal must bear this number. 20 C.F.R. §802.210.

Following the formal hearing in this matter, claimant moved to supplement the record with additional evidence. Employer opposed claimant's motion. In his Order, the administrative law judge identified a new issue that requires resolution before he can rule on claimant's motion to supplement the record. Pursuant to 20 C.F.R. §702.336(b), the administrative law judge gave the parties notice of this issue and set a schedule for the submission of evidence on the issue. The administrative law judge also required the parties to address whether claimant's motion to supplement the record would be moot in light of the evidence produced.

Employer appeals this Order and asks that the Board stay the proceedings before the administrative law judge during the pendency of its appeal. Employer avers that its appeal is of a "collateral order" such that the Board can entertain its interlocutory appeal. We reject employer's contention and dismiss its appeal.

Employer's appeal is of non-final order. Although the Board is not bound by formal or technical rules of procedure, 33 U.S.C. §923(a), the Board ordinarily does not undertake review of non-final orders. *See, e.g., Newton v. P&O Ports Louisiana, Inc.*, 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *cf. Niazzy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987) (Board accepted interlocutory appeal where due process concerns were raised). Interlocutory review is appropriate in that "small class [of cases] which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Under this "collateral order" doctrine, review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Butler*, 28 BRBS 114. If the order appealed from does not satisfy the criteria of the collateral order doctrine, the Board will undertake interlocutory review nonetheless if, in its discretion, it is necessary to properly direct the course of the adjudicatory process. *See Hardgrove v. Coast Guard Exchange System*, 37 BRBS 21 (2003); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1988).

Contrary to employer's contention, the administrative law judge's Order does not satisfy the criteria of the collateral order doctrine. It does not conclusively determine the disputed issue; it merely orders the parties to produce additional evidence such that the disputed issue can be resolved in view of a fully developed record. The issue is not separate from the merits, as it is integrally related to the availability of suitable alternate employment and, thus, to claimant's entitlement to benefits. *Tignor*, 29 BRBS 135.

Moreover, the Order is based on the administrative law judge's discretionary authority under 20 C.F.R. §702.336(b), and is fully reviewable, under an abuse of discretion standard, when a final order is issued.¹ See generally *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013). Furthermore, in view of the administrative law judge's discretionary authority under 20 C.F.R. §702.336(b), it is not necessary for the Board to direct the course of the adjudicatory process in this case. See, e.g., *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008). That the issuance of a final decision and order may be delayed due to the post-hearing proceedings does not demonstrate the need for piecemeal review. *Newton*, 38 BRBS 23. Thus, we dismiss employer's appeal of the administrative law judge's interlocutory order.

Accordingly, employer's appeal is dismissed. Consequently, employer's motion to stay the proceedings before the administrative law judge is denied.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

¹ The regulation at 29 C.F.R. §18.1 states, "To the extent that these rules [29 C.F.R. Part 18] may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling." Thus, contrary to employer's contention, the regulation at 20 C.F.R. §702.336(b) controls if it is, in fact, inconsistent with 29 C.F.R. §18.54(c).