DOCTRINES OF PRECLUSION

Introduction

When a claimant has filed claims or lawsuits for the same injury under more than one statute various doctrines of preclusion may be raised as a defense to the claim under the Act or to issues raised in a claim under the Act. For example, cases addressing preclusion have arisen when, in addition to a claim under the Act, the claimant has filed claims or tort suits under a state workers' compensation claim, the Jones Act, or the Federal Employers' Liability Act. In addition, various doctrines of estoppel may be raised by claimant or employer in response to the other party's conduct in prior proceedings. Note that these doctrines are often interrelated.

It is well settled that the doctrine of laches does not apply to bar claimant from filing a claim pursuant to Section 13 of the Act or from pursuing a timely filed claim. In *Petit v. Electric Boat Corp*., 41 BRBS 7 (2007), the administrative law judge found that the employee failed to actively and diligently pursue his entitlement to disability benefits for over twenty years and that this led employer to believe that the disability claim was no longer live. The Board reversed this finding, as it was tantamount to a finding that the claim is barred by the doctrine of laches which is not available to defend against claims under the Act. *See* Section 13 of the desk book.

An employer is entitled to a credit for amounts paid to claimant under a state workers' compensation law or the Jones Act for the same injury, disability or death. 33 U.S.C. §903(e); *see* Section 3(e) of the desk book; *Sun Ship, Inc. v. Pennsylvania*, 447 U.S 715, 12 BRBS 890 (1980); *Calbeck v. Travelers Ins. Co*., 370 U.S. 114 (1962).

Election of Remedies and Full Faith and Credit

Mere acceptance of payments under a state act does not constitute an election of remedies barring a claim under the Longshore Act. *Calbeck v. Travelers Ins. Co*., 370 U.S. 114 (1962); *Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962). Issues arose, however, when a state workers' compensation claim was adjudicated prior to the commencement of a claim under the Longshore Act. It had been argued that the subsequent federal claim is barred by the earlier state proceeding under the doctrines of *res judicata*, full faith and credit, or election of remedies. *See generally Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 981 n. 31, 11 BRBS 298, 308-309 n.31 (D.C. Cir. 1979); *Flying Tiger Lines, Inc. v. Landy*, 370 F.2d 46 (9th Cir. 1966); *Ekar v. Int'l Union of Operating Engineers*, 1 BRBS 406 (1975), *aff'd in pert. part sub nom. Director, OWCP v. Boughman*, 545 F.2d 210, 5 BRBS 30 (D.C. Cir. 1976). The Courts of Appeals reached conflicting results on this issue. *See Pettus v. American Airlines, Inc.*, 587 F.2d 627, 8 BRBS 800 (4th Cir. 1978), *cert. denied*, 444

U.S. 883 (1979) (Full Faith and Credit clause and *res judicata* bar subsequent D.C. Act claim after Virginia claim adjudicated); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979) (Longshore claim not barred by election of remedies, Full Faith and Credit clause, or *res judicata* where claimant first sought and was denied benefits under the Virginia statute); *National Van Lines, Inc*., 613 F.2d at 981 n.31, 11 BRBS at 308-309 n.31 (following *Jenkins*, court stated that Full Faith and Credit clause does not prevent claimant from obtaining what he is due under D.C. Act notwithstanding prior recovery under Virginia law).

In *Thomas v. Washington Gas Light Co.*, 448 U. S. 261, 12 BRBS 828 (1980), a four member plurality of the Supreme Court held that the Full Faith and Credit Clause does not preclude successive compensation awards. The Court considered the different interests affected by the potential conflicts between the two jurisdictions from which claimant sought compensation and concluded that Virginia had no legitimate interest in preventing the District of Columbia from granting an award to a claimant who had been granted a Virginia award, where the District would have had the power to apply its workers' compensation law in the first instance. Three justices concurred in the result of the plurality, but relied on the rationale of *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622 (1947). The rule of *McCartin* permitted a state, by drafting its statute in "unmistakable language," to preclude an award in another state. The concurrence found that the Virginia statute lacked the "unmistakable language" required to preclude a subsequent award in the District of Columbia.

In *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980), the Supreme Court held that state and Longshore Act jurisdiction may run concurrently in areas where state law constitutionally may apply.

Following *Thomas*, the Board held that an award of compensation under the Virginia Workers' Compensation Act did not operate as a bar to an award based on the same injury under the District of Columbia Workmen's Compensation Act. *Murphy v. Honeywell, Inc*., 12 BRBS 856 (1980); *see also Dixon v. McMullen & Associates, Inc.*, 13 BRBS 707 (1981) (Miller, concurring in result only) (Smith, concurring in part and dissenting in part) (three opinion decision holding that neither the Full Faith and Credit Clause nor the doctrines of collateral estoppel and election of remedies barred a longshore claim brought subsequent to a settlement agreement under a state workers' compensation statute).

In *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 13 BRBS 301 (5th Cir. 1981), *rev'g* 9 BRBS 518 (1978), *cert. denied*, 454 U.S. 1123 (1981), the court, citing *Thomas* and *McCartin*, held that the Full Faith and Credit Clause did not prevent claimant, who had a judicially approved settlement under the Texas workers' compensation statute, from asserting a claim under the Longshore Act. Claimant, however, would have to

credit his state benefits against any recovery under the Longshore Act. Election of remedies was held inapplicable in the absence of an indisputable state declaration precluding pursuit of a subsequent longshore claim.

Similarly, in *Simpson v. Director, OWCP*, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), *rev'g on other grounds* 13 BRBS 970 (1981), *cert. denied*, 459 U.S. 1127 (1983), the court held that a state court award did not collaterally estop claimant from bringing a claim under the Longshore Act. The court held that although a state court opinion could collaterally estop a litigant from debating the scope of state court jurisdiction, the question of state court jurisdiction was not re1evant under the federal Act. That Congress authorized federal compensation for all injuries to employees on navigable waters was to be accepted regardless of what a particular claimant recovered under state law. The court held further that *res judicata* was inapplicable since claims under the Longshore Act may not be pressed in state court.

In *Jenkins v. McDermott, Inc*., 734 F.2d 229, 16 BRBS 102(CRT), *vacated on other grounds on reh'g,* 742 F. 2d 191, 16 BRBS 140(CRT) (5th Cir. 1984), which involved a tort suit, the court held that where the Longshore Act and the state workers' compensation law were concurrently applicable, but nothing in the record indicated that claimant had elected his state benefits over the federal remedy, the district court could not grant summary judgment to a third-party defendant on the basis of a provision of the state statute barring claims against third parties. The court held that application of the state bar to recovery could not survive an election of the federal remedy in view of the Longshore Act's purpose to provide uniformity of treatment to all maritime workers and the fact that Louisiana, the situs state, was the only jurisdiction whose workers' compensation law barred recovery against employer's principals.

The Fifth Circuit held that an approved Section 8(i) settlement precludes a claimant from pursuing a Jones Act suit for the same injury. Pursuant to *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991), receipt of voluntary payments under the Longshore Act does not preclude a Jones Act action. However, a settlement indicated that claimant had elected the workers' compensation recovery as his remedy and thus his Jones Act claim is barred. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 26 BRBS 59(CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). The Ninth Circuit, however, held in *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), that, pursuant to *Gizoni*, a settlement of the Longshore claim does not preclude a Jones Act suit because some maritime workers may be Jones Act seamen who are injured while also performing a job specifically enumerated under the Longshore Act. The court observed that there is no danger of double recovery due to the applicability of credit provisions.

The Fourth Circuit has held that where a claimant received a settlement on his railroad claim under the Federal Employers' Liability Act (FELA), the doctrine of election of remedies (*i.e.*, situations where an individual pursues remedies that are legally or

factually inconsistent) bars claimant from pursuing a claim under the Longshore Act for the same injury. As claimant's FELA action was concluded years earlier, he is not in need of the relatively quick proceedings available under the Longshore Act. *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000); *see also In Re CSX Transportation, Inc. [Shives]*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998) (FELA claim precluded by Section 5(a); *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev'd mem.*, 7 F. App'x 156 (4th Cir. 2001) (Board's holding that FELA settlement does not preclude Longshore claim is reversed).

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The Board rejected employer's argument that the administrative law judge erred in failing to give full faith and credit to the Maryland Workmen's Compensation Commission's finding that claimant did not have an accidental injury arising out of and in the course of his employment. Employer had contended that claimant's claim under the D.C. Act was barred because both the Maryland and D.C. workers' compensation statutes require such a showing in order to establish entitlement to compensation. Employer, however, failed to establish that claimant had the same burden of proof under both statutes for establishing an injury arising out of and in the course of employment. In addition, the Board noted that the Maryland Commission's finding was stated in summary fashion and did not indicate whether its determination represented a legal conclusion or factual findings; only the latter must be given the *res judicata* effect. The Board therefore rejected the argument that this summary conclusion would bar a subsequent determination of causation under the legal standard applicable under the Act. *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987).

The Board rejected employer's contention that claimant's Longshore Act claim is barred by the doctrine of election of remedies based on claimant's receipt of an award under Louisiana law. The doctrine precludes a litigant from pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternative remedy. It generally does not apply to simultaneous remedies under the Act and state law, *see Sun Ship*, 447 U.S. 715, 12 BRBS 890, due to the crediting of one recovery against the other. Federal law preempts state law even if the state law contains "unmistakable language" making its remedy exclusive. *Munguia v. Chevron, U.S.A., Inc*., 23 BRBS 180 (1990), *aff'd on recon. en banc*, 25 BRBS 336 (1992), *aff'd on other grounds*, 999 F.2d 808, 27 BRBS 103 (CRT), *reh'g denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994).

For the reasons stated in *Munguia*, 23 BRBS 180, the Board rejected employer's contention that claimant's settlement of his state claim precluded his claim under the Act.

Hartman v. Avondale Shipyard, Inc., 23 BRBS 201 (1990), *vacated in part on other grounds on recon.*, 24 BRBS 63 (1990).

The Board held that the administrative law judge was bound to honor the contractual agreements regarding apportionment of the state claim in setting the amount of the Section 3(e) credit under the Full Faith and Credit clause of the Constitution. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

Claimant settled his claims in a United Kingdom court with his employer, "AG Jersey," and two related companies. The Board directed the administrative law judge to address on remand the contention that if all three employers are immune from tort liability, then claimant's election to sue them under British law constitutes an election of remedies that precludes recovery under the Act. The remedy pursued in the UK court would have to have been factually or legally inconsistent with the claim under the Act. *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013).

After determining that claimant's employer failed to establish that claimant settled his tort claim with a third party, the Board addressed employer's "election of remedies" and "exclusivity" contentions. In rejecting AG Jersey's argument that claimant's decision to pursue a tort claim in the United Kingdom, a right he had as a British citizen, precluded his right to pursue benefits under the Act, the Board explained that "exclusivity" and "election of remedies" are related but different concepts. That is, "exclusivity" is the pursuit of the same claim in different forums, whereas "election of remedies" is the pursuit of inconsistent claims. This case involves "exclusivity," and specifically, the relationship between foreign law and the Act. The Board held that a foreign court's decision applying that court's own law and resulting in a recovery to the claimant cannot negate a claimant's right under the DBA to receive compensation for his otherwise compensable work injuries. As international law may give rise to concurrent jurisdiction, AG Jersey, in knowing that the DBA was to be claimant's "exclusive" remedy under Section 5(a), should have raised and pleaded that as a defense in the foreign court. Thus, the Board held that claimant's right to benefits under the Act was not barred by the Act's exclusivity provisions. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

Res Judicata and Collateral Estoppel

The doctrine of *res judicata* is one of claim preclusion whereas collateral estoppel is one of issue preclusion. *Res judicata* can only apply if: 1) the parties in the current action are the same or are in privity with the parties in the prior action; 2) the court that rendered the prior judgment was a court of competent jurisdiction; 3) the prior action must have terminated with a final judgment on the merits; and 4) the same claim or cause of action must be involved in both actions. *See, e.g., Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003). Under the principle of collateral estoppel, a party is barred from relitigating an issue if: (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *See, e.g., Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995). "[T]he point of collateral estoppel is that the first determination is binding not because it is right but because it is first--and was reached after a full and fair opportunity between the parties to litigate the issue." *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 22, 31BRBS 109, 112(CRT) (1st Cir. 1997).

In order for *res judicata* to act as a bar to relitigation of the same claim, there must be final judgment on the claim. In *Simms v. Valley Line Co.*, 769 F.2d 409, 15 BRBS 178(CRT) (5th Cir. 1983), the court dismissed an appeal as premature where claimant had brought suit as a seaman under the Jones Act and as a harbor worker under the Longshore Act. The administrative law judge in the Longshore claim had determined that claimant was a harbor worker and had awarded benefits. Insurer appealed the administrative law judge's determination. Claimant also appealed, adopting insurer's arguments as to claimant's seaman status and further requesting that he not be prejudiced in any way by pursuing both the Longshore claim and a Jones Act claim. The Board dismissed claimant's appeal on the grounds that he had not been adversely affected by the administrative law judge's decision because he had been awarded benefits. Claimant appealed to the Fifth Circuit. The court dismissed claimant's appeal because insurer's appeal before the Board was still pending and the Board had not issued a final decision. The court stated that the extent to which *res judicata* and collateral estoppel would be applied to a Jones Act suit following a formal Board finding of non-seaman status and entitlement to benefits could not be determined in the absence of a final Board determination of claimant's status. *See also Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 16 BRBS 34(CRT) (5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984).

Thus, the Fifth Circuit held that a Louisiana state court judgment holding that claimant was a "maritime employee" under the Longshore Act, and that there was no negligence on the part of vessel owner, precluded claimant from litigating a Longshore claim in federal court under the principle of *res judicata*: both actions arose from the same

incident and the parties and the remedy sought are identical. *Sider v. Valley Lines*, 857 F.2d 1043 (5th Cir. 1988).

In *Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), the Board held, and the Ninth Circuit affirmed, that *res judicata* did not apply on remand to an administrative law judge's initial finding that an employer was not potentially liable for claimant's injury. The administrative law judge initially determined that claimant did not suffer an injury while he was in the employ of Triple A Machine Shop or General Engineering. Claimant appealed only that portion of the decision regarding Triple A. The Board held that the administrative law judge misapplied the Section 20 presumption and remanded the claim for further findings regarding the cause of claimant's injury. The administrative law judge determined that claimant had sustained an injury while working for Triple A, which was aggravated during his later employment with General Engineering. He thus found that General Engineering, the later employer, was the responsible employer. As General Engineering was no longer a party the administrative law judge determined that no relief could be granted. Claimant appealed, contending that the administrative law judge's initial finding that General Engineering was not liable was *res judicata*. The Board rejected this argument because the administrative law judge's initial finding was based on an erroneous application of law which had been vacated.

The doctrine of collateral estoppel may be applicable where both the former and subsequent claims arose under the Longshore Act, *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983), where the initial claim arose under a state act, *Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997), or where one claim was under the Longshore Act and one was under the Jones Act, *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995). Collateral estoppel may be applied only if the legal standards are the same in both proceedings. Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins]*, 583 F.2d 1273, 8 BRBS 723 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979).

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The Board applied collateral estoppel to vacate an administrative law judge's findings regarding disability where they conflicted with a previous administrative law judge's findings, which the Board had affirmed, regarding the same claimant and covering the same period of time. *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983).

Where the parties settled a claim and the settlement order was not appealed, it became final after thirty days under Section 21(a). Claimant's failure to raise the administrative law judge's authority to approve settlements by filing an appeal within that time rendered the order *res judicata* between the parties as settlements are not subject to modification under Section 22. *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986), *aff'g Downs v. Texas Star Shipping Co., Inc*., 18 BRBS 37 (1986).

The First Circuit held that where claimant agreed to a settlement under the Longshore Act, he sought and acquiesced in the finding that his injuries arose out of and in the course of his employment. Therefore, as he did not appeal the approval of the settlement, he was collaterally estopped from contesting the Act's coverage and his FTCA suit was barred by the NFIA. The court noted that claimant's mere application for Longshore Act benefits did not bar his tort claim; rather, it was his acceptance of the settlement which barred the suit. *Vilanova v. U.S*., 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989).

The Board affirmed the administrative law judge's rejection of the application of the doctrines of full faith and credit and collateral estoppel, based on California workers' compensation decision, to the Longshore case. Extent of disability and commencement of benefits are mixed questions of fact and law, and collateral estoppel effect can only be given to such questions when the legal standards are the same under California law as they are under the Longshore Act. *Barlow v. Western Asbestos Co*., 20 BRBS 179 (1988).

The Board rejected claimant's contention that his Jones Act suit determined that there was coverage under the Act and that this finding must be given collateral estoppel effect. Although the suit necessarily raised the issue of whether claimant was a seaman or a ship repairman potentially covered under the Act, the issue of situs was never litigated in district court and was not necessary to its determination. The doctrine of collateral estoppel therefore is inapplicable. *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995).

The Board rejected employer's contention that the Director is barred from raising the issue of Section 8(f)(3) at a second hearing by the doctrines of *res judicata* and collateral estoppel. The administrative law judge sufficiently narrowed the scope of his first decision so as to clarify that he was not deciding the Section 8(f)(3) issue. Thus, as the issue was not fully and fairly litigated at the first hearing, the doctrines do not bar the Director's raising of the issue. *Ortiz v. Todd Shipyards Corp*., 25 BRBS 228 (1991).

Collateral estoppel prevented the court from addressing employer's contention regarding the deputy commissioner's "excuse" under Section 14(e), as the issue was resolved in a prior proceeding, *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088,

23 BRBS 61(CRT) (5th Cir. 1990), and the resolution was necessary to the imposition and affirmance of the statutory assessment. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991).

The Board affirmed the administrative law judge's finding that Pac Fish is liable as claimant's employer under the doctrine of collateral estoppel. In this case, the state court applied the same standards to determine claimant's status as a borrowed employee that have been applied in cases arising under the Act. Since this issue was actually litigated and necessary to the outcome of the state suit, the administrative law judge correctly determined that employer could not relitigate its status before him. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board rejected employer's contention that collateral estoppel or *res judicata* applies to bar relitigation of the issue of the work-relatedness of claimant's hypertension. The issue was not previously litigated; thus one of the prerequisites to the invocation of collateral estoppel is not met. *Chavez v. Todd Shipyards Corp*., 28 BRBS 185 (1995) (*en banc*) (Brown & McGranery, JJ., dissenting), *aff'g on recon*. 27 BRBS 80 (1993) (McGranery, J., dissenting*), aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Board rejected the contention that employer was collaterally estopped from raising the issue of the Act's coverage by way of an injury on navigable waters because the district court in the prior Jones Act case had specifically found that claimant was an "employee" within the meaning of the Longshore Act. Although employer was a party to the Jones Act suit, the district court did not address the issue of situs and neither of the two carriers was a party to the action. Since situs was not a necessary determination in the district court's determination that claimant was not a seaman but was a "maritime employee" under the Act, the prerequisites to the application of collateral estoppel are missing. *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (1994).

The Ninth Circuit rejected employer's contention that collateral estoppel applies to bar claimant's action as a "seaman" under the Jones Act where claimant previously recovered as a "non-seaman" under the LHWCA; the court held that claimant is not estopped from bringing a Jones Act claim where the jurisdictional issue was not previously litigated and there was no express finding that claimant was not a "master or member of a crew" for purposes of the LHWCA. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995).

The Board affirmed the administrative law judge's finding that employer may not assert the doctrine of collateral estoppel to a statement in a state court judgment that the court was notified that a third-party suit was amicably resolved. The court's statement is not unambiguous evidence that the parties actually executed a settlement, nor does it establish that the issue before the administrative law judge, namely the existence of a

third-party settlement, was actually litigated and decided by the Florida court. Accordingly, the administrative law judge properly found that the claim is not barred pursuant to Section 33(g) based upon the doctrine of collateral estoppel. *Formoso v. Tracor Marine, Inc*., 29 BRBS 105 (1995).

The Board held that the second administrative law judge erred in not giving collateral estoppel effect to the previous judge's award to employer of an offset under Section 33(f) for the entire net amount of the third-party settlements entered into by decedent and his wife (claimant), rather than the amount decedent alone received for his personal injury action. The Board held that the fact that the first hearing was on the disability claim and the second was on the death claim does not result in a lack of identity of issues, as the same third-party settlements were at issue in each case. Moreover, employer asserted two inconsistent legal arguments in the two proceedings, resulting in an inequitable windfall to employer, pursuant to the doctrine of judicial estoppel. *Taylor v. Plant Shipyards Corp*., 30 BRBS 90 (1996).

Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence in admitting and considering evidence in cases arising under the Act. Thus, the administrative law judge in this case had greater latitude to admit evidence than did the district court, which denied the testimony of claimant's expert pursuant to Rules 702 and 703 of the Federal Rules of Evidence. As the administrative law judge thus had different evidence before him, the district court's decision on the issue of causation need not be given collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

The First Circuit held that the Longshore Act award is barred by collateral estoppel, having determined that the federal administrative law judge should have given collateral estoppel effect to the Maine workers' compensation commission's finding that claimant's work injury had no permanent effect on claimant's condition. The court rejected claimant's argument that differences in burdens of proof and in the substantive standards under the state and federal compensation schemes make collateral estoppel inappropriate in this case; the court ruled, first, that employer had a lighter burden of proof under Section 20(a) than in the state proceeding and, second, that differences in the substantive legal standards have no bearing on the factual question of whether the work incident caused permanent injury. *Bath Iron Works Corp v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

The Board rejected claimant's argument that the administrative law judge selectively gave collateral estoppel effect to state proceedings which were adverse to him, while not accepting the favorable findings of fact. While finding of facts from one forum must be accepted in another forum, the issue of extent of disability, presented here, is a mixed question of law and fact to which collateral estoppel effect is not given due to differing burdens of proof. The Board reversed the administrative law judge's finding that

collateral estoppel precludes claimant from litigating the issue of the extent of disability under the Longshore Act, after having brought a claim under Maine law, where the allocations of the burdens of production and proof differ materially under the two schemes. Employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act, and claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the Longshore Act. The case distinguishes *Acord*, 125 F.3d 18, 31 BRBS 109(CRT). *Plourde v. Bath Iron Works Corp*., 34 BRBS 45 (2000).

The Board held that the administrative law judge erred in finding that claimant is collaterally estopped from raising the issue of Section 49 discrimination under the Act by the district court's judgment in claimant's ADA lawsuit. As the finding that is central to the court's dismissal of the ADA action bears no relationship to the issues presented by the Section 49 claim, collateral estoppel does not apply. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

The Board reversed the administrative law judge's rejection of the parties' stipulation that decedent was exposed to injurious stimuli during the course of non-covered employment with NASA subsequent to his covered employment in sufficient quantities and of sufficient duration to cause mesothelioma, and that the mesothelioma was caused, at least in part by this exposure. The Board held that this stipulation cannot be binding on NASA, as it is not, and cannot be, a party to the longshore claim, nor can the stipulation be given collateral estoppel effect in any other proceeding. Moreover, the stipulation gives employer an element of its defense to the claim, which involved a challenge to the "last covered employer" rule, and the administrative law judge therefore should have accepted it. *Justice v. Newport New Shipbuilding & Dry Dock Co*., 34 BRBS 97 (2000).

The Board reversed the administrative law judge's determination that collateral estoppel bars claimant's claim for death benefits. In this case, claimant's stepmother, decedent's widow, filed and lost her claim for death benefits on the ground that decedent's death was not compensable under the Act. Claimant thereafter filed a claim for death benefits on her own behalf. The Board discussed concepts of "privity" developed in case law, including "virtual representation," and held that claimant is not in privity with her stepmother. Therefore, she is not barred by collateral estoppel or *res judicata* from having her claim heard on the merits, despite the fact that the compensability of the same death is at issue. The Board remanded the case for a hearing on the merits. *Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003).

The Board affirmed the administrative law judge's finding that the first administrative law judge's decision regarding the employee's disability claim contains no findings that are binding with regard to the issue of coverage in the claim for death benefits. From the decisions regarding the *inter vivos* claim, it is clear the sole issue that was actually

litigated was whether Section 33(g)(1) barred that claim. Thus, the issue pertinent to the claim for death benefits, *i.e.*, whether decedent was a member of a crew excluded from coverage under Section 2(3)(G) was never actually litigated in the first proceeding. Consequently, the doctrine of collateral estoppel does not apply to the coverage issue raised in this case. *Uzdavines v. Weeks Marine, Inc*., 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

In affirming the Board, the Second Circuit held that employer was not collaterally or judicially estopped from "relitigating" the issue of the decedent's coverage under the Act. The court held that, since the parties' stipulation concerning the scope of the Act was limited to the decedent's disability claim, employer was not taking an "inconsistent" position by now asserting, as a defense to claimant's survivor's claim, that the decedent was not covered. The court observed, as did the administrative law judge and Board, that the parties merely submitted a non-binding stipulation assuming that coverage existed for the narrow purpose of allowing the administrative law judge to resolve employer's motion to dismiss the claim under Section 33(g). Thus, for purposes of collateral estoppel, the issue was never "actually litigated," and for purposes of judicial estoppel no one was "misled" by the parties' stipulation in the original disability claim proceeding. *Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The Board rejected employer's contention that claimant is estopped from receiving compensation under the Act based on the finding by a hearing officer for claimant's prior state compensation claim that he voluntarily retired. The hearing officer's finding is dicta, and thus does not preclude claimant from litigating the issue of his entitlement to benefits under the Act. Dicta are not entitled to collateral estoppel effect because the finding was not essential to the prior judgment. *Reed v. Bath Iron Works Corp*., 38 BRBS 1 (2004).

Claimant was injured while working for a borrowing employer. Claimant filed a claim under the Act against the lending employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. Thus, the award of benefits against the borrowing employer is affirmed. The Board noted that the district court's decision that Norquest is the borrowing employer is entitled to collateral estoppel effect because the case was litigated between the same parties and the finding was necessary to the court's judgment. *Sears v. Norquest Seafoods, Inc*., 40 BRBS 51 (2006).

Claimant settled his claims in a United Kingdom court with his employer, "AG Jersey," and two related companies for an amount less than the amount he would be entitled to under the Act without obtaining prior written approval from his DBA carrier. The

administrative law judge determined that one of the two related companies, "AG PLC," was a third party to the settlement, thereby precluding claimant's entitlement to further benefits under the Act pursuant to Section 33(g). The administrative law judge relied on the UK court's decision that there was no contract between claimant and AG PLC to determine that AG PLC is third party/separate entity. Because the elements for applying either res judicata or collateral estoppel have not been satisfied, as the issue of whether the companies are employers under the Act was not addressed by the UK court, and as the DBA carrier was not a party to the UK claims, the Board vacated the findings that AG PLC is a third party and that Section 33(g) precludes claimant from receiving benefits under the Act. It remanded the case for the administrative law judge to fully address the issue under an appropriate borrowed employee tests and/or to address claimant's contention that the three entities should be treated as one. *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013).

Equitable and Judicial Estoppel

Two doctrines of estoppel are based on one party's conduct. Equitable estoppel is a doctrine in equity which prevents one party from taking a position inconsistent with an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. To apply this doctrine to claims under the Act, four elements are necessary: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997). *See also Betty B Coal v. Director, OWCP*, 194 F.3d 491, 504, 22 BLR at 2-1 (4th Cir. 1999). In addition, the party claiming estoppel against the government must show more than mere negligence, delay, inaction or failure to follow an internal agency guideline. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991).

The doctrine of judicial estoppel is designed to protect the integrity of the courts and judicial process from inconsistent positions of parties and involves considerations of orderliness and regularity in sworn positions at litigation. *See Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11, *aff'd on recon.*, 44 BRBS 77 (2010); *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19 (1989). The essential elements for the application of judicial estoppel are: (1) an unequivocal assertion of law or fact by a party in one judicial proceeding; (2) the assertion by that party of an intentionally inconsistent position of law or fact in a subsequent judicial proceeding; (3) in order to mislead the Court and obtain unfair advantage as against another party. The party against whom this doctrine is invoked must have been successful in the prior proceeding or at least have received some benefit from the previously taken inconsistent position. *See Sparks,* 44 BRBS at 13-14; *Fox v. West State, Inc*., 31 BRBS 118 (1997). The courts of appeals do not have uniform standards for application of judicial estoppel. *See, e.g., Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Sparks,* 44 BRBS at 13-14. Application of the doctrine is discretionary. *Fox,* 31 BRBS at 122.

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A private litigant who seeks to use the doctrine of equitable estoppel against the government bears a very heavy burden. The court sets out the four steps necessary for the doctrine to apply and additionally notes that the party claiming estoppel must show more than mere negligence, delay, inaction, or failure to follow an internal agency

guideline. The doctrine does not apply to the issue of the Section 14(e) "excuse" as employer does not allege that the deputy commissioner made more than an improvident decision regarding the scope of his authority. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc*., 25 BRBS 37 (1991).

The Ninth Circuit held that in order to apply the doctrine of estoppel four elements must be met: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or he must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his own detriment. The court reject's claimant's contention that employer is estopped from seeking a reduction in claimant's benefits pursuant to Section 22 because the parties had reached a settlement under Section 8(i). The court noted that there was no settlement under Section 8(i), and thus there was no reliance on employer's conduct to claimant's detriment. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997).

The Board rejected employer's contention that claimant should be estopped from contesting employer's entitlement to a Section 33(f) offset for amounts received in third-party settlements by non-dependent children based on representations contained in Form LS-33. There is no evidence to support employer's assertion that it relied solely on the information on the forms when it approved the settlements. Moreover, there is no evidence that employer was ignorant of the full contents of the settlement agreements. Thus, the necessary elements for estoppel are not present. *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996).

In this case, the administrative law judge found that the doctrine of equitable estoppel applied to prevent claimant from proceeding with her claim for benefits. In dicta, the Board explained the requirements of equitable estoppel and showed how at least one of the elements, detrimental reliance, was missing from this case. Thus, the doctrine is not applicable. Although the Board found the administrative law judge erred in applying equitable estoppel, it held the error harmless as, in light of its determination that claimant's motion for modification was invalid in the context of the case, the issue of whether she was estopped from proceeding with her claim was moot. *Porter v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 113 (2002).

The Board affirmed the administrative law judge's finding that the doctrine of equitable estoppel does not apply to prevent employer from asserting a lack-of-coverage defense. In this case, claimant contended that employer's past payments of benefits under the Act estopped employer from denying coverage for this injury. Equitable estoppel does not apply because claimant did not rely to her detriment on those past payments. Rather, claimant filed claims for benefits under both the Longshore Act and the state act, thereby

protecting her rights under state law should her claim under the Act fail. *B.E. [Ellis] v. Electric Boat Corp.,* 42 BRBS 35 (2008).

The Board reversed the administrative law judge's finding that the claim for disability benefits is barred by equitable estoppel. The Board explained with respect to the detrimental reliance element that the party claiming equitable estoppel must show that its reliance on the adverse party's representation or conduct was reasonable; *i.e.,* that knowledge of the truth could not have been acquired with reasonable diligence. In this case, the Board held first that employer failed to offer sufficient evidence that it took any action in reliance on the employee's conduct to its detriment. Moreover, any detrimental reliance that employer might have shown was not reasonable. In the absence of a formal order approving withdrawal of the disability claim, employer could not have reasonably relied on the employee's representations or conduct to draw its conclusion that the claim was no longer open. *Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007).

Claimant contended on appeal that the administrative law judge erred in failing to hold employer estopped from denying her coverage under the DBA since employer paid its insurance carrier premiums for such coverage and represented to claimant that she would be covered under the DBA during the period of her employment in Iraq. The Board declined to address this issue as it was not raised before the administrative law judge and the issue does not involve a question of law, but determinations of fact by the administrative law judge. *Z.S. v. Science Applications Int'l Corp.,* 42 BRBS 87 (2008).

The Board rejected claimant's assertion that the doctrine of promissory estoppel should apply to this case to bar employer from denying liability for compensation. The Board held that, as there was a contract between the parties, promissory estoppel cannot apply. Moreover, the Board affirmed the administrative law judge's determination that claimant did not assert detrimental reliance and, therefore, equitable estoppel does not apply. Accordingly, the Board affirmed the administrative law judge's decision to permit employer to defend the claim on the grounds of a lack of coverage. *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).

The Ninth Circuit held that the administrative law judge and Board correctly found that claimant did not establish that employer is equitably estopped from denying coverage under the Act based on a general provision of claimant's employment contract indicating that he is "covered for worker's compensation benefits, if any, payable under the laws of the employee's country of origin." Specifically, the Ninth Circuit held that there is no evidence that employer represented to claimant, who was hired as a barge foreman, that he would be covered by the Act and claimant failed to allege that he reasonably relied on that provision to his detriment, i.e., no evidence that claimant was even aware of this provision, let alone that he changed his position for the worse in reliance on it. *Keller*

Found./Case Found. v. Tracy, 696 F.3d 835, 46 BRBS 69 (CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013).

The Board affirmed the administrative law judge's denial of benefits as claimant was injured in a car accident on a public road that is not a covered situs. The Board affirmed the administrative law judge's finding that employer was not somehow estopped from contesting Longshore coverage based on the state's denial of his state claim on the ground that his remedy was under the Longshore Act. The Board held that the action of the state insurance fund cannot be imputed to employer as there is no identity of interest between these entities. Moreover, the employer could not have stipulated to coverage under the Act had it so desired, and jurisdiction under the Act cannot be conferred by consent, collusion, laches, waiver or estoppel. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem*., 15 F. App'x 169 (4th Cir. 2001).

The Board rejected claimant's contention that employer is estopped from asserting that claimant is not covered under the Longshore Act because it had taken the opposite approach in the state forum. The Board noted that it is unclear if the Second Circuit applies the doctrine of judicial estoppel. If it does apply, claimant failed to establish that employer intentionally mislead the state board regarding its coverage position. *Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990).

Claimants filed claims alleging that work-related lung impairments caused total disability and hearing loss claims as voluntary retirees. The Board rejected employer's contention that claimants were judicially estopped from alleging inconsistent positions as to their retiree status. The Board held that the doctrine of judicial estoppel was not applicable as it is designed to protect the integrity of the courts and judicial process from inconsistent positions of parties and involves considerations of orderliness and regularity in sworn positions at litigation. The claimants did not attempt any deception by filing each of their claims in accordance with the applicable provisions of the Act. *Manders v. Alabama Dry Dock & Shipbuilding Corp*., 23 BRBS 19 (1989).

The Board rejected employer's contention that claimant cannot contend he had no restrictions before the work injury given his allegation in the state claim that he was permanently totally disabled at an earlier date. Judicial estoppel is not implicated unless the first forum accepts the legal or factual determination alleged to be at odds with the position advanced in the current forum, and such fact was not determined in the state claim. *Fox v. West State, Inc*., 31 BRBS 118 (1997).

The Board held that the second administrative law judge erred in not giving collateral estoppel effect to the previous judge's award to employer of an offset under Section 33(f) for the entire net amount of the third-party settlements entered into by decedent and his wife (claimant), rather than the amount decedent alone received for his personal injury action. The Board held that the fact that the first hearing was on the disability claim and

the second was on the death claim does not result in a lack of identity of issues, as the same third-party settlements were at issue in each case. Moreover, employer asserted two inconsistent legal arguments in the two proceedings, resulting in an inequitable windfall to employer, pursuant to the doctrine of judicial estoppel. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

In affirming the Board, the Second Circuit held that employer was not collaterally or judicially estopped from "relitigating" the issue of the decedent's coverage under the Act. The court held that, since the parties' stipulation concerning the scope of the Act was limited to the decedent's disability claim, employer was not taking an "inconsistent" position by now asserting, as a defense to claimant's survivor's claim, that the decedent was not covered. The court observed, as did the administrative law judge and Board, that the parties merely submitted a non-binding stipulation assuming that coverage existed for the narrow purpose of allowing the administrative law judge to resolve employer's motion to dismiss the claim under Section 33(g). Thus, for purposes of collateral estoppel, the issue was never "actually litigated," and for purposes of judicial estoppel no one was "misled" by the parties' stipulation in the original disability claim proceeding. *Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 45 (2003).

The Board reversed the administrative law judge's decision granting employer's motion for summary decision and consequent denial of benefits, holding that the administrative law judge erred in applying the doctrine of judicial estoppel. The Board discussed the elements of the doctrine and held that claimant's claim under the DBA is not barred due to claimant's failure to inform the bankruptcy court of her pending DBA claim. The Board concluded that claimant did not gain an unfair advantage over her creditors by not disclosing her DBA claim because, pursuant to Section 16 of the Act, any benefits she receives from the DBA claim cannot be attached by her creditors. As a necessary element of judicial estoppel was absent from this case, and in light of the plain language of Section 16, the Board held that judicial estoppel does not apply. The case was remanded for proceedings on the merits. *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 11, *aff'd on recon.*, 44 BRBS 77 (2010).

The Board denied employer's motion for reconsideration, rejecting its argument that the Board erred in reversing the administrative law judge's application of judicial estoppel. The Board affirmed its conclusion that the "motive" element was absent in this case and, therefore, all factors necessary to apply judicial estoppel are not present. Additionally, the Board rejected as speculative employer's assertion that had the bankruptcy court known of the DBA claim the court may have denied claimant's discharge. Moreover, because neither the court nor the trustee was compelled to re-open the bankruptcy case upon learning of the DBA claim, there is no evidence of bankruptcy abuse. *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 77, *aff'g on recon.* 44 BRBS 11 (2010).

As a defense against a claim by one carrier on the ground that another is liable, INA argued that the other carrier's entitlement to reimbursement for 12 years of benefits was barred by the doctrines of equitable estoppel, laches and/or "jurisdictional" estoppel. The Board held that, to the extent "jurisdictional" estoppel exists, it is either a form of equitable estoppel or judicial estoppel. In any event, none of the doctrines applies to bar claimant's entitlement to benefits. The Board's decision explains the inapplicability of each doctrine. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board rejected the Director's contention that because claimant and employer previously stipulated that claimant's condition was not yet permanent and the original administrative law judge accepted that stipulation, the doctrine of judicial estoppel precludes modification on the ground of a mistake in fact regarding the nature of claimant's disability. A determination based on stipulations is subject to Section 22 modification based on grounds of either a change in condition or a mistake of fact, and Section 22, which reflects a statutory preference for accuracy, displaces equitable doctrines of finality such as judicial estoppel. *Buttermore v. Electric Boat Corp.*, 46 BRBS 41 (2012).

Claimant filed a claim in 2012 for a 2010 vehicle accident and employer disputed the claim on multiple grounds, including timeliness of the claim, coverage, and whether the injury occurred during the course of claimant's employment. Because these defenses essentially assert that claimant was not "entitled" to compensation under the Act, claimant averred that employer was arguing that claimant is not a "person entitled to compensation" under Section 33(g) and, therefore, Section 33(g) is not applicable. The Board rejected this contention, relying on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), which provides that an employee becomes a person entitled to compensation under Section 33(g) at the moment his right to recovery vests and not when an employer admits liability. As employer did not dispute claimant's employee status or the occurrence of the accident, the administrative law judge properly found that claimant is a "person entitled to compensation" under Section 33(g). As there was no other judicial proceeding such that employer could have taken an inconsistent position under oath, the administrative law judge also properly found that employer's defenses are not inconsistent and employer is not judicially estopped from asserting its Section 33(g) defense against claimant's claim for benefits. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified on other grounds on recon.*, 50 BRBS 7 (2016).

Preemption, State Statutes Governing Guaranty Funds

Under the Supremacy Clause of the Constitution, state law is preempted when it conflicts specifically with a federal law. U.S. Const. art. VI; *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992). There are three circumstances in which state law is preempted by federal law: (a) where Congress expressly provides for preemption ("express preemption"), *id.*, (b) where federal law completely occupies the field ("field preemption"); and (c) where there is a specific conflict between state and federal law ("conflict preemption"), *Service Engineering Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996). As discussed above, federal preemption does not apply to preclude both federal and state compensation schemes from applying to the same injury. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). However, a state law cause of action for conduct which the Longshore Act addresses is in effect preempted by the Act even though the relevant section contains no expressly preemptive language. *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808, 21 BRBS 1(CRT) (5th Cir. 1988); *Hall v. C & P Telephone Co.*, 809 F.2d 924 (D.C. Cir. 1987); *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *cf. Martin v. Travelers Ins. Co.*, 497 F.2d 329 (1st Cir. 1974). *See* Section 5(a) of the desk book for the types of federal and state tort claims that are preempted by application of the Longshore Act.

In instances where a state insurance guaranty fund is liable for disability benefits, that fund's liability for attorney's fees, interest, and additional assessments may be determined by reference to the state law. *See Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009); *Marks v. v. Trinity Marine Group*, 37 BRBS 117 (2003); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

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Where claimant received a smaller compensation award under Connecticut law than under the Longshore Act, the Second Circuit held that the Board properly credited her entire state award minus attorney's fees against the Longshore award pursuant to Section 3(e). Although the Connecticut State Commissioner's order approving the state settlement appeared to indicate that claimant is entitled to the state award in addition to the Longshore award, and Connecticut law arguably allowed for the federal award to be credited against the state award, the court held that allowing employer a Section 3(e) credit was mandated by the plain language of the statute and, pursuant to the Supremacy Clause, the Longshore Act could not be superseded by state law. *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992).

The Ninth Circuit held that a claimant, whose benefits under the Act are barred pursuant to Section 33(g) for failure to obtain employer's prior written approval of a third-party civil action, is not precluded from seeking workers' compensation benefits under state

law for the same injury. The court ruled that claimant's pursuit of California state workers' compensation benefits does not frustrate the purpose behind Section 33(g), which acts to "protect the rights of employers from unfairly low third-party settlements." Because permitting benefits under California law in this instance "does not act as an obstacle to Congress' purpose" in enacting Section 33(g), the Act's forfeiture provision does not preempt state workers' compensation law. *Service Engineering Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996).

Where state law does not cover workers entitled to Longshore benefits, the Board rejected employer's argument that it is entitled to a Section 3(e) credit for its liability under the state act. The Board concluded that employer's preemption argument was without merit because Section 3(e) was not intended to apply where concurrent state and federal jurisdiction does not exist and there is no danger of double recovery because under state law the state is entitled to reimbursement for any state benefits paid to claimant. The Board held that the administrative law judge erred in concluding that, in general, medical expenses are not properly the subject of a Section 3(e) credit, but found the error harmless because the administrative law judge correctly recognized that the state's right to reimbursement for claimant's medical expenses is contingent upon claimant's obtaining an award of medical benefits under the Longshore Act. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part and modified in part sub nom. E.P. Paup Co. v. Director, OWCP*, 994 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Affirming the Board's decision in *McDougall*, awarding claimant benefits and directing reimbursement to the state for benefits previously paid to claimant under the state act, the Ninth Circuit rejected employer's argument that the Board's reimbursement order violated Section 3(e). The court reasoned that Section 3(e) does not apply to the instant case because state law excludes coverage for workers covered under maritime law. The court held that Federal preemption may occur only when Congress has expressly precluded state law, an expression of such intent can be inferred from the structure and purpose of the federal statute, or when state law conflicts with federal law or stands as an obstacle to achieving federal objectives. The court noted that while the plain language of Section 3(e) supports the argument that state law is preempted, a closer review satisfied it that Congress did not intend to expressly preempt the state's reimbursement statute. Finally, the court stated that Section 3(e) applies only if there is concurrent state and federal coverage, and that there is nothing in the Act indicating that a state cannot exclude from its jurisdiction injuries covered by federal law. The court therefore affirmed the Board's conclusion that employer is not entitled to an offset under Section 3(e). *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board held while federal preemption applies to the Act in general, the administrative law judge erred in applying it here to find that claimant's entitlement to interest and a Section 14(e) penalty under the Act pre-empted the Florida statute which created its insurance guaranty fund, FIGA, and expressly relieved it of liability for interest and

penalties. The Board held that the Florida statute merely limits the liability of FIGA and does not deny claimant any of his rights under the Act; the two acts thus are not inconsistent with each other. The Board reversed the administrative law judge's finding that FIGA is liable and held that employer is liable for interest and the penalty under Section 4 of the Act. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The Board held that the Louisiana state law regarding the scope of LIGA's liability precluded LIGA's liability for the payment of claimant's attorney's fees incurred prior to the insolvency of carrier, notwithstanding LIGA's liability for claimant's compensation benefits. Moreover, the Board held that as the issue under the Longshore Act concerned counsel's entitlement to a fee and employer's liability therefor, and as these issues are not addressed by the Louisiana laws regarding LIGA, the Longshore Act and the Louisiana statute are not inconsistent with each other and thus a preemption analysis need not be applied in this case. The Board therefore vacated the finding that claimant was liable for the attorney's fee pursuant to Section 28(c) and remanded for the district director to determine whether claimant's counsel was entitled to an attorney's fee payable directly by employer under Section 28(a) or (b) of the Act. The Board noted that employer's insolvency did not affect its liability for a fee, but could present an enforcement issue. *Marks v. Trinity Marine Group*, 37 BRBS 117 (2003).

In this case employer's carrier was declared impaired by the Texas Guaranty Association (TPCIGA) and employer is bankrupt – its assets in trust – and the issue arose as to whether TPCIGA could be held liable for claimant's attorney's fee pursuant to state law. The Board reversed the administrative law judge's determination that the Act preempts the Texas law which governs TPCIGA's liability. The Board held that, as insurance is regulated by the states, TIGA is a state insurance statute, and the Act is a workers' compensation statute, there is no conflict between the Longshore Act and the Texas insurance code. Both statutes apply, and application of the state statute mandates whether and to what extent TPCIGA must satisfy the carrier's obligations under the Longshore Act. The applicable Texas law provides that TPCIGA is liable for post-insolvency attorney's fee. Employer is liable for pre-insolvency fees. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009).

Law of the Case

The doctrine of the law of the case operates to prevent relitigation of issues decided in a prior appeal of the same case. *See, e.g., Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003). The Board has stated that the law of the case doctrine is discretionary and may not apply where there is a change in the underlying fact situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the Board's initial decision was clearly erroneous and allowing it to stand would result in manifest injustice. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005). For cases discussing this doctrine, *see* Section 21 of the desk book.

Collateral Attacks

Generally, findings of state and bankruptcy courts are not subject to collateral attack in federal proceedings, and, except where Section 22 of the Act is applicable, findings under the Longshore Act that have become final are not subject to attack in subsequent proceedings. *See also* Sections 8(i) and 22 of the desk book.

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The Board affirmed the administrative law judge's finding that claimant cannot collaterally attack the judgment of a bankruptcy court that employer is entitled to interest on the amount of its Section 33(f) lien paid out of bankruptcy proceeds. Claimant did not challenge the distribution in the bankruptcy court at the time it was made and cannot use another forum to seek redress. *Hudson v. Puerto Rico Marine, Inc*., 27 BRBS 183 (1993), *aff'd mem*., No. 93-3375 (11th Cir. Nov. 16, 1994).

Although it was not necessary to reach the issue in affirming the finding that Section 33(g) was inapplicable, the Board rejected employer's contention that a settlement in a third-party suit had in fact occurred, in view of the documentary evidence of an order from the state court vacating the dismissal of the suit, as well as testimony from several witnesses to the effect that no settlement had occurred. *Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom. Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

In this *pro se* appeal, the Board affirmed the administrative law judge's rejection of claimant's motion to rescind an approved settlement, holding initially that, in contrast to *Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT), which stated claimant may rescind an unapproved settlement, approved settlements are not subject to unilateral rescission. The Board also affirmed the administrative law judge's finding that he lacked jurisdiction to set aside his compensation order as claimant did not file a timely motion for reconsideration of the decision approving the settlement and settlements are not subject to

modification. The Board further held that it lacked jurisdiction to review the merits of the decision approving the settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed. *Porter v. Kwajalein Services, Inc*., 31 BRBS 112 (1997), *aff'd on recon*., 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999) (table), *cert. denied*, 528 U.S.1052 (1999).

The Board affirmed a grant of summary judgment in employer's favor, where claimant sought modification and the administrative law judge found that the parties previously entered into a Section 8(i) settlement which was final. Although neither the agreement itself nor the administrative law judge's order of approval explicitly referred to Section 8(i), the administrative law judge on modification properly noted that such is not required under the Act and that Section 702.242(a) was complied with. Moreover, since the judge approving the agreement found it adequate and not procured by duress, the standard applicable under Section 8(i), the administrative law judge on modification reasonably interpreted the order as approving a Section 8(i) settlement. While claimant argued for the first time on appeal that the parties' agreement was not a valid Section 8(i) agreement because of omissions or technical deficiencies in the documentation underlying the settlement application, the Board held that the validity of the agreement underlying a Section 8(i) settlement order is not subject to an attack in modification proceedings under Section 22, but rather raises legal issues which must be timely appealed under Section 21. *Diggles v. Bethlehem Steel Corp*., 32 BRBS 79 (1998); *see also Rochester v. Washington University*, 30 BRBS 233 (1997).

Employer accepted liability for future medical benefits in a settlement agreement, although it noted that other employers were potentially liable. The district director approved the agreement under Section 8(i), and it became final. Accordingly, the settlement agreement conclusively resolved the issue of the responsible employer for claimant's future medical benefits and employer cannot assert in a later proceeding involving medical benefits that other employers should be liable. *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002).