## SECTIONS 19, 23, 24 and 27
## Procedure before the District Director and Administrative Law Judge

### Introduction

The statutory provisions relating to procedures for processing a claim and proceeding to a hearing and decision are contained in Sections 19, 23, 24 and 27 of the Act. 33 U.S.C. §§919, 923, 924 and 927. Section 21 of the Act addresses appeals of administrative law judge decisions to the Benefits Review Board and the United States Courts of Appeals. Appellate procedure is discussed in that section of the desk book.

Section 19 describes procedures relating to filing and processing claims. As noted in discussing other sections of the Act, the official responsible for initial claims processing is now referred to as the "district director" rather than by the title "deputy commissioner" used in the statute. 20 C.F.R. §701.301(a)(7). These terms are used interchangeably in this section of the desk book.

Section 19(a) provides that, subject to the requirements of Section 13, a claim may be filed with the deputy commissioner at any time after the first seven days of disability following an injury or at any time after death, and the deputy commissioner "shall have full power and authority to hear and determine all questions in respect of such claim." This latter clause, however, must be interpreted in conjunction with the transfer of hearing functions to administrative law judges in the 1972 Amendments, which amended Section 19(d), *infra.*

Under Section 19(b), the deputy commissioner must notify employer and other interested parties within 10 days that a claim has been filed. Section 19(c) provides that the deputy commissioner shall investigate the claim and upon application of any interested party, order a hearing. The parties are entitled to at least 10 days notice of the hearing, served personally or sent by registered or certified mail. Following a hearing, an order must be entered rejecting the claim or making an award.

Section 19(d), as amended in 1972, transferred the hearing authority previously held by the deputy commissioners to administrative law judges. It provides, "notwithstanding any other provision of the Act," hearings must be conducted in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §554, and by a hearing examiner qualified under Section 3105 of that title. Section 19(d) further states that "all powers, duties, and responsibilities vested by this Act" on the date of enactment of the 1972 Amendments in the deputy commissioners with respect to such hearings are transferred to such hearing examiners. The hearing examiners referred to in this section are now administrative law judges.

In enacting Section 19(d), however, Congress did not alter the references to the deputy commissioner's authority throughout the rest of the statute. Thus, case precedent developed addressing references to the deputy commissioner in various provisions, *e.g.*, Sections 19, 22, 23, 27, to determine whether specific authority to act continues to be held by the deputy commissioner, was transferred to an administrative law judge, or is held by both concurrently. *See, e.g., Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986)

Section 19(e) states that the compensation order rejecting a claim or making an 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."

Section 19(f) states that a disability compensation award may be made after the death of the injured employee. *See* "The Claim," *infra*. *See also* Section 8.

Section 19(g) allows the deputy commissioner to transfer a case to another deputy commissioner for investigation or such other necessary action.

Section 19(h) states that an injured worker who is claiming compensation must submit to medical examinations required by the deputy commissioner. Proceedings are to be suspended with no compensation payable during any period when the employee refuses to submit to an examination. *See* Section 7.

Section 23 is entitled "Procedure Before the Deputy Commissioner," but it applies to administrative law judges as well. Section 23(a) provides:

> In making an investigation or inquiry or conducting a hearing, the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry of conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a). It further provides that the declaration of a deceased employee concerning the injury shall be admitted into evidence and "shall, if corroborated by other evidence, be sufficient to establish the injury." Section 23(b) provides that hearings are open to the public and must be stenographically reported; the Secretary is required to adopt regulations providing for the preparation of a record of the hearing and other proceedings.

Section 24 states that no person shall be required to attend any proceeding before the deputy commissioner as a witness at a location outside his state or more than 100 miles

from his residence unless he paid mileage and a fee for one day's attendance; under Section 25, witnesses are entitled to the same fees and mileage as those in federal courts. However, the testimony of any witness may be taken by deposition or interrogatories under the rules of practice for the federal district court where the case is pending.

Section 27 is entitled "Powers of Deputy Commissioner," but many of the powers it references are held by administrative law judge as they involve to hearing procedures. Under Section 27(a), the deputy commissioner or Board has the power to preserve and enforce order during proceedings, to issue subpoenas, to administer oaths, to compel the attendance and testimony of witnesses or the production of evidence or the taking of depositions, to examine witnesses and to take any action under law which is necessary to effectively performing the duties of his office.

Under Section 27(b), any person who disobeys or resists a lawful order, misbehaves during a hearing, neglects to produce any materials after being order to do so, or refuses to appear after being subpoenaed may be subject to sanctions by the U.S. District Court. Upon certification of the facts by the administrative law judge or deputy commissioner, the section provides that the district court shall, in a summary manner, hear the evidence regarding the acts complained of and if the evidence warrants it, punish the person in the same manner as for contempt committed before the court.

The statutory directives in these sections are implemented by the regulations at 20 C.F.R. Part 702. To the extent an issue is not specifically addressed by the statute or the Part 702 regulations, the general rules of practice and procedure for adjudicatory proceedings before administrative law judges, 29 C.F.R. Part 18, may apply. New OALJ regulations became effective on June 18, 2015. Citations in cases issued before this date refer to the old regulations.

Due to the interaction of these sections regarding the authority of, and proceedings before, deputy commissioners and administrative law judges, Sections 19, 23, 24 and 27 have been unified here. As appellate procedure is addressed in Section 21 and that section of the desk book, additional decisions on such issues as the substantial evidence standard of review are found in that section.

## The Claim

Under Section 19(a), subject to the time limitations of Section 13, a claim may be filed with the deputy commissioner/district director at any time after the first seven days of disability following an injury, or at any time after an employee's death. A claim will be barred, however, if it is filed outside the applicable limitations period under Section 13. *See also* 20 C.F.R §§702.221-223; Section 13 of the desk book.

Section 19(b) provides that the deputy commissioner must notify the employer and any other interested party of the claim within 10 days after it is filed either by personal service or registered mail.

Section 19(f) explicitly provides that an award of compensation for disability may be made after the death of an injured employee. *See Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985), *aff'd sub nom. Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986); *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983). An employee's survivors thus may file for survivor's benefits and also for disability compensation accruing prior to the employee's death. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 830 (1978).

A claim must be in writing and filed with the deputy commissioner. 20 C.F.R. §702.221(a). The claim need not appear on the form designated by the Department of Labor; a letter from counsel has been deemed sufficient. *Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir. 1960), *cert. denied*, 364 U.S. 884 (1960). *Accord Nix v. O'Keeffe*, 255 F.Supp. 752 (D.Fla. 1966). An oral interview of the claimant is not sufficient, *Slade v. Branham*, 48 F.Supp. 769 (D.Md. 1942), although a memorandum memorializing a call to the deputy commissioner has been held to suffice. *McKinney v. O'Leary*, 460 F.2d 371 (9th Cir. 1972). Whether a document constitutes a "claim" has been liberally construed; the test is whether the communication reasonably conveys the message that a claim is being filed. *See, e.g., Peterson v. Washington Metro. Area Transit Auth.*, 17 BRBS 114 (1984); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981), and cases cited in "What Constitutes a Claim" in Section 13 of the desk book.

Claims may also be withdrawn, without prejudice, subject to certain conditions. 20 C.F.R. §702.225. In order to withdraw a claim prior to a determination on it, the district director or administrative law judge must approve the withdrawal as being for a proper purpose and in the claimant's best interest. *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 127 n.5 (1984); *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 139 (1979); *Graham v. Ingalls Shipbuilding/Litton Systems, Inc.*, 9 BRBS 155 (1978). The receipt of money in exchange for withdrawal is not a proper purpose; to achieve this result, the settlement procedures of Section 8(i) must be followed. *Rodman*, 16 BRBS at 127 n.5;

*Matthews*, 11 BRBS 139. Cases digested, *infra*, regarding withdrawal focus primarily on the authority to approve withdrawal; the withdrawal of claims in general is covered in Section 8(i) of the desk book. *See also* Section 15(b).

With regard to the involuntary dismissal of claims, the Board initially held that neither the Act nor regulations establish a procedure for an administrative law judge to dismiss a claim. Rather, the Act requires that an administrative law judge either award or deny benefits after a hearing. *Brown v. Reynolds Shipyard*, 14 BRBS 460 (1981). However, following the Office of Administrative Law Judges' adoption of Rules of Practice and Procedure, 29 C.F.R. Part 18, which provide for the dismissal of an abandoned claim, the Board reached a different result, permitting a claim to be dismissed upon abandonment and limiting *Brown* to its facts. *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989). These rules apply except to the extent that they are inconsistent with the Act or regulations, in which case the latter controls. Moreover, the rules provide that the Federal Rules of Civil Procedure apply in any situation not provided for or controlled by these rules, the Act or its regulations. 29 C.F.R. §18.1(a). Following case precedent under Rule 41(b) of the Federal Rules which permits involuntary dismissal of a case for failure to prosecute only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful, the Board has vacated dismissals and remanded for reconsideration. *See, e.g., Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). Moreover, as sanctions for a claimant's failure to comply with an order of the administrative law judge are specifically provided by the Act in Section 27(b), the Board has held that an administrative law judge cannot dismiss the claim based on the failure to comply with a discovery order but must apply the procedures in Section 27(b) to sanction claimant, as neither the Federal Rules nor the Part 18 rules apply where a specific provision of the Act is applicable. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003). Additional cases are discussed, *infra*, in the section on the administrative law judge's powers.

The Act does not provide for a "protective filing" in occupational disease cases to avoid possible future statute of limitations problems. *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984). In *Black*, the Board rejected claimant's argument that the case should be stayed at the deputy commissioner level until a disability arose at some future date. The Board held that once a claim is filed, a hearing must be held after the informal proceedings are completed. The Fifth Circuit reached a similar result in *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994), holding that there is no provision in the Act for the protective filing of claims. The court held that where claimants filed claims due to asbestos exposure, but were not yet disabled, their claims could not be held in abeyance, but must be adjudicated if a party so requested, as employer did here. The court noted that the filing of protective claims is no longer necessary in light of the 1984 Amendments to Section 13 which do not require that a claim be filed in an occupational disease case until a claimant is disabled.

If employer declines to pay benefits voluntarily, it must controvert the right to compensation within 14 days from the date it receives notice or knowledge of the injury or death. 33 U.S.C. §914; 20 C.F.R. §702.251. Failure to file a notice of controversion where employer does not pay compensation subjects employer to a Section 14(e) assessment of 10 percent on benefits due and unpaid. *See* Section 14 of the desk book.

Section 702.351 allows for the withdrawal of controversion in situations where there is no longer any issue to be litigated before the administrative law judge. *See Lundy v. Atlantic Marine, Inc.*, 9 BRBS 391 (1978). In *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981), the Board concluded that the attempted withdrawal of controversion by one of two employers was invalid because the issue of liability remained pending before the administrative law judge. *See Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007) (digest, *infra*).

A timely claim for an injury may be amended to, *e.g.*, include sequelae, add additional theories for causation or alter periods of disability. In addressing causation and the Section 20(a) presumption, the Supreme Court held that the presumption attaches only to the claim that is made by claimant, but in a footnote the Court noted the informal nature of workers' compensation proceedings and that "considerable liberality" is allowed in amending claims. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 n.7, 14 BRBS 631, 633 n.7 (1982). Based on this language in *U.S. Industries*, the courts and the Board have held that claimant is not limited to his initial filing, but allegations raised in the LS-18, at the formal hearing, in briefs to the administrative law judge, or in other filings sufficient to put employer on notice of additional injury or disability claimed may be considered. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001) (claimant amended disability period); *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998) (cumulative trauma theory raised prior to hearing); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994) (new theory under Section 9); *Hartman v. Avondale Shipyard, Inc.*, 24 BRBS 63 (1990), *vacating in pert. part on recon.* 23 BRBS 201 (1990) (aggravation theory); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989) (Section 20(a) properly applied to back injury even though it was not stated in initial notice of injury; claimant clearly raised claim for back injury).

## Digests

### In General

The right to disability compensation survives the employee's death and the widow has standing to file a lifetime claim under the Act on the decedent's behalf. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

Where claimant filed a claim for hearing loss, and at the formal hearing filed a new audiogram indicating an increased hearing loss, the administrative law judge found that the new audiogram involved a new claim for an aggravation, but rejected employer's argument that this claim should be remanded for filing with the deputy commissioner, finding it would serve no purpose. The Board affirmed this result, finding it unnecessary to determine whether the audiogram represented a new claim or updated evidence on the existing claim. The Board relied on prior holdings that the purpose behind the requirement in Section 13 that the claim be filed with the deputy commissioner is to ensure that employer will receive prompt notification of the claim, and this purpose was satisfied as employer received written notification of an increased hearing loss at the formal hearing, and was given the opportunity post-hearing to submit evidence challenging the claim. *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989).

In cases involving the filing of a claim for purposes of attorney's fee liability pursuant to Section 28(a), the Board and Fifth Circuit held that "a claim for compensation" need not include any competent evidence of disability in support of the claim in order to be "valid;" a claim need only be a writing evincing an intent to seek compensation. Thus, a claim for hearing loss benefits need not be accompanied by an audiogram or other evidence demonstrating a loss of hearing. Where Congress has determined that hearing loss claims are to be treated differently than other claims, it has specifically so provided. *Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Fourth Circuit held that a claim within the meaning of Section 28(a) refers to a formal action that initiates a legal proceeding. In this case, claimant filed an LS-203 claim form. Several months later, he filed a letter seeking additional benefits related to the same injury. The court held that the subsequent filing was not a "claim" for purposes of Section 28(a). *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4th Cir. 2005), *cert. denied*, 546 U.S. 960 (2005).

The Board rejected employer's contention that the administrative law judge erred in failing to remand the case to the district director pursuant to 20 C.F.R. §702.351 for the entry of a compensation order. The withdrawal of controversion regulation assumes that the parties are in agreement as to the disposition of the case, as it instructs the district director to issue a compensation order as in 20 C.F.R. §702.315. In these cases, claimants opposed the issuance of a compensation order and the administrative law judge therefore properly retained jurisdiction over the cases. As the Board also affirmed the administrative law judge's denial of claimants' motion to withdraw, he should proceed to adjudicate the claims. If the claimants fail to raise issues requiring adjudication, the administrative law judge may address this in disposing of employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

**Dismissal**

The Board limited *Brown*, 14 BRBS 460, to its specific facts, and held that the administrative law judge did not abuse her discretion in dismissing the request for a hearing and in refusing to remand the case to the deputy commissioner, resulting in a *de facto* dismissal of the claim, as she properly found it had been abandoned. The Board noted that *Brown* was decided prior to the promulgation of the 29 C.F.R. Part 18 regulations, and Section 18.39(b) allows the administrative law judge to dismiss a request for a hearing upon abandonment and also permits entry of a default decision against any party failing, without good cause, to appear at a hearing. Moreover, Section 18.29(a) grants administrative law judges "all powers necessary to the conduct of fair and impartial hearings, including where applicable, [the authority to] take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts." 29 C.F.R. 18.29(a). Rule 41(b) of the Federal Rules of Civil Procedure allows for the involuntary dismissal of a claim for, *inter alia*, failure to prosecute the claim. These provisions authorize the administrative law judge, in the exercise of sound discretion, to dismiss a claim where it has been abandoned. *Taylor v. B. Frank Joy Co.,* 22 BRBS 408 (1989).

The administrative law judge has the authority to dismiss a claim with prejudice where claimant fails to prosecute his claim, given all the circumstances. However, Rule 41(b) of the Federal Rules provides for the involuntary dismissal of a case for failure to prosecute or comply with the orders of the court only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful. The Board vacated the administrative law judge's dismissal and remanded the case for the administrative law judge to consider whether less drastic sanctions, including those provided in Section 27 of the Act, were available and whether claimant's conduct was contumacious in light of the offered explanations as to why claimant did not attend depositions and medical examinations. The administrative law judge also must address whether claimant was represented by counsel and whether employer was prejudiced by the delay. *Twigg v. Maryland Shipbuilding & Dry Dock Co.,* 23 BRBS 118 (1989).

The Board vacated the dismissal of the claim and remanded the case for a hearing on the merits. The Board noted that dismissal is an extreme sanction and the fact-finder must consider whether lesser sanctions would better serve the interests of justice. In this case, claimant missed only the last scheduled hearing and had been ready to proceed at prior scheduled hearings which were continued at employer's request and at claimant's request because of the unavailability of claimant's physician. *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989).

The administrative law judge acquired jurisdiction over the claim following the Board's denial of claimant's motion for reconsideration. The administrative law judge did not abuse his discretion in dismissing claimant's' claims with prejudice pursuant to 29 C.F.R.

§18.29(a) based on claimant's repeated and numerous abuses of the administrative process over the entire course of the case including claimant's refusal to comply with discovery requests and to submit to a medical examination. The case sets forth the black letter law regarding the standards to be considered before an administrative law judge may dismiss a claim with prejudice, specifically FRCP 37, 41. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993).

The Board held that the administrative law judge erred in dismissing claimant's claim with prejudice due to his failure to comply with the administrative law judge's discovery orders. Section 27(b) applies to provide sanctions where claimant fails to obey an order of the administrative law judge. Under Section 27(b), the administrative law judge may certify the facts surrounding a party's sanctionable conduct to the district court for action. Where the Act specifically provides the manner in which conduct like that of claimant is to be dealt with, neither the general Rules of Practice and Procedure for the OALJ, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure, apply. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

**Withdrawal**

The Board affirmed the administrative law judge's decision to grant claimant's request to withdraw his claim under the Act pursuant to 20 C.F.R. §702.225, claimant having elected to exclusively pursue his claim under the state workers' compensation statute. Claimant is entitled to pursue his claim under either applicable federal or state statue, or both, where federal and state jurisdiction run concurrently; it is claimant's decision as to where to pursue his remedy. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., concurring and dissenting).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's failure to forward the cases to the Office of Administrative Law Judges upon employer's request for a formal hearing is a ministerial and nondiscretionary duty. Once a party requests a hearing, the district director loses any authority to act on the claim. The court stated that after the claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996)(court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases), *rev'g Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (*en banc*) (Brown, J., concurring).

The Board vacated the administrative law judge's decision that withdrawal of his claim to pursue a state claim was not for a proper purpose, holding that it was proper as claimant is entitled to choose his forum for worker's compensation benefits. The Board also vacated the administrative law judge's requirement that claimant file a second longshore case within 15 days of the denial of claimant's motion to withdraw the initial longshore claim. The Board stated that, a claimant has one or two years from the date he becomes aware or should have become aware of a work-related injury or an occupational disease, and it was improper for the administrative law judge to mandate how and when claimant should file a claim. *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998).

A claim is not withdrawn unless the requirements of Section 20 C.F.R. §702.225(a) are met. An administrative law judge has the authority to enter an Order approving a withdrawal request but must determine, consistent with the regulatory criteria, whether the request for withdrawal is for a proper purpose and whether approval is in the claimant's best interest. *Petit v. Electric Boat Corp.*, 41 BRBS 7 (2007).

The Board held that the administrative law judge erred in finding that the claimants' motion to withdraw was not for a proper purpose as required by 20 C.F.R.

§702.225(a)(3). The claimants were entitled to pursue a tort remedy in state court, as they had the right to choose the forum in which they will first litigate their cases. The Board declined to address claimants' contention that the administrative law judge erred in assessing the prejudice to employer under this prong of the regulation, noting however, that in a black lung case, the Board agreed with the Director that this factor need not be assessed. The Board affirmed the administrative law judge's finding that claimants' motion to withdraw was not in their best interests pursuant to C.F.R. §702.225(a)(3). This inquiry is specifically given to the fact-finder. The administrative law judge rationally found that claimants' recovery in state court was speculative, both on a monetary basis and on the claims asserted. Moreover, depending on the success of employer's defenses in state court, claimants could lose the right to refile under the Act, pursuant to Section 13(d). The Board remanded the case to the administrative law judge for adjudication/ruling on employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

**Amendment of Claims**

On the unique facts of this case, claimant, the widow of a deceased employee, had the option of filing under Section 9 as it existed prior to the 1984 Amendments based on either her husband's death from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury. She filed a timely claim, based on her husband's death due to an asbestos-related condition, and almost three years after her husband's death, indicated in writing that she also sought death benefits based on decedent's having been permanently totally disabled at the time of his death. The Board affirmed the administrative law judge's determination that claimant's raising of a new theory of recovery under Section 9 constituted a timely amendment of her original claim, noting that the amendment's timeliness is determined by that of the original claim and that the U.S. Supreme Court has indicated that liberal amendment of pleadings is to be allowed. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Eighth Circuit denied employer's challenge to the sufficiency of the claim and lack of notice as claimant's claim alleging an injury to his right knee and pretrial stipulation providing notice to employer that he wished to reserve the right to claim that his knee injury was in the nature of a cumulative trauma, put employer on notice prior to the hearing that there was uncertainty as to the nature of claimant's injury with a possibility of cumulative trauma. Additionally, three months prior to the hearing, claimant's counsel sent a letter to the Department of Labor with a copy to the claim representative for employer's insurer stating that, after having time to consider the injury, the work claimant did at employer and not the accident he had there aggravated his knee condition. Thus, employer had sufficient information on which it could investigate the claim. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Claimant was awarded permanent partial disability benefits for asbestosis in 1978. He continued working but in 1990 was transferred to a new work area where his lung condition was aggravated. Claimant ceased working in February 1991 and filed for modification to change his benefits to permanent total disability based on his average weekly wage at the time he stopped working. The First Circuit affirmed the Board's decision that claimant satisfied the statute of limitations under the Act, approving the Board's reasoning that because claimant's letter seeking modification was timely under Section 22, it was unnecessary for Jones to take the additional step of filing a new injury claim under Section 13 and that the Section 22 proceedings, if not the letter itself, provided a timely alert that Jones was asserting a new injury claim under an aggravation theory. The court stated that by moving for modification and arguing that the benefits should be based on his 1991 salary, claimant was necessarily asserting either that he sustained a new injury or an aggravation of his prior injury. Claimant therefore was not

required to file a separate formal claim under Section 13. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999).

As claimant timely filed a motion for modification, claimant's subsequent amending of that claim to assert entitlement to an additional period of benefits was permissible, as claimant may amend a pending claim. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

The Fifth Circuit held that a "claim" does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits arising out of a single injury. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter asserted a claim for an award of permanent total disability benefits. The Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would reject employer's argument because the relation back theory of FRCP 15(c) allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading, and here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Where claimant injured his back and neck in 1990 and filed a claim for permanent partial disability benefits which the administrative law judge denied in a 1996 decision, the Board rejected claimant's assertion that his claim for temporary total disability benefits filed in 2000 for the same injury constituted a "new" claim under Section 13 instead of modification under Section 22. The Board, following the Fifth Circuit's decision in *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), concluded that a "claim" may consist of requests for multiple types of benefits for an injury and, therefore, a filing is not a "new claim" where it requests a different type of disability benefits from the type originally sought for the same injury. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

## Proceedings Before the Deputy Commissioner/District Director

Section 19(a) provides that the "deputy commissioner shall have full power and authority to hear and determine all questions in respect of" claims filed under the Act. 33 U.S.C. §919(a). This provision, in concert with Sections 19(c), 23(a) and 27(a), reflects the dual roles of adjudication and investigation that were held by the deputy commissioner prior to the enactment of the 1972 Amendments to the Act.

The 1972 Amendments amended Section 19(d), withdrawing the adjudicatory power to conduct hearings from the deputy commissioners and conferring it on hearing officers, now administrative law judges, who are qualified to conduct hearings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §554. *Barthelmy v. J. Ray McDermott & Co., Inc.*, 537 F.2d 168, 4 BRBS 325 (5th Cir. 1976); *Lauzon v. Strachan Shipping Co.*, 602 F.Supp. 661 (S.D. Tex. 1985); *Blake v. Hurlburt Field Billeting Fund*, 17 BRBS 14 (1985); *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982); *Clefstad v. Perini North River Associates*, 9 BRBS 217 (1978); *Neal v. Strachan Shipping Co.*, 1 BRBS 279 (1974). This change reflects the concern that administrative and adjudicative functions were too closely tied together, *see* 1972 U. S. Code Cong. & Adm. News 4708, and effects what the Board has described as a "neatly legislated procedural separation of informal settlement conferences and formal adjudications." *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585, 589 (1981).

As a result, the adjudicative functions referred to in Section 19(a) are reserved only for administrative law judges under Section 19(d). In amending the Act in 1972, however, Congress neglected to alter those references to the deputy commissioner's authority that appeared throughout the Act. The Board therefore has reviewed various provisions of the Act to determine whether specific provisions refer to powers held by the deputy commissioner/district director, the administrative law judge, or both concurrently.

The Board has held that in view of Section 19(d), deputy commissioners/district directors no longer possess the authority to perform certain adjudicatory duties which are referred to in Sections 19, 23, and 27. Thus, the Board held that the deputy commissioner does not have the authority to issue subpoenas duces tecum, *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986), *overruling Rabb v. Marine Terminals Corp.*, 11 BRBS 498 (1978), and contrary language in *Percoats*, 15 BRBS at 154, and that he may not compel testimony at depositions. *Percoats*, 15 BRBS at 155. *See* Section 27(a). *See also Grandy v. Vinnell Corp.*, 14 BRBS 504 (1981) (deputy commissioner may not entertain motion for exhumation and autopsy).

The deputy commissioner/district director's role, as it emerges in the scheme of the post-1972 Act, is that of a claims administrator who functions both to process claims and to facilitate their informal resolution in a timely and fair manner. *Maine*, 18 BRBS 129. *See* 20 C.F.R. §§702.301 to 702.321. For example, claims are initially filed with the

district director, who must notify the responsible employer that a claim has been filed. 20 C.F.R. §§702.221, 702.224. *See also* Section 14(h), 33 U.S.C. §914(h) (deputy commissioner's duty to investigate claims when right to compensation is controverted). In addition, in sections where the statute describes actions to be taken by the Secretary, *e.g.*, 33 U.S.C. §§907, 939, that authority is delegated to the Director and district directors. *See* 20 C.F.R. §701.301 The district director is thus responsible, *inter alia*, for supervising an injured employee's medical care and medical examinations, 20 C.F.R. §§702.401-436, s*ee Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002) (active supervision of a claimant's medical care is performed by the district director, but issues which involve factual disputes as opposed to those which are purely discretionary are for the administrative law judge to decide); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting) (authority to determine whether a physician has complied with Section 7(d)(2) reporting requirement and whether good cause has been shown to excuse non-compliance is given only to the Director and his designates, the district directors), conducting vocational rehabilitation, 20 C.F.R. §§702.501-508, *see Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003), evaluating requests for special fund relief, 20 C.F.R. §702.321, and awarding attorney's fees for work at that level, 20 C.F.R. §§702.131-135. *Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978).

In addition, the deputy commissioner continues to possess the authority to approve settlements under Section 8(i) of the Act. The 1984 Amendments expressly grants this authority to both administrative law judges and the district directors, consistent with pre-Amendment holdings of the Board. *See Blake*, 17 BRBS 14; *Clefstad*, 9 BRBS 217.

Where a case is pending at the deputy commissioner level, and the issuance of a subpoena becomes necessary, the parties may apply to the Office of the Chief Administrative Law Judge for the issuance of a subpoena. This procedure does not affect the jurisdiction of the district director over informal proceedings; the case remains before that official pending issuance of the subpoena, and once it issues, the informal proceedings continue. *Maine*, 18 BRBS 129.

Where a claim is disputed, the district director is empowered to resolve the dispute consistent with protecting the rights of the parties and at the earliest possible date, generally by informal discussion by telephone or at the district director's office. 20 C.F.R. §702.311. In doing so, the district director is authorized to hold informal conferences. 20 C.F.R. §702.312. No witnesses are called at informal conferences, and no stenographic report may be taken. 20 C.F.R. §702.314(a). Consistent with Section 702.311, correspondence between the parties and the district director may serve as the "functional equivalent of an informal conference." *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4th Cir. 2007).

If the parties reach agreement, the district director shall embody the agreement in a memorandum or issue a formal compensation order. 20 C.F.R. §702.315. An order issued upon consent of the parties pursuant to Section 702.315 may be modified under Section 22. *See, e.g., Stock v. Mgmt. Support Assoc.*, 18 BRBS 50 (1986), and cases cited in Section 22 of the desk book.

If it becomes apparent that agreement cannot be reached, the district director ends the conference and, after evaluating the available evidence, prepares a closing memorandum of conference setting forth the issues, relevant facts and a recommendation on each issue. This memorandum must be sent to the parties, who have 14 days to state whether they agree or disagree with the recommendations. 20 C.F.R. §702.316. If the parties continue to disagree, then the district director may schedule additional conferences if he believes this action may result in an agreement; if satisfied that an additional conference would be unproductive or any party requests a hearing, the district director shall prepare the case for transfer the case to the Office of the Chief Administrative Law Judge for formal adjudication. *Id.; see* 20 C.F.R. §§702.317-319.

Informal conferences are not mandatory. Thus, the Board held that the deputy commissioner acted within his discretion in referring a case to the Office of Administrative Law Judges without an informal conference where there were numerous complex issues, employer had ample opportunity to develop evidence and present issues to the administrative law judge, and employer was not prejudiced. *Matthews v. Jeffboat, Inc.*, 18 BRBS 185 (1986). Note, however, that employer must raise entitlement to Section 8(f) relief before the district director if it has reason to know that permanency is at issue. *See* 33 U.S.C. §908(f)(3); 20 C.F.R. §702.321. Moreover, the lack of an informal conference and recommendation can affect whether an employer may be held liable for an attorney's fee under Section 28(b). *See* Section 28 of the desk book.

Absent an agreement by the parties or a request for an order under Section 702.315, the district director is not empowered to issue a compensation order. *Roulst v. Marco Constr. Co.*, 15 BRBS 443 (1983). Upon request of any interested party, the case must be referred to the Office of Administrative Law Judges for a hearing on the claim. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994); *Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir.), *cert. denied*, 364 U.S. 884 (1960) (discussing difference between Sections 14(h) and 19(c)); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 279 F.2d 75, *denying reh'g in* 274 F.2d 794 (5th Cir. 1960); *Black v. Bethlehem Steel Corp.*, 16 BRBS 138 (1984). Once a request for a hearing has been made, Section 19(c) confers jurisdiction on the administrative law judge. *Black*, 16 BRBS at 142.

Where a compensation order has been issued and employer does not pay the amounts awarded, claimant may seek a default order pursuant to Section 18. *See also* Section 21(d). The district director is charged with investigating the alleged default and issuing a supplementary order declaring the amount of the default; where employer has failed to make payments within 10 days of the filing of a compensation order, a 20 percent assessment is added under Section 14(f). The claimant may then take the supplementary

order to the United States District Court for enforcement. *See, e.g., Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). Enforcement is discussed in Section 18 of the desk book.

The district director may make any calculations required to effectuate a compensation order, as this task is ministerial. *See Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994); *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009); *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). A decision may not be enforceable until these calculations are made. *Id.* However, if additional fact finding is required, the case must be referred to an administrative law judge.

Although Section 22 explicitly refers to the initiation of modification proceedings before the deputy commissioner, the Board has held that modification may be properly sought before the administrative law judge who heard the case where an appeal is pending before the Board when the Section 22 request is filed. *Craig v. United Church of Christ, Commission for Racial Justice*, 13 BRBS 567 (1981). In other cases, modification may be initiated before the deputy commissioner. However, his function is to gather evidence and conduct informal investigations; he may not modify the decision of an administrative law judge in a contested case. *See Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Arbizu v. Triple A Machine Shop*, 15 BRBS 46 (1982). *See also* Section 22.

The Board has held that the deputy commissioner may not delegate to a claims examiner discretionary duties such as the authority to determine attorney's fees. *Mazzella*, 8 BRBS 755; *Dunn v. United Terminals, Inc.*, 8 BRBS 751 (1978). *Cf. Bradley v. Director, OWCP*, 8 BLR 1-418 (1985) (deputy commissioner may delegate ministerial duties such as setting deadline for submitting fee petition). In *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991), the Board rejected the argument that a settlement agreement had been approved under Section 8(i) where the purported "approval" was contained in a letter from the claims examiner; the Board held that the letter did not comply with the requirements for proper approval and that the claims examiner was not authorized to approve a Section 8(i) settlement. The Board discussed the district court's decision in *Barulec v. Skou, R.A.*, 471 F.Supp. 358 (S.D.N.Y. 1979), *aff'd mem.*, 622 F. 2d 572 (2d Cir. 1980), *aff'd on other grounds sub nom. Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981), relied upon by a dissenting judge for the proposition that the deputy commissioner's authority to enter an award based on settlement can be delegated to a claims examiner. The majority rejected this position, stating that in *Barulec*, the court held that Section 8(i) applies only to settlements reached by the parties independently, and that if the parties reach an agreement following an informal conference a claims examiner had the authority under the existing regulation to approve this agreement.

*See* 20 C.F.R. 702.312 (1976) (amended 1977) (under amended regulation, compensation order may only be issued by a person designated by the Director to do so, *i.e.*, the district director). The Board has held that an assistant deputy commissioner who was duly authorized to perform the duties of a deputy commissioner may approve a Section 8(i) settlement. *House v. Southern Stevedoring Co.*, 14 BRBS 979 (1982), *aff'd*, 703 F.2d 87, 15 BRBS 114(CRT) (4th Cir. 1983).

## Digests

### In General

Where the deputy commissioner previously provided an accounting of the amounts which employer had paid and owed, the Board instructed employer to present any remaining issues pertaining to recoupment of employer's alleged overpayments from the Special Fund to the deputy commissioner, as those issues may be resolved informally and it was thus unnecessary for the Board to address them. *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987).

The Board held that, pursuant to Section 19(d), and *Neal*, 1 BRBS 279, the deputy commissioner did not have authority to issue a compensation order subsequent to November 26, 1972, the effective date of the 1972 Amendments to the Act. Thus, the Board held that the compensation order issued in 1973 by the deputy commissioner was not valid, and employer's compensation payments made under that order must be considered voluntary. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989).

On reconsideration, the Board rejected the Director's contention that the deputy commissioner's 1973 compensation order was valid because it became final and binding when it was not appealed within thirty days. The Board rejected the Director's argument based on *Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986), that the deputy commissioner's order became final when it was not appealed. Unlike *Downs*, where the administrative law judge's authority to approve settlements was valid at the time the action was taken, the deputy commissioner had no authority to issue a compensation order in 1973, so it was void from its inception. *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *aff'g and modifying on recon.* 21 BRBS 355 (1988).

The Board held that a deputy commissioner erred in modifying an administrative law judge's decision, as he does not have the power to modify decisions of administrative law judges, and the administrative law judge erred in directing him to do so. The administrative law judge erred in failing to determine the responsible carrier, and it was also error for the deputy commissioner to engage in fact finding on this issue. The deputy commissioner performs only administrative and pre-hearing investigative tasks.

Moreover, it was irrational for the deputy commissioner to assess a Section 14(f) amount against Hanover Insurance Company for failure to pay the administrative law judge's award within 10 days since Hanover was not a party before the administrative law judge and was not found liable until the deputy commissioner's subsequent order. The case was remanded to the administrative law judge for findings on the disputed questions of fact. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board viewed the deputy commissioner's letter purporting to alter language in an administrative law judge's decision as an impermissible modification, pursuant to *Sans*, 19 BRBS 24, and *Penoyer*, 9 BLR 1-12. Reasoning that the deputy commissioner possessed no authority to issue this letter, the Board held that both the letter and the administrative law judge's second decision issued in response to it were of no legal effect. The period for filing an appeal with the Board thus began when the administrative law judge's first decision was filed. The Director's appeal, submitted some six months after this decision was filed in the deputy commissioner's office, was thus dismissed as untimely. *Hernandez v. Bethlehem Steel Corp.*, 20 BRBS 49 (1987).

The Board held that the deputy commissioner exceeded his authority by vacating the administrative law judge's decision awarding permanent total disability benefits based on his apparent finding that claimant was only partially disabled. It was error for the deputy commissioner to engage in fact finding on the disability issue and to issue an order as no agreement had been reached between the parties. The Board vacated the deputy commissioner’s order, reinstated the administrative law judge’s decision and remanded the case for further consideration of employer’s request for modification. *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

The Board affirmed the administrative law judge's finding that the deputy commissioner had no authority to issue a Notice of Modification of an administrative law judge award in a black lung case. The Board set out the history of modification proceedings under the Longshore Act and reiterated its holdings that a deputy commissioner can only modify a decision of a deputy commissioner. The Board further noted that when, as here, no appeal is pending before the Board and new evidence is discovered, the deputy commissioner investigates the grounds for modification and forwards evidence to the administrative law judge. In this case, the administrative law judge did not consider the new evidence, and the case was accordingly remanded. *Yates v. Armco Steel Corp.*, 10 BLR 1-132 (1987) (black lung case).

The Ninth Circuit held that not all decision-making by the district directors is subject to a hearing before the administrative law judge. Section 19(d) does not establish an absolute right to a hearing before an administrative law judge; thus, purely legal disputes or those that do not require fact-finding are not within the jurisdiction of the OALJ. Disputes as to the adequacy of the district director’s award of attorney's fees are within his sole discretion and therefore do not involve any matters that require an evidentiary inquiry.

Such disputes lie outside of the OALJ's purview. Thus, a district director's attorney's fee award is directly appealable to the Board if there are no disputed facts. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531 U.S. 378 (2000). *See* Direct Appeal in Section 21.

The Board held, in accord with the Director's position, that when a party files a petition for modification with OWCP, the district director is obliged to take some action in the processing of the claim. As it is incumbent upon the district director to set the informal conference and begin processing the claim, a claimant's failure to take action following the filing of a motion for modification is not controlling as to his intent to pursue the claim. Thus, in this case where claimant filed a timely motion in 1999 and took no other action until he filed an additional motion over one year later, the Board held that claimant's inaction did not establish abandonment or a lack of intent to pursue the 1999 claim. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

This case arose under the D.C. Act, and thus the Longshore Act as it existed prior to the 1984 Amendments was applicable. Under Section 8(d)(3), claimant, as decedent's survivor, may be entitled to death benefits because decedent was receiving permanent partial disability benefits and died due to causes unrelated to his work injury. However, because disputed factual issues existed, such as whether claimant filed a timely claim for compensation, it was improper for the district director to award claimant death benefits. The district director has no authority to issue a compensation order absent an agreement between the parties. Therefore, the Board vacated the district director's award and remanded the case. *Durham v. Embassy Dairy*, 40 BRBS 15 (2006).

The Board rejected employer's assertion that it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation. Contrary to employer's assertion, the district director did not err in not transferring the case to OALJ upon employer's request. Rather, because the Act gives the Secretary of Labor the authority to provide and direct vocational rehabilitation, the authority is wielded by the district directors and is discretionary. Thus, administrative law judges have no authority to determine the propriety of vocational rehabilitation, and it was appropriate for the district director to retain the case. Moreover, employer was not denied constitutional due process because, prior to assessing liability for total disability benefits during the period of rehabilitation, employer was afforded a full hearing on this issue. With regard to implementation of the vocational program, the Board noted that the employer has the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Ninth Circuit rejected employer's assertion that it was denied due process because it was not permitted a hearing to determine the necessity of a vocational rehabilitation program for claimant. The court relied on its decision in *Healy Tibbitts*, 201 F.3d 1090,

33 BRBS 209(CRT), stating that Section 19(c) does not require an evidentiary hearing on all contested issues. The determination of the reasonableness of a rehabilitation program is left to the discretion of the district director and does not require any fact-finding by an administrative law judge. Moreover, the court stated that the implementation of the rehabilitation program itself did not deprive employer of property because the implementation did not trigger the payment of benefits; payments were required because of the administrative law judge's award after the hearing. The hearing constituted a sufficient pre-deprivation hearing and protected employer's due process rights. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.* 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008).

The Board rejected claimant's contention that employer was required to pay compensation within 10 days after the administrative law judge issued her decisions. The administrative law judge ordered the district director to calculate the amount of compensation due. Pursuant to *Keen*, 35 F.3d 226, 28 BRBS 110(CRT), the earliest date from which compensation was due pursuant to the administrative law judge's decisions was 10 days after the district director filed a letter reflecting the calculations necessary for employer to determine the extent of its compensation liability. The Board remanded for the district director to determine whether employer made timely payments of the amounts previously calculated. In her decisions, moreover, the administrative law judge did not specify the amount of employer's credit for past compensation payments, nor did the parties stipulate to the amount of any benefits previously paid. Claimant challenged the district director's calculation of the amount of benefits due, asserting that employer had not adequately proven under Section 14(k) the amount of its back payments. The Board held that, while employer is liable for an assessment on the amount previously calculated by the district director, proceedings before an administrative law judge, pursuant to *Hanson*, 34 BRBS 136, and *Bray*, 664 F.2d 1045, 14 BRBS 341, are necessary to address the factual matters raised with regard to the amount of compensation due. Pursuant to *Severin*,, 910 F.2d 286, 24 BRBS 21(CRT), employer cannot be held in default for any additional compensation found due on remand until this dispute is resolved. *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

The Board held that authority for approving an application for commutation of benefits under Section 9(g) lies with the district director and not the administrative law judge. Specifically, Section 9(g) states that the Secretary may commute future payments to non-resident aliens. Since the enactment of the 1972 Amendments and Section 19(d), references to the Secretary refer to the deputy commissioners (district directors) to whom the Secretary's discretionary authority has been delegated. Therefore, the administrative law judge did not have the authority to address the issue. The Board held that the administrative law judge erred in relying on 29 C.F.R. §18.29 as authority for addressing commutation, as this refers to general powers for conducting a hearing and Section 9(g) is a rule of special application. Thus, in this case arising under the DBA involving an alien non-resident widow, the administrative law judge erred in addressing the issue of commutation because he did not have the authority to address it; moreover, there also was no application for commutation pending. With the exception of the administrative law judge's proper statement that benefits to decedent's children cannot be commuted because they are citizens of the United States, the Board vacated the administrative law judge's commutation findings and held that employer may file an application with the district director should it wish to apply to commute the widow's benefits. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

In this case, which arises under the DBA, and is still before the district director, employer requested a subpoena from the administrative law judge ordering claimant to attend a deposition so that it may investigate its potential claim for reimbursement under the WHCA. Based on OALJ rules and on the Board's decision in *Maine*,18 BRBS 129 (1986) (en banc), the administrative law judge found that he has the authority to issue the requested subpoena. The Board vacated the order and quashed the subpoena on the grounds that the administrative law judge abused his discretion in issuing an unnecessary subpoena the purpose of which is to obtain information that is irrelevant for resolving the DBA claim. Specifically, the Board held that claimant's willingness to participate in an informal conference, on the very matter on which employer seeks information, makes the issuance of a subpoena unnecessary in this case, as claimant has not refused to provide the requested evidence or frustrated the processing of her DBA claim. The Board noted that employer did not attempt any informal methods before requesting a subpoena and that this is not a situation wherein the informal process has broken down. Thus, the *Maine* criteria for issuing a discovery subpoena have not been met. Moreover, as there is no dispute in the DBA claim, the only purpose for employer's subpoena request is to ascertain its eligibility for reimbursement of compensation under the WHCA, and, as such purpose is not "in respect of" the DBA claim, the administrative law judge does not have the authority to address it. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012).

**Duty to Transfer Case for Hearing**

When a party requests that the case be transferred to the OALJ for a hearing, the district director has a clear, ministerial and non-discretionary duty to transfer the case for a hearing under Section 19(c). In this case, where employer repeatedly requested transfer and there was little likelihood that the cases would be resolved through informal means, the district court did not err in granting a writ of mandamus ordering the district director to transfer the cases. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994).

The Fifth Circuit held, consistent with *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), that an administrative law judge's decision does not become final and enforceable until the deputy commissioner furnishes the calculations directed by the decision. The fact that employer could have made the calculations on its own is not determinative in this case in view of the specific directive that the deputy commissioner make the calculations. Thus, the district court properly declined to enforce the assessment of a Section 14(f) penalty for late payment. *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994).

The Board noted that Section 19 specifically requires the district director to investigate claims and order hearings upon the request of a party, but the Act does not specify the time period for carrying out that duty or the consequences or effects of a delay by the district director's office. Relying on the Fifth Circuit's opinion in *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT), the Board held that the district director's duty to transfer the case to the OALJ under Section 19 upon the request of a party is mandatory. Where the district director dismissed the case upon claimant's request for withdrawal three years after employer requested a hearing, the Board, relying on *Asbestos Health Claimants*, determined that the district director failed to perform her mandatory duty under Section 19 to transfer the case to the OALJ. However, despite the derogation of duty, and in the interest of judicial efficiency, the Board concluded that the failure to refer the case constituted harmless error, as claimant had no claim to pursue and could have withdrawn his case at any time subject to the regulations. *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (*en banc*) (Brown, J., concurring), *rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT), *vacating on reh'g* 81 F.3d 501, 30 BRBS 39(CRT) (5th Cir. 1996).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's duty to forward cases to the Office of Administrative Law Judges upon employer's request for a formal hearing is ministerial and nondiscretionary. Once a party requests a hearing, the district director loses any authority to act on the claim and must refer it for hearing. The court stated that after the

claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996)(court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases).

Claimant filed a claim in 1987 based on exposure to asbestos, although no disability was alleged. In 1992, employer requested that the district director refer the case to the OALJ for a hearing. After the district director denied employer's request, employer appealed the district director's denial to the Board. Following the Fifth Circuit's holding in *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT), and its decision in *Black*, 16 BRBS 138, the Board held that Section 19(c) imposes a mandatory duty on the district director to order a hearing upon the application of any interested party. *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting).

The Board rejected employer’s contention that the district director erred in not entering a compensation order based on the parties’ stipulations pursuant so 20 C.F.R. §702.315. Claimant did not agree with the proposed stipulations, resisted the issuance of a compensation order and raised issues of fact. Therefore, the district director properly transferred the case to the OALJ for a hearing, 20 C.F.R. §702.316. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004).

## Administrative Law Judge Adjudication

### Section 19(c)-Notice of Hearing and Timely Decision

Section 19(c) provides that where a hearing on a claim is ordered, the claimant and other interested parties are entitled to at least ten days' notice of such hearing, served personally on the parties or sent to them by certified or registered mail. *See J.T. [Tisdale] v. American Logistics Services*, 41 BRBS 41 (2007).

In addition, Section 19(c) states that following a hearing an order accepting or rejecting the claim must be issued within twenty days. *See also* 20 C.F.R. §702.349. The Board has held that the "twenty day rule" is not mandatory. Rather, failure to issue a decision within twenty days only requires remand where the aggrieved party shows that it was prejudiced by the delay. *Welding v. Bath Iron Works Corp.*, 13BRBS 812 (1981). *Accord Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981)**,** *aff'g* 11 BRBS 441 (1979); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983). *Welding* overruled prior decisions, including *Rosenzweig v. Namor Foods*, 7 BRBS 898 (1978), to the extent that they did not require prejudice due to the late issuance of a decision.

Prejudice may be established where a party demonstrates errors in the administrative law judge's consideration of the evidence. *See Champion v. S & M Traylor Brothers*, 14 BRBS 251 (1981) (Miller, dissenting), *rev'd on other grounds*, 690 F.2d 285, 13 BRBS 33 (D.C. Cir. 1982) (contention claimant prejudiced by being forced to continue receiving welfare held insufficient); *Valencia v. Marine Terminals Corp.*, 9 BRBS 788 (1978); *Jeyakaran v. Daniel, Mann, Johnson & Mendenhall*, 8 BRBS 505 (1978). *Cf. Rosenzweig*, 7 BRBS 898 (noting numerous errors regarding facts and unsupported statements by administrative law judge, although Board concluded it could not say for certain there was prejudice due to delay).

### Digests

The Board declined to address the issue of whether the administrative law judge's failure to issue a decision within twenty days of the hearing, as required by 20 C.F.R. §702.349, constituted reversible error in light of the decision to remand the claim on other grounds. *Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

The Board rejected claimant's contention that the administrative law judge's failure to issue his decision within twenty days after the close of the record pursuant to Section 19(c) and 20 C.F.R. §702.349 required that the decision be vacated and a new hearing held as claimant did not show prejudice as a result of the delay. *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 ( 2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010).

The Board remanded the case for a hearing on the limited issue of whether employer was served with notice of the hearing by certified or registered mail as required by Section 19(c). Employer was not present at the hearing, and benefits were awarded based on claimant's evidence. The Board rejected claimant's contention that employer was obligated to inquire about any proceedings based on its knowledge that claimant was pursuing a claim under the Act. If employer did not receive notice as required by statute, the administrative law judge must vacate the award of benefits and hold a new hearing in which employer is allowed to participate. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

The Board initially held that the Act and its implementing regulations explicitly set out minimum time requirements, albeit at different intervals, in which the parties are to receive notice of a hearing. The Board thus held that the general regulation at 29 C.F.R. §18.42(e), relied upon by the administrative law judge in expediting the formal hearing, is not applicable. Nevertheless, the Board upheld the administrative law judge's decision to expedite the hearing in this case. Specifically, the Board held, on the facts in this case, that allowing employer less than the time specified by 20 C.F.R. §702.335 (not less than 30 days) was insufficient to warrant a conclusion that employer's right to procedural due process was abridged. First, the administrative law judge's decision complied with the time limit of Section 19(c) of the Act (at least 10 days' notice). Second, and more importantly, employer had not provided any substance to its allegation of prejudice or any indication that the expedited hearing impeded its defense in this case. The record established that employer fully defended its case and was not adversely affected by the administrative law judge's decision to expedite the hearing. *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003).

The Board vacated the award of benefits, as the requirements for giving proper notice of a hearing of Section 19(c) were not followed. The Board distinguished *Sullivan*, 36 BRBS 127, wherein the award of benefits was not vacated, as the notices were patently deficient in this case. The parties are entitled to 10 days' notice, by certified mail, of the hearing. Claimant first filed a claim against the potentially liable corporate officers six days before the hearing. This document was improperly addressed. The administrative law judge's notice of the hearing was improperly addressed to employer and not served on the corporate officers; certified mail was not used. A subsequent show cause order was similarly deficient. The Board held that the corporate officers are entitled to separate, proper notice of the hearing, as they are entitled to argue that Section 38(a) of the Act is not applicable. The Board also held that a delivery system with tracking capability is required to satisfy Section 19(c)'s requirements regarding service by certified mail. *J.T. [Tisdale] v. American Logistics Services*, 41 BRBS 41 (2007).

**Authority of the Administrative Law Judge in General**

The Section 19(d) provision that hearings are to be conducted in accordance with Section 554 of Title 5 of the U.S. Code (the Administrative Procedure Act) and by hearing examiners (administrative law judges) qualified under 5 U.S.C. §3105 transferred the adjudicatory power to conduct formal hearings from the deputy commissioners to the Office of Administrative Law Judges (OALJ). Pursuant to this provision, any decision issued by a deputy commissioner after the effective date of the amendments is void. *Neal v. Strachan Shipping Co.*, 1 BRBS 279 (1974

If informal procedures fail to resolve the claim, the deputy commissioner must transfer the case to the Office of the Chief Administrative Law Judge. Section 702.317 of the regulations, 20 C.F.R. §702.317, addresses preparation and transfer of the case. The district director must provide the parties with a copy of the pre-hearing statement form, which is to be completed within 21 days. After receipt of the forms, the district director transmits them to the OALJ, together with all available evidence which the parties intend to submit at the hearing; the materials transmitted cannot include any recommendations or memoranda prepared by the district director's office. The regulations further provide that the administrative file is also not transferred, but if a party considers a document from the file necessary to the proceedings, such party may obtain it and introduce it at the hearing before the administrative law judge. *See* 20 C.F.R. §§702.318, 702.319. The work product of the district director and his staff are not subject to retrieval.

The regulations pertaining to formal hearings before the administrative law judge are set forth at 20 C.F.R. §§702.331 to 702.351. Pursuant to statute and regulation, formal hearings are conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §554 *et seq.* (the APA). *See* 33 U.S.C. §919(d); 20 C.F.R. §702.332. Only the provisions of the APA regarding adjudicatory functions are incorporated; administrative law judges possess no rule-making authority. *See Moore v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 28 (1982) (Kalaris, concurring) (administrative law judge's use of hearing loss formula was not impermissible rule-making).

In addition to the statute and regulations, the OALJ Rules of Practice and Procedure may apply in situations not specifically addressed by the Longshore Act or its regulations. 29 C.F.R. §18.1. These regulations also incorporate the Federal Rules of Civil Procedure in situations not covered by any other provision. *See Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993) (explaining the interaction between the Act, the OALJ Rules, and the Federal Rules in a case where the issue was specifically addressed by a provision of the Act, the court stated that, while the OALJ regulations incorporate the Federal Rules "in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation," 29 C.F.R. §18.1(a), Section 18.1(a) does not purport to apply when the "situation" is controlled by the

statute); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003) (Section 27 provides remedy where claimant fails to obey a discovery order and administrative law judge thus erred in relying on Part 18 regulations and Federal Rules to dismiss claim).

Claimants may proceed *pro se* before the OALJ, including representing themselves at hearings. *See Darling v. Northwest Marine Iron Works*, 15 BRBS 486 (1983). The administrative law judge is not required to give legal advice to a *pro se* claimant. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

In amending the Act in 1972, when Congress enacted Section 19(d) to transfer adjudicatory authority to administrative law judges "notwithstanding any other provision of the Act," it did not alter references to the deputy commissioner's authority to take action in the rest of the statute. The Board therefore has reviewed various provisions of the Act to determine whether specific provisions refer to powers held by the deputy commissioner/district director, the administrative law judge, or both concurrently. *See, e.g., Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986).

With regard to Section 8(i) settlements, under the 1972 amendments the statute provided for approval of such settlements by the deputy commissioner; this section, like others in the Act, was not amended when adjudicatory authority was transferred to administrative law judges. In *Clefstad v. Perini North River Associates*, 9 BRBS 217 (1978), the Board held that the authority to approve settlements was held by administrative law judges as well as deputy commissioners. In *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982), however, the Fifth Circuit held that administrative law judges were not authorized to approve Section 8(i) settlements. The Board subsequently held that it would not follow *Ingalls* outside the Fifth Circuit. *Blake v. Hurlburt Field Billeting Fund*, 17 BRBS 14 (1985). This issue was resolved by the 1984 Amendments, which amended Section 8(i) to expressly allow both administrative law judges and deputy commissioners to approve settlements.

The administrative law judge's authority under Section 19(d) also includes the authority to approve the withdrawal of claims under 20 C.F.R. §702.225. S*ee Graham v. Ingalls Shipbuilding/Litton Systems, Inc*., 9 BRBS 155 (1978). *See also Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996). Withdrawal of claims is addressed in Section 8(i) of the desk book.

The administrative law judge has the authority to hear and decide motions for modification under Section 22. *Craig v. United Church of Christ, Commission for Racial Justice*, 13 BRBS 567, 572 n.6 (1981). In *Craig*, the Board held that where an appeal is pending, modification may be initiated with an administrative law judge. Otherwise, modification is initiated by filing with the district director, who then processes the claim

in the same manner as the original claim, including referral to an administrative law judge where the parties do not agree and a hearing is requested.

Under Section 19(c), following a hearing an administrative law judge must, by order, either reject the claim or enter an award in respect of a claim. *See* 20 C.F.R. §702.348. The administrative law judge is authorized to issue "continuing" awards and is not limited to awarding benefits only through the date of the hearing. *See Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

The function of the administrative law judge is to adjudicate compensation claims under the Act. An adjunct to this authority is the power to hear and resolve insurance contract disputes which arise under the Act, the resolution of which are necessary in order to determine liability for paying benefits in claims under the Act. *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 126 (1984); *Brady v. Hall Brothers Marine Corp. of Gloucester*, 13 BRBS 854 (1981). Determining the responsible carrier, for example, is often necessary in order to award compensation. However, where there is no claim for compensation, the administrative law judge lacks jurisdiction to adjudicate such disputes. *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981) (claimant disappeared and no aspect of claim was in dispute, which was solely between two insurers). In *Valdez v. Bethlehem Steel Corp.*, 16 BRBS 143 (1984), the Board upheld a discovery order issued by the administrative law judge on employer's motion to obtain information on coverage from an insurance carrier over the carrier's objections that the administrative law judge lacked jurisdiction to adjudicate an issue of insurance coverage. The Board held that insurance is mandated by the statute and determining the liable carrier is necessary to an award of benefits. *Compare Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996) (administrative law judge properly addressed borrowed employee issue; court stated that in the absence of a valid and enforceable indemnification agreement, the borrowing employer must reimburse claimant's formal employer for any compensation paid), with *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (administrative law judge determines entitlement and the party responsible for payment; parties' claims regarding insurance contract indemnification are not questions in respect of a claim under Section 19).

Where a non-occupational insurer pays benefits for an injury which is determined to be work-related, it may intervene and seek reimbursement of the medical benefits paid from the liable employer/carrier. *Aetna Life Ins. Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982) (permitting intervention on remand from the Board). *See M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009) (ILWU-PMA fund intervened to recover payments); *see also Grierson v. Marine Terminals Corp.*, 49 BRBS 27 (2015). *Cf. Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190

(1984) (*Harris* distinguished where claim for reimbursement based on injury which was not in issue in compensation claim).

The Board has also held that the administrative law judge has subject matter jurisdiction to adjudicate a claim filed by a non-dependent survivor as administratrix of the employee's estate. *Wilson v. Vecco Concrete Constr. Co.*, 16 BRBS 22 (1983). Claimant's standing is not contingent upon presentation of a claim which will ultimately be decided in her favor.

Where more than one claim has been filed, the administrative law judge is not required to hold the second claim in abeyance until a claim related to an earlier injury is decided. *Martinez v. St. John Stevedoring Co., Inc.*, 15 BRBS 436 (1983). In this case, the Board ruled against a requirement that the hearing on the second of two separate claims must be held in abeyance, in view of the fact that no prejudice to either party resulted from the uninterrupted adjudication of the latter claim. The complaining party was afforded an opportunity to litigate issues relating to the subject matter of the first claim in the proceedings on the second.

In another case involving two separate claims, the Board vacated an administrative law judge's decision because it conflicted with an earlier decision which had been affirmed by the Board. In remanding the later case, the Board noted the collateral estoppel effect of the first decision on findings common to both claims. *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983).

The Board has held that bifurcated hearings are to be avoided; an administrative law judge should adjudicate all issues before him in one proceeding to avoid piecemeal litigation and procedural delays. *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984).

The 20 C.F.R. Part 702 regulations do not specifically provide for the filing of a motion for reconsideration of an administrative law judge's decision. In 2015, the OALJ Rules of Practice and Procedure were amended to state that a motion for reconsideration "must be filed no later than 10 days after service of the decision on the moving party." 29 C.F.R. §18.93. In *Kuhn v. Associated Press*, 16 BRBS 46 (1983), the Board affirmed an administrative law judge's determination based on Rule 59(e) of the Federal Rules that a motion for reconsideration must be filed within 10 days of the filing of the decision in order to be timely. The Board has also relied upon its regulation, 20 C.F.R. §802.206(b)(1), which requires that a motion for reconsideration be filed within 10 days of the filing of the decision in order for an appeal to the Board to be timely. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001). The Board and the court of appeals held that the 10 days excluded intermediate weekends and holidays, pursuant to FRCP 6(a). However, in 2009, the FRCP were amended and Rule 6(a) no longer excludes intermediate weekends and holidays.

Moreover, the Board has also held that there is no provision in the Act or regulations requiring service on the parties before a document is considered "filed" by the district director. Thus, claimant's motion for reconsideration was timely filed with the administrative law judge even though it was not served on employer within the ten-day filing limit. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). *See also Hamilton*

*v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84 (1996) (time for filing motion for reconsideration with administrative law judge commences on the date district director certifies he filed the administrative law judge's decision. 33 U.S.C. §919(e); 20 C.F.R. §§702.349-350, 802.206). *See generally Carillo v. Louisiana Ins. Guaranty Assn.*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009).

Where the Board remands a case to the administrative law judge, he must take action as directed by the Board. 20 C.F.R. §802.405. If an administrative law judge disregards the Board's instructions, the Board has remanded the case again. *See Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). *See also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004) (Board did not err in remanding case); *Garmon v. Aluminum Co. of America - Mobile Works*, 29 BRBS 15 (1995), *aff'g on recon.* 28 BRBS 46 (1994) (Board upholds initial decision remanding case due to legal error).

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### Miscellaneous

An administrative law judge may remand a case to the deputy commissioner for consideration of a new issue only when evidence not considered by the deputy commissioner is likely to resolve the case without a hearing. 20 C.F.R. §702.336. In this case, the administrative law judge abdicated his responsibility to resolve disputed issues of fact regarding the responsible carrier issue by remanding the case, as the administrative law judge is empowered to resolve any issue arising at the hearing. The administrative law judge should have notified a potentially liable carrier of the proceedings, added the carrier as a party, and held the record open for further evidence regarding the date of last exposure and the carrier on the risk at that time. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The regulation at 29 C.F.R. §18.6(b) provides ten days for a party to respond to a motion in administrative law judge proceedings. By issuing his Order to Compel prior to the expiration of the ten day response time, the administrative law judge violated the due process rights of the petitioner. *Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987).

In a prior decision finding no Section 49 discrimination, the administrative law judge credited claimant's testimony, but on remand from the D.C. Circuit, he credited other evidence over claimant's testimony. In a footnote, the Board rejected claimant's assertion of error, stating that in deciding a case on remand from the appellate court the administrative law judge was not bound by his previous findings, given that his earlier disposition of the case had been reversed. *Geddes v. Washington Metro. Area Transit Auth.*, 19 BRBS 261 (1987), *aff'd sub nom. Geddes v. Director, OWCP*, 851 F.2d 440, 21 BRBS 103(CRT) (D.C. Cir. 1988).

The regulations provide that, prior to the transfer of a case to the OALJ for a hearing, each party must file a pre-hearing statement. Section 702.317(e) allows the administrative law judge to consider a party's failure to file a pre-hearing statement with the deputy commissioner where this failure is relevant. In this case, employer's failure to properly raise Section 8(f) relief deprived the Director of notice of this issue. *Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

Where claimant filed a claim for hearing loss, and at the formal hearing filed a new audiogram indicating an increased hearing loss, the administrative law judge found that the new audiogram involved a new claim for an aggravation, but rejected employer's argument that this claim should be remanded for filing with the deputy commissioner, finding it would serve no purpose. The Board affirmed this result, finding it unnecessary to determine whether the audiogram represented a new claim or updated evidence on the existing claim. Although the Act (Section 19(c)) and regulations (Sections 702.301, 702.316) indicate that claims must first be referred to the deputy commissioner, the administrative law judge did not prejudice employer's procedural and substantive rights, as employer received written notification of the increased hearing loss at the formal hearing and was given the opportunity post-hearing to submit evidence challenging the claim, and the administrative law judge acted in the most judicially efficient manner in addressing all of the evidence on the extent of claimant's hearing loss. *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989).

The Board held that the administrative law judge did not err by declining to advise claimant how to respond to the Director's post-hearing brief. The Act does not require the administrative law judge to provide legal advice to a *pro se* claimant. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

In a case where the administrative law judge had previously remanded the case to the deputy commissioner to address employer's Section 8(f) arguments in the first instance, the Board held that the administrative law judge was not bound by the "law of the case" doctrine from addressing the Director's Section 8(f)(3) contention when the case came before him again inasmuch as the doctrine does not prevent review of the same tribunal's interlocutory order. As the administrative law judge clarified that he had not remanded the case to the deputy commissioner for dispositive findings on the Section 8(f)(3) bar, he properly addressed the issue in his decision. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

An administrative law judge's denial of reconsideration is reviewed to determine if there was an abuse of discretion. In this case, the administrative law judge did not abuse his discretion in denying employer's motions for reconsideration and discovery. Due to its admitted negligence, employer failed to participate in the resolution of this claim for over

three and one-half years, and it failed to attend the formal hearing. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

The Board rejected employer's argument that, as Section 19(d) only vests in administrative law judges authority under the Act, administrative law judges do not have the power to award interest on an award. The Board acknowledged that 28 U.S.C. §1961 does not give an administrative law judge the authority to award interest, but it noted its previous reliance on Section 1961 was limited to using that section as a guide in setting the interest rate and not as authority for such an award. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (Dolder, C.J., concurring and dissenting).

In a 1993 decision, the Board affirmed an attorney's fee award, which had been based on affidavits from employer. Claimant thereafter investigated the affidavits and in 1995, filed a motion to set aside the fee award as it was based on fraudulent information. The Board held that as no appeal of the Board's initial decision was taken or motion for reconsideration filed, the administrative law judge's award of an attorney's fee became final 60 days from the date of the Board's decision. As there is no authority in the Act or the regulations for reopening a case that has reached finality and is not subject to modification, the Board held that the administrative law judge properly found he did not have jurisdiction. The Board rejected claimant's reliance on FRCP 60(b) as it states that a motion on the basis of fraud or misrepresentation, as claimant's was herein, must be made within one year from the date the order was entered; claimant's motion was thus untimely. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997).

The Ninth Circuit, citing case law interpreting the SSA, stated that in a claim under the Act, the treating physician's opinion is entitled to special weight because he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

The Board rejected employer's argument that the administrative law judge committed reversible error by citing *Amos*, 164 F.3d 480, 32 BRBS 144(CRT), for the principle that a treating physician's opinion is entitled to "special weight," as the court's opinion states this. The administrative law judge, moreover, properly did not summarily credit the treating physician's opinion, but fully discussed his opinion and its underlying rationale, as well as the other medical evidence of record. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

The Board vacated the administrative law judge's decision that withdrawal of his claim to pursue a state claim was not for a proper purpose, holding that it was proper as claimant is entitled to choose his forum for worker's compensation benefits. The Board also vacated the administrative law judge's requirement that claimant file a second longshore case within 15 days of the denial of claimant's motion to withdraw the initial longshore

claim. The Board stated that, a claimant has one or two years from the date he becomes aware or should have become aware of a work-related injury or an occupational disease, and it was improper for the administrative law judge to mandate how and when claimant should file a claim. *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998).

In this occupational disease case, the self-insured employer had sufficient notice, and was therefore not denied due process, after the carrier which had been liable for claimant's medical benefits was allowed to raise the issue of the responsible insurer upon claimant's request for compensation benefits on modification. Employer had prior knowledge that the carrier sought to deny responsibility for compensation benefits based on additional harmful exposures after employer became self-insured. Employer received a transcript of claimant's deposition taken after issuance of the initial decision and it was able to cross-examine claimant at the modification hearing as to additional industrial exposure. Moreover, the administrative law judge expressed willingness to offer employer additional access to claimant before closing the record. *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

The Board affirmed the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d), for the duration of the time claimant refused to undergo a medical examination ordered by the administrative law judge. The Board noted that this action was not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, the Board reiterated that there are some medical issues which remain in the domain of the administrative law judge: specifically, those issues which involve factual disputes as opposed to those which are purely discretionary. In this case, the parties disputed claimant's entitlement to hearing aids for his non-ratable work-related hearing loss; however, the administrative law judge did not address the issue but instead remanded the case for the district director to do so. The Board vacated the administrative law judge's order of remand, and remanded the case to the administrative law judge for resolution of the issue of whether hearing aids are necessary and reasonable treatment for claimant's hearing loss, as such factual issues are for the administrative law judge. The Board rejected employer's assertion that claimant's alleged non-compliance with state law affects his entitlement under the Act. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The Board vacated the denial of benefits and remanded the case for the administrative law judge to conduct a hearing on claimant's motion for modification. The Board held that the administrative law judge erred in failing to grant claimant's request for a hearing where claimant asked for the opportunity to testify either via deposition or hearing

regarding his foot condition. Although the administrative law judge stated why he believed claimant's testimony would not aid his case, the Board held that only upon hearing the testimony and considering it in conjunction with any other evidence admitted at the new hearing, as well as the originally-submitted evidence, would the administrative law judge be able to determine the relevance of claimant's testimony. Thus, although claimant made his request in the "eleventh hour," the request was timely and must be granted. *Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008).

The Board held that authority for approving an application for commutation of benefits under Section 9(g) lies with the district director and not the administrative law judge. Specifically, Section 9(g) states that the Secretary may commute future payments to non-resident aliens. Since the enactment of the 1972 Amendments and Section 19(d), references to the Secretary refer to the deputy commissioners (district directors) to whom the Secretary's discretionary authority has been delegated. Therefore, the administrative law judge did not have the authority to address the issue. The Board held that the administrative law judge erred in relying on 29 C.F.R. §18.29 as authority for addressing commutation, as this refers to general powers for conducting a hearing and Section 9(g) is a rule of special application. Thus, in this case arising under the DBA involving an alien non-resident widow, the administrative law judge erred in addressing the issue of commutation because he did not have the authority to address it; moreover, there also was no application for commutation pending. With the exception of the administrative law judge's proper statement that benefits to decedent's children cannot be commuted because they are citizens of the United States, the Board vacated the administrative law judge's commutation findings and held that employer may file an application with the district director should it wish to apply to commute the widow's benefits. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

**Duty to Award or Deny Benefits**

The Board reviewed an administrative law judge's decision which found coverage but did not include a compensation order since the parties stated that once the coverage issue was resolved, all issues necessary to an award could be resolved by agreement. The Board stated, however, that in the future, in order to avoid piecemeal review, the administrative law judge should obtain the facts necessary to resolve all issues prior to deciding the coverage issue so that a single compensation order may issue. *Jackson v. Straus Systems, Inc.*, 21 BRBS 266 (1988).

The Board held that because the issues of nature and extent of claimant's disability were properly before the administrative law judge, the administrative law judge erred by failing to make a determination regarding claimant's right to an award of "continuing" temporary total disability benefits. The Act and its regulations mandate that an administrative law judge set forth findings of fact and conclusions of law in his compensation order, and that the order either make an award to the claimant or reject the claim. *See* 33 U.S.C. §919(c); 20 C.F.R. §702.348. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

The Board rejected the argument that the administrative law judge erred in remanding this case to the deputy commissioner for calculation of the amount of employer's Section 33(f) credit and entry of an award. The Board held that the administrative law judge made the necessary findings of fact and conclusions of law so that the deputy commissioner was charged with making purely ministerial calculations. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Fifth Circuit held that the administrative law judge erred in remanding this case to the district director with instructions that claimant provide sufficient evidence of his post-injury earnings. If the record does not provide evidence sufficient to establish claimant's post-injury earnings, then it is the administrative law judge's responsibility to obtain such information. The administrative law judge must, at a minimum, specify the amount of compensation due or provide a means of calculating the correct amount without resort to "extra-record facts" which are potentially subject to genuine dispute between the parties. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

The Board remanded the case to the administrative law judge as he did not enter an award of benefits prior to addressing employer's entitlement to Section 8(f) relief. There was no agreement between claimant and employer as to claimant's entitlement to benefits at the time the case was referred to OALJ, and although the parties allegedly stipulated to entitlement subsequently, the administrative law judge neither received the alleged stipulations nor took evidence on the substantive issues. Rather, he remanded the case to the district director in abrogation of his responsibility. Moreover, he therefore was

procedurally prevented from addressing Section 8(f) because it was unknown whether the award was for permanent benefits of more than 104 weeks or the Director agreed to the alleged stipulations. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999).

The Board remanded the case to the administrative law judge as he did not enter an award of benefits prior to addressing employer's entitlement to Section 8(f) relief. The parties' stipulations concerning claimant's entitlement to benefits must be embodied in a compensation order. Nonetheless, the Board held that, unlike in *Gupton*, 33 BRBS 94, the appeal of the Section 8(f) issue need not be dismissed because the denial was based on the application of Section 8(f)(3), and resolution of the issue therefore was not contingent upon the extent of claimant's permanent disability. *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005).

The Board rejected employer's contention that the administrative law judge erred in awarding benefits on a continuing basis beyond the date of the hearing. The Board held that the Act provides for such continuing awards and that, provided the record contains evidence to support such an award, the administrative law judge may properly award benefits into the future. Contrary to employer's assertion, Section 22 modification of such continuing awards provides appropriate relief upon the discovery of evidence of a change in conditions or a mistake in the determination of a fact when making such award. To hold that an administrative law judge cannot award continuing benefits is judicially inefficient and is tantamount to requiring perpetual re-opening of cases. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

The Fourth Circuit held that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there was "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. The court further rejected employer's contention that its inability to recoup any overpayments that might occur between the date of maximum medical improvement and the date of any Section 22 modification decision would abridge employer's due process right to a hearing prior to being deprived of its property; the court held that the initial hearing and subsequent appeals provided employer with all the process that is constitutionally due. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

The Board noted that the administrative law judge's compensation order must include an "order" directing employer and the Special Fund to pay benefits to claimant for specific time periods, as issuing an order is a duty of the administrative law judge. Employer

must pay benefits for all temporary disability and 104 weeks of permanent disability before the Special Fund can be held liable under Section 8(f). *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010).

The Board vacated the administrative law judge's finding on reconsideration that he did not have the authority to award temporary total disability benefits in this case and reinstated the order that employer pay continuing temporary total disability benefits. Given the parties' stipulation that claimant remained temporarily totally disabled as of the date of the hearing, once the administrative law judge determined the appropriate compensation rate, he had the duty under Section 19(c) and its implementing regulation, 20 C.F.R. §702.348, to make an award to claimant of continuing temporary total disability compensation. Section 19(c) provides that an administrative law judge "shall" by "order" "make an award" or "reject the claim. *Luttrell v. Alutiiq Global Solutions*, 45 BRBS 31 (2011).

The Board vacated the administrative law judge's Order, which incorporated and "accepted" the parties' stipulations without providing for an "award" of benefits. The administrative law judge's Order is not in accordance with Section 19(c) and its implementing regulation, Section 702.348, as it does not conclude with an order entering an award of benefits. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014).

**Ripeness**

The Board vacated as premature the administrative law judge's findings concerning the proper method of calculating the amount of employer's Section 33(f) setoff against any possible future third-party settlements, inasmuch as there had not yet been any settlements to credit. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in part and rev'd in pert. part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

The Ninth Circuit reversed the Board's determination that the Section 33(f) apportionment issue was not ripe because no settlement had been executed between claimant and the third parties. The court stated that the uncertainty in the apportionment question created a practical hardship for both parties preventing an execution of a settlement. Thus, the matter met the traditional standard for determining ripeness, and the court remanded the case to the Board for consideration of the parties' theories of apportionment. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), *rev'g in pert part. Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990).

After claimant sought benefits due to asbestos exposure, the parties entered into a Section 8(i) settlement, and claimant thereafter settled various suits against asbestos manufacturers without employer's approval. Employer then filed a motion to dismiss the "claim" pursuant to Section 33(g), seeing to prohibit claimant from seeking medical

benefits in the future. The administrative law judge rejected employer's motion, as claimant had not filed a claim for medical benefits, finding that employer did not meet either prong of a "traditional" ripeness analysis, *i.e.*, the fitness of the issue for review or the hardship requirement. The Board affirmed the administrative law judge's decision. The Board stated that the 1985 settlement constituted the final disposition of the only claim filed in this case and that, as there was no pending claim to address, employer could not be aggrieved unless or until claimant formally filed a claim for medical benefits. Moreover, as there were no issues to adjudicate, employer was not denied due process by the administrative law judge's denial of its request for a hearing. Under these circumstances, the administrative law judge did not err in remanding the case without instructing the district director to dismiss or close it. *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994). *Accord Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994) (given the administrative law judge's finding that no future claims can be filed in this case due to claimant's death and to the failure of his survivors to file a timely claim for death benefits, there was no pending claim to address).

The First Circuit vacated the Board's affirmance of an administrative law judge's decision denying relief to a claimant who had been paid all benefits due but sought to have employer file forms under Section 14 acknowledging his coverage under the Longshore Act. Employer did not dispute Longshore coverage, but asserted it should not be required to file additional forms as no benefits were due. On appeal to the court, the Director asserted that claimant was entitled to an order stating he was covered by the Act, but not to one requiring employer to file additional forms. The court initially rejected employer's contention that there was no case or controversy as no money was due, and it agreed with the Director that the Section 14 filing requirements did not create rights enforceable by claimant. Determining claimant's request essentially sought declaratory relief, the court analogized the case to *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), which required that as a condition of receiving nominal compensation the claimant show "a significant possibility" of future disability based on the past injury and held that in order to obtain the declaratory relief sought here same showing should be imposed on claimant before the employer is required to litigate or an administrative law judge to resolve an issue of disputed coverage. The court stated that on remand, employer could insist upon such a showing as a part of claimant's claim. *Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73(CRT) (1st Cir. 1998).

Although the claimant had not undergone the recommended surgery and thus had not experienced a period of disability as a result thereof, the court held that the issue of causation (which injury was the surgery related to) was ripe for adjudication because it did not depend on undeveloped facts for resolution and there is the prospect of hardship to claimant if the issue was left unresolved. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

**Intervenors**

The administrative law judge properly allowed a pension fund, which had paid out medical and loss of time benefits to claimant under the assumption that his injuries were not work-related, to intervene to recover amounts paid. *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

The Board held that the administrative law judge's dismissal of a claim by Permanente Medical Group/Kaiser Foundation Hospital, an intervenor-petitioner, constituted an abuse of discretion. Initially, the Board indicated that the administrative law judge erred in failing to state the grounds upon which he based his dismissal of the claim. Moreover, there was no indication that the administrative law judge based his dismissal on Kaiser's alleged failure to comply with his pre-trial order. The Board further held that Kaiser's failure to appear at the hearing was not a sufficient ground on which to base the dismissal of its claim. The Board noted that dismissal for failing to appear at a hearing, deposition, or medical appointment is an extreme sanction, and stated that the administrative law judge must consider whether lesser sanctions would better serve the interests of justice. The Board also found that the administrative law judge erred in dismissing Kaiser's claim in view of the misleading language used by the administrative law judge in his decision. *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993).

The Board held that an intervenor's Section 17 lien claims and claims for reimbursement of medical expenses under Section 7 must be resolved simultaneously with claimant's entitlement. By intervening in these cases in pursuit of its Section 17 lien and reimbursement of medical benefits, ILWU-PMA became "a party" to the claim under Section 8(i), and claimant and employer could not settle without ILWU-PMA's involvement. As settlement agreements between claimant and employer did not resolve these existing lien and reimbursement claims, the administrative law judges erred in approving the settlements. The settlements were vacated and the cases remanded. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *aff'd on recon.*, 43 BRBS 115 (2009).

On reconsideration, the Board reiterated that since ILWU-PMA's claims for reimbursement of medical benefits are derivative of claimants' claims for medical benefits under Section 7, ILWU-PMA's claims must be resolved simultaneously with the claimants' claims. If employers and claimants were permitted to settle the claim for medical benefits without ILWU-PMA's participation, employers' liability for medical benefits would be extinguished and the Plan would be without recourse. Thus, the Board properly held that since the settlements in these cases infringe on ILWU-PMA's derivative right to reimbursement of medical benefits, they must be vacated. At the Director's urging, the Board clarified its holding to reflect that only those parties with a financial interest in the claim must have their rights resolved simultaneously with the rights of the other parties whose financial interests are also at stake. *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 115, *aff'g on recon.* 43 BRBS 1 (2009).

**Issue in Respect of a Claim: Adjudicating Reimbursement & Insurance Issues**

It is within the administrative law judge's authority to resolve the issue of the responsible carrier. In this case, there was no contention that employer lacked insurance, and the administrative law judge erred in holding employer liable and remanding the case to the deputy commissioner to determine the responsible carrier, as this issue required fact finding. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The administrative law judge erred in advising the parties at the hearing that he would not resolve the issue of LIGA's liability, and then ruling on the issue in the decision. The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. The Board held, however, that a new hearing on LIGA's liability was unnecessary in this case as state law mandated its liability. *Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990), *modified on other grounds on recon.*, 24 BRBS 169 (1991).

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act, but the administrative law judge's failure to do so in this case is harmless error, as the contract here provided for liability consistent with the exposure rule of *Cardillo*. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

The Board rejected the contention of the borrowing employer that the administrative law judge lacked the authority to order it to reimburse the lending employer for claimant's compensation because claimant did not file a claim against the borrowing employer. Pursuant to Rule 14(c) of the FRCP in maritime and admiralty claims a defendant may implead another party against whom the claimant has not asserted a claim and demand that that party be found liable to both the original defendant and to the claimant. Moreover, the Board noted that an administrative law judge has all powers, duties and responsibilities necessary to resolve claims under the Act and that claims for reimbursement of an employer or carrier raise questions in respect to compensation claims. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board held that the administrative law judge erred in relying on *Busby*, 13 BRBS 222, and *Rodman*, 16 BRBS 123, to find that he did not have jurisdiction to determine whether Omega's carrier, INA, was entitled to reimbursement from the alleged borrowing employer, Elf, because claimant was no longer an active litigant, having settled a third-party suit and relinquished any rights for compensation from Omega pursuant thereto. The Board held that the administrative law judge erred in viewing this case as involving solely contractual issues between INA and Elf, when in fact it was a responsible employer case involving application of the borrowed employee principles. This is an issue arising under the Act which an administrative law judge is empowered to resolve; any contractual issues were ancillary issues raised by Elf in response to Omega's

responsible employer claim. Moreover, the case was distinguishable from *Busby* and *Rodman,* as it involved a meritorious claim for benefits, as evidenced by the fact that claimant had been fully paid for his work-related injury to a scheduled member. *Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997).

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act, including issues ancillary to the responsible employer issue. The administrative law judge's failure to do so in the instant case was harmless error as he sufficiently reviewed the contractual provisions of record and made factual determinations by which the Board could modify his decision to hold one entity solely liable to claimant. *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997).

In addressing the issue of whether an award of attorney's fees to employer based on an alleged breached of an insurer's duty to defend under the terms of its insurance policy with employer is a question "in respect of a claim" as is required to fall within the administrative law judge's jurisdiction under Section 19(a), the Board overruled *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978), and affirmed the administrative law judge's finding that he lacked jurisdiction to address employer's request for a fee payable by its carriers. Whereas in each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award, the Board determined that, in retrospect, *Gray* is anomalous in that it is the only case in which the Board found that the administrative law judge had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to, any other issue necessary to resolution of the claim. Finally, neither Section 28 nor any other provision of the Act provides for an award of attorney's fee to an employer or addresses how the assessment of a reasonable fee is to be made. *Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP,* 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

The Fifth Circuit held that Section 19(a) of the Act does not vest jurisdiction in administrative law judges to decide a contract dispute between an employer and its carriers when the cause of action is wholly unrelated to an underlying claim for compensation. Employer's claim involved neither a determination of which carrier must pay compensation benefits or a dispute over potential coverage of a benefits claim, but rather involved employer's claim for attorney's fees. Thus, the court affirmed the Board's holding that the administrative law judge lacked jurisdiction to adjudicate this claim. *Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

In this "borrowed employee" case arising in the Fifth Circuit, the Board initially rejected the Director's contention that the administrative law judge lacked jurisdiction to consider

the relevant contractual provisions in determining the responsible employer. The Board relied on a statement in *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994) (affirming holding borrowing employer is liable for benefits in context of Section 4(a)), that "a borrowing employer is required to pay the compensation benefits of its borrowed employee, and, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured worker's formal employer for any compensation benefits it has paid to the injured worker." Thus, the Board held that the administrative law judge acted within his authority in resolving the liability issues based on his interpretation of the relevant contracts. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Fifth Circuit reversed this decision, holding that the parties' claims regarding their indemnification contractual provisions are not "questions in respect of" a longshore claim pursuant to Section 19(a) of the Act, and therefore neither the administrative law judge nor the Board had jurisdiction to adjudicate these claims. The court held that *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT), was not contrary to this result as it did not stand for the proposition that any contractual indemnification issues may be adjudicated by the administrative tribunal, but held that, in the borrowed-employee context, the borrowing employer is the entity responsible for the payment of the claimant's benefits. Thus, the administrative law judge in *Total Marine* properly adjudicated the borrowed employee issues which arose under the Act and bore directly on the compensation claim. This case did not involve such issues, and the administrative law judge and the Board thus lacked authority to adjudicate the contractual dispute involving contractual indemnity and insurance issues among the lending employer, its insurer, and the borrowing employer. The court stated that the parties' claims may be pursued in a court of general jurisdiction. *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Board affirmed the administrative law judge's denial of petitioners' motion to intervene, as their request for a finding of tort immunity under Section 33 was not an issue "in respect of" a compensation claim pursuant to Section 19(a) of the Act. Petitioners are corporate officers of employer. Claimant filed a state tort claim against the intervenors and then his motion to dismiss his claim under the Act pursuant to Section 33(g) was granted. As the claim of immunity is not an issue essential to resolving the rights and liabilities of the claimant and the employer regarding a compensation claim, the administrative law judge properly declined to address the immunity issue, pursuant to *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT), and *Equitable Equip. Co.*, 191 F.3d 630, 33 BRBS 167(CRT). *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 F. App'x 415 (5th Cir. 2004).

Claimant was injured in an office on a fixed platform off the coast of Louisiana. At the time of the injury, employer had two carriers on the risk for injuries occurring on the Outer Continental Shelf. For injuries occurring off the coast of Texas, Houston General was at risk. For injuries occurring off the coast of Louisiana, INA was at risk. After discussing the terms of the insurance contracts and rejecting INA's argument that claimant's presence on the platform was temporary such that liability lay with Houston General, the Board held that INA was liable for benefits as claimant's injury occurred off the coast of Louisiana. Because Houston General mistakenly paid benefits for 12 years, Houston General was entitled to reimbursement from INA. The Board held that the case was analogous to the Fifth Circuit's decision in *Total Marine*, 87 F.3d 884, 30 BRBS 62(CRT), and distinguishable from *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT), as there was no contract dispute to resolve as between the two insurers, so the reimbursement would be similar to what might occur between a borrowing and lending employer. Consequently, although the Board affirmed the administrative law judge's finding that INA was liable for benefits, it held that he should have addressed the issue of reimbursement, and it remanded the case for him to do so. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

Following remand, the Board held that where INA settled with claimant after the administrative law judge's decision on remand, the post-adjudication settlement resolving all issues pertaining to claimant did not divest the administrative law judge or the Board of the authority to address the responsible carrier and reimbursement issues raised herein. The Board explained that this case did not involve a contract dispute and was not analogous to *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT). Rather, it involved the question of who is liable for claimant's benefits and, regardless of the fact that claimant has been paid in full, the issue is one which is "in respect of" claimant's claim. Failure to address the issue would be tantamount to holding two carriers liable for the same injury and that is not permitted under the Act. Accordingly, the Board affirmed the administrative law judge's determination that INA must reimburse Houston General for the benefits it paid claimant, as that decision is in accordance with the Board's prior decision, which is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

In this case, which arises under the DBA, and is still before the district director, employer requested a subpoena from the administrative law judge ordering claimant to attend a deposition so that it may investigate its potential claim for reimbursement under the WHCA. Based on OALJ rules and on the Board's decision in *Maine*,18 BRBS 129 (1986) (en banc), the administrative law judge found that he has the authority to issue the requested subpoena. The Board vacated the order and quashed the subpoena on the grounds that the administrative law judge abused his discretion in issuing an unnecessary subpoena the purpose of which is to obtain information that is irrelevant for resolving the DBA claim. Specifically, the Board held that claimant's willingness to participate in an informal conference, on the very matter on which employer seeks information, makes the issuance of a subpoena unnecessary in this case, as claimant has not refused to provide the requested evidence or frustrated the processing of her DBA claim. The Board noted that employer did not attempt any informal methods before requesting a subpoena and that this is not a situation wherein the informal process has broken down. Thus, the *Maine* criteria for issuing a discovery subpoena have not been met. Moreover, as there is no dispute in the DBA claim, the only purpose for employer's subpoena request is to ascertain its eligibility for reimbursement of compensation under the WHCA, and, as such purpose is not "in respect of" the DBA claim, the administrative law judge does not have the authority to address it. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012).

**Authority to Dismiss/ Party's Failure to Appear/Default**

The Board limited *Brown v. Reynolds Shipyard*, 14 BRBS 460 (1981) (holding that neither the Act nor regulations establish a procedure for an administrative law judge to dismiss a claim; rather, the Act requires that an administrative law judge either award or deny benefits after a hearing), to its specific facts and held that the administrative law judge did not abuse her discretion in dismissing the request for a hearing and the concurrent refusal to remand the case to the deputy commissioner resulted in a *de facto* dismissal of the claim, which was found to have been abandoned. The Board noted that *Brown* was decided prior to the promulgation of the 29 C.F.R. Part 18 regulations. *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989).

While the administrative law judge has the authority to dismiss a claim with prejudice where claimant fails to prosecute his claim, he must first consider less drastic sanctions. Fed. R. Civ. P. 41(b) provides for the involuntary dismissal of a case for failure to prosecute or comply with the orders of the court only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful. The Board vacated the administrative law judge's dismissal and remanded the case for the administrative law judge to consider whether less drastic sanctions were available, including those in Section 27 of the Act, and whether claimant's conduct was contumacious in light of the offered explanations as to why claimant did not attend depositions and medical examinations. The administrative law judge also must address whether claimant was represented by counsel and whether employer was prejudiced by the delay. *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

The Board vacated the dismissal of the claim and remanded the case for a hearing on the merits. The Board noted that dismissal is an extreme sanction and the fact-finder must consider whether lesser sanctions would better serve the interests of justice. In this case, claimant missed only the last scheduled hearing and had been ready to proceed at prior scheduled hearings which were continued at employer's request and at claimant's request because of the unavailability of claimant's physician. The Board further held that, as there is no provision in the Act or regulations requiring service on the parties before a document is considered filed, claimant's motion for reconsideration was timely filed with the administrative law judge even though it was not served on employer within the ten-day filing limit. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

The administrative law judge acquired jurisdiction over the claim following the Board's denial of claimant's motion for reconsideration. The administrative law judge did not abuse his discretion in dismissing claimant's claims with prejudice pursuant to 29 C.F.R. §18.29(a) based on claimant's repeated and numerous abuses of the administrative process over the entire course of the case including claimant's refusal to comply with discovery requests and to submit to a medical examination. The case sets forth the black letter law regarding the standards to be considered before an administrative law judge

may dismiss a claim with prejudice, specifically FRCP 37, 41. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993).

The Board held that the administrative law judge's dismissal of a claim by Permanente Medical Group/Kaiser Foundation Hospital, an intervenor-petitioner, constituted an abuse of discretion. Initially, the Board indicated that the administrative law judge erred in failing to state the grounds upon which he based his dismissal of the claim. Moreover, there was no indication that the administrative law judge based his dismissal on Kaiser's alleged failure to comply with his pre-trial order. The Board further held that Kaiser's failure to appear at the hearing was not a sufficient ground on which to base the dismissal of its claim. The Board noted that dismissal for failing to appear at a hearing, deposition, or medical appointment is an extreme sanction, and stated that the administrative law judge must consider whether lesser sanctions would better serve the interests of justice. The Board also found that the administrative law judge erred in dismissing Kaiser's claim in view of the misleading language used by the administrative law judge in his decision. *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993).

When employer failed to appear at the formal hearing without good cause, the administrative law judge was authorized under 29 C.F.R. §18.5(b) to find facts as alleged by claimant - the appearing party. Thus, the initial award of permanent total disability benefits based only on claimant's evidence was affirmed. However, the Board held that the administrative law judge erred in denying employer's subsequent request for modification under Section 22, as the failure to appear at the initial hearing is not a basis for denying modification and carrier stated grounds sufficient to bring the claim within Section 22. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

The Board held that the administrative law judge erred in declaring employer in default for failing to attend the hearing where employer attempted to postpone the hearing and confirmed it had no legal representative, due to the withdrawal of counsel's authority to act on behalf of the carrier in bankruptcy, two business days before the date of the hearing. Similar to those situations where the dismissal of a claimant's case was deemed to be an overly harsh sanction, the Board vacated the declaration of default against employer on these facts. The Board held that under Section 18.5(b) of the OALJ Rules, the administrative law judge should have addressed whether employer established "good cause" for not appearing before declaring it in default. Further, the Board held that the administrative law judge should have considered Rule 55(c) of the Federal Rules of Civil Procedure, which also applies a "good cause" standard, before summarily denying employer's motion for reconsideration. As it determined there could be only one result under the facts of this case, *i.e.*, good cause was shown, the Board vacated the declaration of default and remanded the case for a hearing on the merits, permitting employer's participation on remand. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

The Board held that, as Section 27(b) provides sanctions for failure to comply with discovery orders, the administrative law judge erred in relying upon the Federal Rules of Civil Procedure to dismiss claimant's claim with prejudice due to his failure to comply with the administrative law judge's discovery orders. Under Section 27(b), the administrative law judge may certify the facts surrounding a party's sanctionable conduct to the district court for action. Where the Act specifically provides the manner in which conduct like that of claimant is to be dealt with, neither the general Rules of Practice and Procedure for the OALJ, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure, apply. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

**Authority to Approve Withdrawal of a Claim**

In considering the applicable regulation governing the withdrawal of claims, the Board noted that procedural regulations in force at the time the administrative proceedings take place govern, not those in effect at the date of injury. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

Where claimant informed the administrative law judge of the fact that he was "no longer pursuing benefits" under the Act and requested that the case be remanded to the district director, the Board held that claimant's motions did not unambiguously declare his intent to withdraw the claim. Consequently, the administrative law judge erred in granting withdrawal and remanding the case to the district director over employer's objections to the motions and its request for a hearing on the merits. The Board vacated the administrative law judge's orders and remanded the case for him to determine claimant's exact intentions and then either consider the motion for withdrawal in accordance with the regulations or hold a hearing on the merits. *Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

The Board held that the administrative law judge erred in finding that the claimants' motion to withdraw was not for a proper purpose as required by 20 C.F.R. §702.225(a)(3). The claimants were entitled to pursue a tort remedy in state court, as they had the right to choose the forum in which they will first litigate their cases. The Board declined to address claimants' contention that the administrative law judge erred in assessing the prejudice to employer under this prong of the regulation, noting however, that in a black lung case, the Board agreed with the Director that this factor need not be assessed. The Board affirmed the administrative law judge's finding that claimants' motion to withdraw was not in their best interests pursuant to C.F.R. §702.225(a)(3). This inquiry is specifically given to the fact-finder. The administrative law judge rationally found that claimants' recovery in state court was speculative, both on a monetary basis and on the claims asserted. Moreover, depending on the success of employer's defenses in state court, claimants could lose the right to refile under the Act, pursuant to Section 13(d). The Board remanded the case to the administrative law judge for adjudication/ruling on employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

**Raising Issues before the Administrative Law Judge; Stipulations**

Under Section 702.317, 20 C.F.R. §702.317, each party must complete a pre-hearing statement, Form LS-18, prior to transfer of the case. The formal hearing will address the issues listed by the parties in their pre-hearing statements. The hearing may be expanded to allow consideration of new issues if the evidence presented warrants their consideration. 20 C.F.R. §702.336(a). The administrative law judge must give the parties a reasonable time to prepare for new issues. If a new issue arises from evidence not previously addressed by the district director and such evidence "is likely to resolve the case without the need for a formal hearing," the administrative law judge may remand the case to the district director.

Section 702.336(b), 20 C.F.R. §702.336(b), provides that parties must be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing. *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984); *see Esposito v. Universal Terminal & Stevedoring Corp.*, 9 BRBS 796 (1978). Where such notice is not provided, and a Decision and Order issues, the Decision must be vacated and the case remanded. *Klubnikin*, 16 BRBS at 184*; Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983). In *Spearman v. Foxhall East Condominiums*, 13 BRBS 722 (1981), the employer was confronted with a claim for permanent total disability for which it had not prepared. The administrative law judge nevertheless proceeded with the hearing. In remanding the case, the Board held that it was error to continue the hearing without providing the employer time to address the new claim.

Section 702.338, 20 C.F.R. §702.338, further provides that the administrative law judge "shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." If the administrative law judge believes that relevant material is available which has not been presented, he may adjourn the hearing or, at any time prior to the filing of the compensation order, reopen the record for receipt of additional evidence.

Together, these sections give the administrative law judge broad discretion to raise issues, accept new evidence and conduct hearings in a manner which best protects the rights of the parties. *See* 20 C.F.R. §702.339.

The Board has vacated an administrative law judge's refusal to consider a new issue which could not have been anticipated by its proponent prior to the hearing. In *Bolden v. U. S. Stevedores Corp.*, 18 BRBS 172 (1985), the Board held that the administrative law judge abused her discretion by declining to address the employer's claim for relief under Section 26, which permits a party to recover costs from an opponent for instituting or continuing groundless proceedings with respect to a claim or order. Inasmuch as the

basis for the employer's assertion for Section 26 relief lay in claimant's testimony at the hearing, it was an abuse of discretion not to consider it. 20 C.F.R. §702.336 (b).

In *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982), the Board upheld the legal principle that claimant was entitled, pursuant to the aggravation rule, to recover for his entire hearing lost without apportionment for a pre-employment loss. However, as claimant initially sought compensation for the difference between his pre- and post-employment hearing capacity and there was no evidence in the record that employer was given notice that claimant sought benefits for his entire hearing loss, the Board held that employer was prejudiced and remanded the case for employer to have the opportunity to present additional evidence on the degree of claimant's hearing loss.

In *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509 (1979), claimant was awarded compensation for temporary partial disability, although the only issue at the hearing was the determination of the compensation rate for the period of claimant's total disability. The Board vacated the award after noting that the administrative law judge based his decision on claimant's testimony and medical records and that employer had received no notice of the new issue as required by the APA. In vacating and remanding, the Board found it "clear that the determination of the rate of compensation under Section 10 involves fundamentally different considerations from the determination of whether claimant is temporarily partially disabled." *Id.*, 11 BRBS at 512. In contrast, in *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985), employer asserted that the administrative law judge could not consider the issue of permanent partial disability because claimant only sought total disability. In rejecting this contention, the Board noted that "[a] claim for total disability benefits includes any lesser degree of disability." *Id.*, 17 BRBS at 204 n. 2. Nevertheless, the Board, remanding on other grounds, directed that the employer could request that the administrative law judge hear additional arguments on remand "[i]nsofar as employer did not have sufficient notice and opportunity to prepare for the partial disability issue." *Id.* *See also Bonner v. Ryan Walsh Stevedoring Co.*, 15 BRBS 321 (1983) (administrative law judge may award permanent total where only permanent partial and temporary total disability were raised). *See* Section 8 of the desk book, "Raising Partial and Total."

An administrative law judge may not raise a new issue *sua sponte* in his Decision and Order. *Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985). In *Bukovac*, the administrative law judge issued a decision finding that claimant was temporarily totally disabled but also stating that the "hearing is expanded" to consider Section 49 of the Act, and that an order would issue directing employer to show cause why Section 49 penalties should not be imposed. The administrative law judge then issued a hearing notice, stating that a formal hearing would be conducted in order for employer to show cause why Section 49 penalties should not be imposed. On appeal of this order, the Board vacated it, holding that the administrative law judge lacked jurisdiction. When an administrative

law judge finds that a case presents an issue which has not been raised by a party, he must give the parties notice that he is raising a new issue and hold the record open in order to provide them an opportunity to respond before he issues his decision. *Id.* The Board also stated that an administrative law judge may not order a new hearing based on a new issue raised in a Decision and Order awarding benefits, since once a compensation order is issued, the record is closed, and the administrative law judge's authority to raise a new issue expires. *Id*. *See* 20 C.F.R. §§702.336(b), 702.338.

As a general rule, stipulations made by parties are binding upon those who made them. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985). Stipulations are offered in lieu of evidence and may be relied upon to establish an element of the claim. *See Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999). The voluntary payment of benefits is not a stipulation to compensability, and employer does not waive its right to contest a claim by making these payments. *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

While an administrative law judge is not obligated to accept all stipulations entered into by the parties, an administrative law judge's rejection or modification of a stipulation must be adequately explained. *Grimes v. Exxon Co., USA*, 14 BRBS 573 (1981). An administrative law judge may not reject stipulations without giving the parties prior notice that they will not automatically be accepted and an opportunity to present evidence in support of the stipulations. *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985); *Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock*, 16 BRBS 325 (1984); *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981). This rule applies to stipulations between employer and claimant which affect the Special Fund and are not binding on the Fund. *Id.* Cases addressing stipulations and agreements impacting the liability of the Fund are discussed in Section 8(f) of the desk book.

A stipulation cannot be accepted where it evinces an incorrect application of the law. *McDevitt v. George Hyman Constr. Co*., 14 BRBS 677 (1982).

The Board has held that the parties may not stipulate to jurisdiction under the Act. *Littrell*, 17 BRBS 84; *Mire v. The Mayronne Co.*, 13 BRBS 990 (1982); *Brown v. Reynolds Shipyard*, 14 BIBS 460 (1981); *Erickson*, 14 BRBS 218. In *Littrell*, the Board held that, on remand, the parties were bound by issues stipulated at the original hearing other than the stipulation regarding jurisdiction. Note that these holdings relied on cases where the Board raised coverage under the Act *sua sponte*, viewing it as a matter of subject matter jurisdiction. *Perkins v. Marine Terminals Corp.*, 12 BRBS 219 (1980), *rev'd*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982); *Ramos v. Universal Dredging Corp.*, 10 BRBS 368 (1979) (Miller, dissenting), *rev'd*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981). In reversing these decisions, the Ninth Circuit held that status and situs involve coverage under the Act which is waived unless raised by the parties. *See also Hite v.*

*Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (rejecting employer's attempt to raise coverage for the first time on appeal).

A stipulation as to average weekly wage which is based on a reasonable method of calculation under the Act is not prohibited by Section 15(b) of the Act. *Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985).

The Board will not review a factual issue raised on appeal where the facts were stipulated before the administrative law judge; the general rule that stipulations are binding on the parties applies. *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986).

As stipulations are offered in lieu of evidence and may be relied upon to establish essential facts, stipulated facts may be modified under Section 22. *See Ramos*, 34 BRBS 83. Awards issued based on the parties' stipulations are therefore subject to modification under Section 22. *Id. See, e.g., Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988); *Stock v. Management Support Assoc.*, 18 BRBS 50 (1986).

## Digests

### Raising Issues

As the responsible carrier issue was unresolved before the administrative law judge and there was no agreement between the parties as to the issue, the administrative law judge abdicated his responsibility to resolve disputed questions of fact by remanding the case to the deputy commissioner rather than resolving this issue himself. An administrative law judge may remand a case to the deputy commissioner to address a new issue only when evidence not considered by the deputy commissioner "is likely to resolve the case without the need for a formal hearing." 20 C.F.R. §702.336. The administrative law judge here lacked the information to determine that remand could resolve the case without the need for a hearing. Moreover, under Section 702.336, the administrative law judge is empowered to resolve any issue arising at the hearing. In this case, once he determined the only named insurer was not responsible, it was his duty to reopen the record and identify potentially liable carriers, notifying them of the proceedings, adding them as parties to the case, and holding the record open for further evidence regarding the date of the last exposure and the carrier on the risk on that date. A remand to the deputy commissioner is justified only when it is clear that all interested parties are in agreement and further formal proceedings are unnecessary. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board rejected claimant's argument that employer was precluded from raising Section 13 and Section 33(g) at the hearing before the administrative law judge, even though employer had not raised these issues before the deputy commissioner. Since both issues were raised in employer's pre-hearing statement and at the hearing on the claim, they were properly before the administrative law judge. 20 C.F.R. §§702.317, 702.336. *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126 (1987).

The administrative law judge was not precluded from awarding permanent partial disability by the fact that OWCP ordered employer to pay claimant temporary total disability. Because the deputy commissioner possesses no fact-finding authority, OWCP's implicit temporary total disability determination was not binding on the administrative law judge. Although the nature and extent issues were not explicitly raised before or at the hearing, the parties' stipulation regarding date of permanency and employer's request for Section 8(f) relief suggested that the issue could permissibly be addressed. *Price v. Dravo Corp.*, 20 BRBS 94 (1987).

Where employer attempted to withdraw its controversion at the hearing, but the parties were not in agreement, the administrative law judge properly retained jurisdiction and made findings on the disputed issues. The Board stated that in providing for a remand to the deputy commissioner where a party withdraws controversion of the issues, Section 702.351, upon which employer relied, assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus rendering a formal hearing unnecessary. Such was not the case here. *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988).

The Board rejected employer's contention that the administrative law judge erred in failing to remand the case to the district director pursuant to 20 C.F.R. §702.351 for the entry of a compensation order. The withdrawal of controversion regulation assumes that the parties are in agreement as to the disposition of the case, as it instructs the district director to issue a compensation order as in 20 C.F.R. §702.315. In these cases, claimants opposed the issuance of a compensation order and the administrative law judge therefore properly retained jurisdiction over the cases. As the Board also affirmed the administrative law judge's denial of claimants' motion to withdraw, he should proceed to adjudicate the claims. If the claimants fail to raise issues requiring adjudication, the administrative law judge may address this in disposing of employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

The Board held that administrative law judge erred in addressing, *sua sponte*, the issue of D.C. Act jurisdiction, given that the parties had previously agreed to a Section 8(i) settlement of the substantive aspects of the claim which had been approved by a deputy commissioner. Because the settlement had become final, the administrative law judge was empowered only to decide a factual issue regarding employer's liability for certain

medical expenses. The Board accordingly reversed the administrative law judge's finding of no D.C. Act jurisdiction. *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988).

In a footnote, the Board upheld an administrative law judge's determination that 29 C.F.R. §18.20, which deems a matter addressed by a request for admissions conceded if a party fails to respond to the request, did not divest the administrative law judge of authority to decide Section 8(f) issues in this case. The Board held that the "law of the case" doctrine does not preclude an administrative law judge from reopening the previously-decided issue of Section 8(f) relief where the case was before him pursuant to a request for modification, even where Section 8(f) had not been specifically raised as an issue in the modification request, if the administrative law judge found that a "mistake in fact" was contained in the previous Section 8(f) determination. The Board nonetheless remanded, since the administrative law judge did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The First Circuit vacated the Board's determination that the issue of Section 8(f) applicability was improperly considered by the administrative law judge, reasoning that although the Section 8(f) issue was not raised by the parties, it was within the administrative law judge's discretion to consider this issue under 20 C.F.R. §702.336(b), which affords administrative law judges authority to raise issues on their own initiative. The court accordingly remanded the case for reconsideration of the issue of Section 8(f) applicability, indicating that since the administrative law judge did not provide the parties with adequate notice that this issue would be addressed, the parties were entitled to submit evidence relevant to Section 8(f) on remand. *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988).

Where employer's amended Form LS-18, listing Section 22 among the contested issues, was filed more than one month prior to the hearing, claimant was provided with timely notice of the new issue. Thus, it was an abuse of discretion for the administrative law judge to refuse to consider employer's request for modification. Moreover, claimant, who had been awarded permanent partial disability benefits for a 1978 injury, was seeking permanent total disability benefits for a second injury and thus, claimant's residual wage-earning capacity subsequent to the 1978 injury was implicitly raised at the hearing. There is also no requirement that the same administrative law judge who issued the initial decision rule on a decision on modification. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

It is within the administrative law judge's discretion to allow parties to raise new issues at the hearing, 20 C.F.R. §702.336. The administrative law judge in this case, however, did not abuse his discretion by refusing to allow employer to raise the issue of Section 8(f) relief given the absence of notice to the Director, the representative of the Special Fund.

Moreover, employer was given an opportunity to raise the Section 8(f) issue in a post-hearing motion, which would have provided Director with notice, but employer failed to take advantage of this opportunity. *Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989).

An administrative law judge may expand the hearing to include new issues or new evidence provided the parties are provided with fair notice, under 20 C.F.R. §702.336. In this case, the parties were given adequate notice and the chance for a further evidentiary hearing on the issue of future medical benefits and thus due process rights were not violated. *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989), *rev'd on other grounds*, 907 F.2d 1552, 24 BRBS 1(CRT) (5th Cir. 1990), *aff'd*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *aff'd*, 505 U.S. 469, 26 BRBS 49(CRT) (1992).

In an occupational disease claim which had previously been denied for reasons rendered invalid by the 1984 Amendments and which had been remanded for reconsideration under the new law, the Board held the administrative law judge properly addressed the issue of claimant's awareness for purposes of determining whether the claim was timely filed. This issue had been raised by employer, and although the administrative law judge previously had made an awareness finding under pre-1984 law, employer had no basis for filing a cross-appeal of this finding since the claim would have been time-barred under pre-1984 law. Moreover, the administrative law judge's initial decision was not "final" as it had been appealed. Thus, the administrative law judge properly viewed the issue of claimant's "awareness" as before him on remand, although he erred in his application of the 1984 Amendment standard on this issue. *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989).

Although a deceased employee's claim for disability compensation had not yet been referred to the Office of Administrative Law Judges, and the only formal claim before the administrative law judge was for death benefits, the Board held that the administrative law judge had jurisdiction to rule on the disability claim, since consideration of the extent of decedent's disability was integral to deciding the claim for death benefits pursuant to pre-1984 Amendment Section 9. The Board noted that declining to adjudicate the disability and death benefits claims together would have resulted in an unnecessary bifurcation of proceedings. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (1994).

Failure to contest coverage under the Act at the deputy commissioner level does not preclude employer's raising this issue after referral to the Office of Administrative Law Judges, as 20 C.F.R. §702.336 provides that new issues may be raised before the administrative law judge. Moreover, employer's voluntary payment of benefits does not estop it from raising coverage as an issue. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

The Board rejected claimant's contention that the administrative law judge erred in allowing LIGA to raise Section 33(g) in a second proceeding on this claim, inasmuch as LIGA was not notified of its potential liability until after the first hearing on this case, and that hearing only involved medical benefits and offset rights. The administrative law judge thus afforded LIGA its first opportunity for a fair hearing on this issue. *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

In a proceeding where claimant challenged OWCP's termination of vocational rehabilitation services, the Board held that claimant was not denied due process when the Director raised post-hearing the affirmative defense that claimant failed to cooperate with OWCP's vocational rehabilitation efforts. Failure to cooperate is *per se* raised whenever termination of a vocational rehabilitation plan is contested. 20 C.F.R. §702.506(c). Claimant therefore should have been aware that his cooperation was at issue prior to the Director's post-hearing participation, and he was afforded an opportunity to submit relevant evidence in response. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

It was within the administrative law judge's discretion to address whether claimant's disability was permanent, an issue raised for the first time at the formal hearing. Employer was not entitled to further notice of the new issue because claimant raised temporary total disability in his pre-hearing statement and there was no significant difference in the burdens of proof required to challenge a claim for permanent rather than temporary total disability. Moreover, the administrative law judge was not obliged to address the issue of coverage, which was listed by claimant in his pre-hearing statement. When employer failed to appear at the formal hearing without good cause, the administrative law judge was authorized under 29 C.F.R. §18.5(b) to find facts as alleged by claimant - the appearing party. Furthermore, as claimant sought an award of benefits, he *per se* did not contest coverage under the Act. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

The Board concluded that the administrative law judge did not abuse his discretion in refusing to entertain claimant's post-hearing request for permanent total disability compensation based on his failure to exercise diligence in developing this issue, which should have been anticipated prior to the hearing. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

At the hearing on claimant's death benefits case, employer conceded that claimant's failure to obtain written approval of third-party settlements she entered into with decedent did not bar her claim for death benefits under Section 33(g)(1). Subsequent to the hearing but prior to the issuance of the administrative law judge's decision, the Ninth Circuit issued *Cretan*, 1 F.3d 843, 27 BRBS 93(CRT), wherein the court held that potential widows are subject to the provisions of Sections 33(f) and (g) of the Act. Thereafter, in a letter to the administrative law judge, employer stated that it had changed

its position with regard to Section 33(g) and requested that the administrative law judge consider Section 33(g) as a new issue, pursuant to 20 C.F.R. §702.336(b). The administrative law judge denied employer's request. The Board held that it was reasonable for employer to raise the issue of Section 33(g) post-hearing based on the holding in *Cretan*, and that the administrative law judge's failure to consider it was an abuse of discretion under Section 702.336(b). Thus, the Board remanded the case for further findings. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

The administrative law judge acted within his discretion under 20 C.F.R. §702.336(b), in refusing to consider a Section 33(g) issue raised by employer after the administrative law judge's adverse decision, as employer waited more than three months after the issuance of the applicable Supreme Court case even though the decision was published prior to the issuance of the administrative law judge's decision. Moreover, the administrative law judge rationally found that as there were different interpretations of the section at issue by the courts at the time of the hearing and a Supreme Court decision was imminent, employer's failure to preserve the Section 33(g) defense for appeal was not excusable, justifiable or understandable. This case was thus distinguishable from *Taylor*, 30 BRBS 90. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

If, during the course of a hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. 20 C.F.R. §702.336(a). In this case, the administrative law judge properly considered the issue of coverage, which was not raised before the district director, inasmuch as employer listed it in the pre-hearing statement submitted to the administrative law judge and raised this issue at the formal hearing. *Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *aff'd in part and rev'd in part on other grounds*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

The Board held that the administrative law judge acted within his discretion in refusing to address employer's request for Section 8(f) relief. While employer timely raised the issue before the district director, it did not raise Section 8(f) relief before the administrative law judge until it filed a motion for reconsideration. Because the administrative law judge may refuse to entertain a post-hearing request to address an issue which should have been anticipated before the hearing, the Board affirmed the administrative law judge's decision. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

The Board rejected employer's contention that the administrative law judge improperly allowed claimant and the Director to raise a new issue at the hearing on remand. Initially, the administrative law judge found that claimant was not "a person entitled to compensation" under Section 33(g)(1), and therefore, his claim was not barred. Subsequently, the Supreme Court issued *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT), and the Board remanded the case for reconsideration pursuant to this decision. In so doing,

the Board noted that claimant and the Director advanced a different theory before the Board as to why claimant's claim was not barred: that since claimant suffered two distinct injuries, asbestosis, contracted while employed at Electric Boat, and chronic obstructive pulmonary disease while working for employer, employer's written approval of the third-party settlements concerning his asbestosis was not required. Due to the change in law represented by *Cowart*, and since the administrative law judge had not addressed this theory, the Board directed him to do so on remand; the administrative law judge found the claim was not barred by Section 33(g) based on this theory. In an appeal following remand, the Board rejected employer's argument that the administrative law judge erred in addressing this theory as the Board has previously specifically directed him to do so. The Board stated that while normally new issues cannot be raised on appeal, it would entertain a new theory necessitated by changes in the law while the case was pending on appeal. Thus, the administrative law judge did not err in accepting this theory on remand. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

The Board rejected claimant's contention that the administrative law judge erred in finding that employer did not waive the right to contest coverage by paying benefits under the Act. Voluntary payments do not constitute a stipulation as to coverage or prevent employer from raising issues concerning the compensability of the claim. *Foster v. Davison Sand & Gravel Co.,* 31 BRBS 191 (1997).

The Board held that the administrative law judge properly addressed the responsible carrier issue although the carrier first raised it before him on remand as it is an issue which is fundamental to the administration of justice. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP,* 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The Board held that the administrative law judge's refusal to consider employer's argument that claimant's injury was a scheduled arm injury under Section 8(c)(1), rather than an unscheduled shoulder injury under Section 8(c)(21), was a proper exercise of her discretionary authority where the parties proceeded under Section 8(c)(21) and employer raised the issue for the first time after issuance of the administrative law judge's initial decision. Under 20 C.F.R. §702.336(b) the administrative law judge has discretion to consider a new issue any time prior to filing of compensation order and in this case the issue was raised after the issuance of the administrative law judge's order. *Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197 (1998).

The Board held that the administrative law judge erred in awarding claimant total disability benefits, as the record contained no indication that claimant at any point prior to the issuance of the decision sought a determination that he was entitled to any total disability benefits beyond those already paid by employer. However, as the administrative law judge determined subsequent to the hearing that total disability was at

issue in this case, a determination which is within his discretion pursuant to Section 702.336(b), the parties were entitled to reasonable notice and an opportunity to submit evidence and to address that issue. Thus, the Board held that the administrative law judge erred on reconsideration in denying employer's motion to submit additional evidence on the issue of total disability. The administrative law judge's finding of permanent total disability benefits was therefore vacated and the case remanded for reconsideration of this issue. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

In an order issued subsequent to his initial decision, the administrative law judge granted employer's motion for reconsideration and vacated his earlier award of medical benefits, finding that claimant failed to comply with Section 7(d). On appeal, the Board vacated the administrative law judge's order, holding that Section 7(d) concerns issues of fact and law that are separate and distinct from the request for medical benefits itself, and thus, the issue of Section 7(d) compliance was not raised automatically by a claim for medical benefits. As employer did not raise Section 7(d) at the hearing below, the Board held that the administrative law judge erred in considering the issue after issuing his initial decision without providing claimant the opportunity to submit evidence. Thus, the Board remanded the case for the administrative law judge to re-open the record in order to reconsider Section 7(d) compliance. *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).

The Board reversed the administrative law judge's finding that the Director's failure to raise a Section 8(f)(2)(A) issue prior to a second motion for reconsideration precluded consideration of the issue, as the Board further held that Section 8(f)(2)(A) may be raised at any time due to its mandatory nature. This was in spite of the administrative law judge's finding that the Director's failure to raise the issue was the result of a lack of diligence in presenting his case. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000).

The Fifth Circuit held that the administrative law judge was free to not accept claimant's concession that he was not claiming benefits for a certain period as a binding judicial admission, but considerations of equity required that the judge state that he was not accepting the concession and give employer notice and opportunity to be heard on the issue before making a contrary finding. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Board rejected claimant's contention that the administrative law judge erred on remand in addressing rebuttal of the Section 20(a) presumption where the case had been remanded for further consideration of disability and medical benefits issues. Employer submitted a new report on remand addressing causation. Thus, the underlying factual situation changed and the law of the case doctrine was inapplicable. Moreover, submission of the report and consideration of the causation issue was consistent with Section 22. *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

Prior to the formal hearing, the administrative law judge denied two motions to dismiss by individuals identified by the Director as having been corporate officers of the employer. Fourteen months later, at the formal hearing, the administrative law judge entertained a renewal of these motions and, following the hearing, the administrative law judge granted the motions to dismiss. The Board held that since the administrative law judge had previously ruled on the motions to dismiss, the parties were entitled to reasonable notice pursuant to 20 C.F.R. §702.336 that he intended to reconsider the named individuals' status as parties to the claim. Therefore, as the administrative law judge erred by failing to notify the parties that he would not be bound by his prior orders denying the motions to dismiss, the Board vacated the administrative law judge's dismissal of the named alleged corporate officers and remanded the case for reconsideration of this issue. *E.B. [Biner] v. Atlantico, Inc.*, 42 BRBS 40 (2008).

The Eleventh Circuit held that the administrative law judge did not abuse his discretion in refusing to consider employer's argument, raised for the first time in a post-hearing brief, that it was due a credit for an alleged overpayment of benefits. The administrative law judge is not required to address issues belatedly raised, although he has the discretion to do so. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

In this case where the Board affirmed the administrative law judge's finding that claimant's work fabricating the living quarters for a tension leg platform, destined for the Outer Continental Shelf, was not covered under either the Longshore Act, because it was not "shipbuilding," or under the OCSLA, because there was no substantial nexus to on-OCS operations, the Board rejected claimant's contention that employer had belatedly raised the coverage issue before the administrative law judge. The Board noted that employer's actions under the Act do not preclude a claimant from also filing a state claim and, moreover, the administrative law judge may address new issues that arise after the informal conference provided all parties are given notice and an opportunity to present evidence. *Baker v. Gulf Island Marine Fabricators, LLC*, __ BRBS __ (2015).

**Stipulations**

Where the administrative law judge accepted stipulations affecting the Special Fund's liability that were submitted by claimant and employer without Director's participation, the Board stated it would normally hold claimant and employer bound by their stipulations and remand for adjudication of the Special Fund's liability only. Under the circumstances of this case, however, where the stipulations to the date of injury and amount of benefits were based on the "last exposure" test, which was disapproved by Congress in the 1984 Amendments, the Board held that it would be unfair to claimant and employer to hold them to their stipulations and remanded the case for readjudication of all issues. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987).

The administrative law judge acted within his discretion in refusing to accept the parties' stipulations agreed to at the informal conference where claimant was represented by a different attorney. 29 C.F.R. §18.51 provides that the stipulations are not binding on the parties until received in evidence. *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988).

The administrative law judge's error in rejecting the parties' stipulation without giving them notice was harmless since the Director did not participate and the stipulation affected the Special Fund. However, since the date of maximum medical improvement agreed to by the parties was supported by the evidence of record, the Board modified the date of permanency to that date. *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (*en banc*).

The Board held that where a stipulation entered into by the parties in a former claim that claimant had no viable disability claim at that time manifested no intention by the parties to be bound in future cases, the administrative law judge erred by finding that the parties were bound by the stipulation. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

An administrative law judge may not reject stipulations without giving the parties prior notice that he will not automatically accept the stipulations. On remand, the Board held that the administrative law judge must give the parties the opportunity to submit evidence in support of their positions on the average weekly wage issue. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

In reversing the administrative law judge’s finding that claimant was not covered under the Defense Base Act, the Board noted that he acted within his discretion in rejecting the parties' stipulation to DBA jurisdiction. *Casey v. Chapman College, Pace Program*, 23 BRBS 7 (1989).

An administrative law judge may discount an alleged agreement regarding claimant's average weekly wage at the informal hearing because it could merely have been a factor in attempting to negotiate a settlement at the informal level. *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989).

The Board permitted the Director to challenge stipulations agreed to by claimant and employer because: a) stipulations are non-binding where they evince an incorrect application of law; b) the stipulations potentially violated Section 15(b) because they constituted an agreement under which claimant was effectively waiving his right to compensation by accepting less compensation than that to which he was entitled; c) the issue contained in the stipulations, the proper maximum compensation rate, was a legal one and could therefore be raised at any time. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

The administrative law judge acted within his discretion in holding employer bound to its stipulation of claimant's annual earnings in the year prior to the injury for purposes of calculating average weekly wage. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Stipulations are offered in lieu of evidence and therefore may be relied on to establish an element of the claim. The parties' stipulation that claimant was totally disabled established his inability to perform his usual work, and employer may attempt to show, through modification proceedings, that claimant was at most partially disabled by offering evidence of a change in condition. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (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 held that the first administrative law judge's finding, in adjudicating the disability claim, that the employee was a "person entitled to compensation" under Section 33(g)(1) could not be interpreted as a stipulation that decedent was covered under the Act in the death claim, as employer's stipulation in the prior proceeding was expressly not binding in any other claims against employer. Moreover, the Board held that it is well

settled that a claim for death benefits is a separate and distinct cause of action which does not arise until the death of the worker. The fact that the two claims may be linked with regard to the establishment of certain critical elements, such as the employee's coverage under the Act, does not alter the procedural requirements that the claimants in a disability and death claim separately establish their entitlement under Sections 8 and 9 respectively. *Uzdavines v. Weeks Marine, Inc.,* 37 BRBS 45 (2003), *aff'd,* 418 F3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The Board vacated the administrative law judge's summary approval of the parties' stipulation that claimant has a seven percent permanent leg impairment since there was neither substantial evidence nor a legal foundation for such a stipulation. In particular, the Board noted that the record contains separate assessments indicating that claimant's permanent impairment may be 16 or 41 percent. Additionally, the Board noted that as the administrative law judge did not address the parties' stipulation regarding the extent of claimant's impairment in terms of the aggravation rule, the credit doctrine, or whether suitable alternate employment was established, the stipulations evince an incorrect application of the law. The Board rejected the contention that the parties can "compromise" via stipulation the degree of permanent impairment. *Bomback v. Marine Terminals Corp.,* 44 BRBS 95 (2010).

The Board vacated the administrative law judge's finding, based on the parties' stipulation, as to the date the Special Fund shall assume liability for claimant's permanent partial disability benefits relating to his cervical injury because the administrative law judge's decision lacked specific findings or stipulations regarding the dates claimant reached maximum medical improvement and as to claimant's post-injury wage-earning capacity. In particular, the Board observed that the record: (1) contains conflicting evidence regarding the date on which claimant reached permanency with regard to his injury; and (2) it does not contain any evidence of suitable alternate employment or explanation as to why the extent of claimant's disability changed from total to partial as of September 30, 2006. Nonetheless, the Board affirmed the administrative law judge's determination that claimant is entitled to an award of disability benefits relating to that injury, as well as her finding that employer has established the requisite elements for entitlement to Section 8(f) relief. *Bomback v. Marine Terminals Corp.,* 44 BRBS 95 (2010).

The Director may appeal stipulations that affect Section 8(f) or the proper administration of the Act. The Board vacated the administrative law judge's order based on stipulations which evinced an incorrect application of law regarding: the proper maximum rate, an improper waiver of claimant's entitlement to interest, the failure to account for benefits for all injuries and time periods of disability, and the failure to properly consider the law for concurrent awards. The parties cannot merely "agree" via stipulation that claimant has been fully compensated. The Board remanded the case for the administrative law judge to make findings of fact or accept proper stipulations and issue an award. *Aitmbarek v. L-3 Communications,* 44 BRBS 115 (2010).

The Board affirmed the administrative law judge's rejection of the parties' stipulation that claimant sustained no permanent disability. The Board noted that while the administrative law judge erred initially in rejecting the parties' stipulation without providing notice, he corrected that error in response to employer's motion for reconsideration. In this regard, the parties received notice of the administrative law judge's rejection of the stipulation, as well as his explanation for taking such action, and the administrative law judge, through the reconsideration process, provided employer the opportunity to develop evidence regarding the issue of claimant's permanent disability. The Board further noted that the administrative law judge rejected the stipulation for the legally correct reason that the absence of a permanent impairment rating does not establish the absence of disability within the meaning of the Act and that he rationally found that the stipulation, that claimant suffered no permanent disability as a result of his work accident, was not supported by the credited medical evidence of record as the physicians restricted claimant from performing his usual work. *Martin v. BPU Mgmt., Inc./Sherwin Alumina Co.*, 46 BRBS 11 (2012), *rev'd on other grounds sub nom. BPU Mgmt., Inc./Sherwin Alumina Co.*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013).

Stipulations are not binding if they evince an incorrect application of law. In this case, two stipulations are not in accordance with Section 22 as they improperly give employer the unilateral authority to determine those changes in condition which warrant a reduction or termination in benefits. This authority rests with the administrative law judge in contested cases. However, the administrative law judge did not err in accepting the parties' stipulation regarding the onset of claimant's disability. Stipulations of fact are offered in lieu of evidence, and the fact need not be established by record evidence. *Mitri v. Global Linguist Solutions*, 48 BRBS 41 (2014)
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The Board rejected employer's assertion that the Section 20(a) presumption did not attach to all of claimant's gastric ailments but, rather, was limited to the asserted claim of a stomach infection. The Board held that employer did not raise this issue before the administrative law judge and also that employer stipulated prior to the hearing that claimant's injury was "gastrointestinal." Thus, the administrative law judge properly applied the Section 20(a) presumption to claimant's GI condition in its entirety. *Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33 (2016).

**Procedure: Administrative Procedure Act, Section 23 and Section 27(a)**

The Act provides that any hearing must be conducted in accordance with the provisions of Section 554 of Title 5 of the U.S. Code, 5 U.S.C. §554, and by hearing officers qualified under section 3105 of that title "notwithstanding any other provisions of the Act." 33 U.S.C. §919(d).

Section 554 is Section 5 of the Administrative Procedure Act (APA). Section 5(a) states that this section applies in every case of adjudication required by statute to be based on a record after an agency hearing, with certain exceptions. Section 5(b) of the APA, 5 U.S.C. §554(b), requires that persons entitled to notice of an administrative hearing shall be informed of the issues of fact and law to be resolved therein, while Section 5(c) states that an agency must give parties the opportunity for submission and consideration of facts, argument, and offers of settlement and, to the extent the parties are unable to resolve the case by agreement, a hearing and decision in accordance with Sections 556 and 557 of Title 5.

The fundamental purpose of the notice requirement is one of due process rather than "correct procedure." Although administrative hearings are not bound by the same details of procedure as the common law courts, they are governed by basic requirements of fairness and notice. *Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Administration*, 495 F.2d 975 (D.C. Cir. 1974).

Section 5(d) of the APA, 5 U.S.C. §554(d), provides that the post-hearing decision shall be made by the administrative law judge who received the evidence and presided at the hearing, unless that officer is unavailable. If the credibility of the witnesses is at issue, and the presiding judge is unavailable to issue a decision, the parties have the right to a *de novo* proceeding before a new administrative law judge. This right may be waived, as in *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (*en banc*), *vacating* 631 F.2d 1190, 12 BRBS 710 (5th Cir. 1980), where the court held that claimant waived his right to a new hearing by not objecting to resubmission of the case on the extant record or seeking to present further evidence and also did not raise the resolution of credibility issues based on the transcript as error before the administrative law judge on reconsideration or before the Board. Similarly, in *Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981), the new administrative law judge offered the parties a supplemental hearing and the opportunity to submit new evidence. Neither party accepted the offer, and, on appeal, the Board held that the parties' failure to opt for the supplemental hearing constituted a waiver of the *de novo* hearing.

Section 7 of the APA, 5 U.S.C. §556, applies to hearings held under 5 U.S.C. §554, and pertains to formal hearings, trial officers and their powers, evidentiary development and the formal record. Under Section 556(b), an administrative law judge may disqualify himself. *See* discussion, *infra*

Section 7(c), 5 U.S.C. §556(c), provides, that subject to agency rules and within its powers, the presiding officer at a hearing may take such actions as administering oaths, issuing subpoenas, take depositions and other actions necessary to the conduct of a hearing. *See* Section 27(a), *infra.*

Section 7(d), 5 U.S.C. §556(d), contains provisions regarding the acceptance and exclusion of evidence. It provides that the parties are entitled to present their cases through oral and documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full disclosure of the facts. Irrelevant, immaterial or unduly repetitious evidence may be excluded. It also states that, "except as otherwise provided by statute, the proponent of a rule or other has the burden of proof." *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). This provision applies under the Act in conjunction with the statutory presumptions of Section 20, 33 U.S.C. §920.

Section 7(e) of the APA, 5 U.S.C. §556(e), states that the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for decision. Pursuant to the APA and 20 C.F.R. §702.338, evidence must be formally admitted into the record; a decision based on evidence not formally admitted violates the APA. *Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984) (administrative law judge did not rule on objections to admission, and thus documents never became part of record). In *Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985), the Board held that the administrative law judge erred in rejecting a motion for Section 22 modification without permitting the parties to present relevant evidence and formally admitting it into evidence. As the administrative law judge's decision was based on evidence not formally admitted into the record, it violated the APA; the decision was thus vacated and the case remanded. *See Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986) (Board cannot consider evidence submitted at oral argument indicating that claimant is barred from compensation due to a third-party settlement; case remanded to the administrative law judge to admit and consider evidence); *Woods v. Bethlehem Steel Corp.*, 17 BRBS 243 (1985) (motion to dismiss claimant's appeal, which resulted in a remand for new findings on disability, due to unapproved third-party settlement denied as facts are not in record; employer may seek Section 22 modification). *See also* 33 U.S.C. §921(b)(3) (Board's decisions must be based on the hearing record).

The hearing provisions of Section 556 are mirrored in Sections 23 and 27 of the Longshore Act as well as the regulations applicable to the adjudication of claims. 20 C.F.R. §§702.331 to 702.351. *See also Grandy v. Vinnell Corp.*, 14 BRBS 504 (1981) (Section 19(d) of the Longshore Act incorporates APA procedures).

Section 23 specifically refers to procedure and authority of the "deputy commissioner or Board," but the adjudicatory authority involved is held by the administrative law judge

consistent with Section 19(d). Section 23(a) provides that the hearing officer shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure. *Compare* Rule 81(a)(6) of the Federal Rules of Civil Procedure, providing that the Federal Rules apply to proceedings for enforcement or review under the Act. It also states that declarations of a deceased employee shall be sufficient to establish injury if corroborated by other evidence. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Section 23(b) provides for open hearings on the record and requires that hearings be stenographically reported. Section 24 states that no one shall be required to attend as a witness in any hearing at a place outside the state where he resides and more than 100 miles from his residence unless he is compensated, but the testimony of any witness may be taken by deposition or interrogatories consistent with the rules of the federal district court where the case is pending. Under Section 25, the compensation is the same as that for witnesses in federal courts.

Section 27(a) also refers to the authority of the deputy commissioner, but the Board has held that it must be interpreted in view of the transfer of authority to administrative law judges. It grants the authority to preserve and enforce order during proceedings; to issue subpoenas, administer oaths, and compel the attendance and testimony of witnesses, or the production of documents or the taking of depositions, examine witnesses; and "to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." 33 U.S.C. §927(a). The Board has held that only the administrative law judges, and not the deputy commissioners, have the power to issue subpoenas or order the taking of depositions. *See Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986); *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982).

Section 27(b) provides sanctions where a party disregards an order of an administrative law judge or misbehaves during a hearing, allowing the administrative law judge to certify the facts to the district court which may punish the party in the same manner as for contempt committed before the court. This section will be discussed, *infra*, with discovery.

The regulations detail how formal hearings are conducted, consistent with the APA and Sections 19, 23-25 and 27. Section 702.337, for example, pertains to the location and time of the formal hearing. Although the regulation states that continuances will not be granted except in cases of extreme hardship or unavailability of a party due to a previously scheduled judicial proceeding, 20 C.F.R. §702.337(b), the administrative law judge's decision to continue a hearing will be overturned only upon a showing of a clear abuse of discretion. *Colbert v. National Steel & Shipbuilding Co.*, 14 BRBS 465 (1981). Section 702.338 requires parties or their representatives to attend the hearings, states that the administrative law judge shall inquire into all matters at issue and receive evidence pertaining thereto, and allows the hearing officer to reopen the hearing for the receipt of

new evidence deemed necessary. *See Bingham v. General Dynamics Corp*., 14 BRBS 614 (1982); *Sprague v. Bath Iron Works Corp.*, 11 BRBS 134 (1979), *decision following remand*, 13 BRBS 1083 (1981)**,** *aff'd* , 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982) (the administrative law judge may inquire into matters not in the record to determine whether they are relevant or subject to discovery).

Under Section 702.351, the administrative law judge shall halt the proceedings upon receipt of a signed statement from a party withdrawing its controversion of the claim. The administrative law judge must then notify the deputy commissioner who shall then proceed to dispose of the case as provided for in 20 C.F.R. §702.315. The regulation essentially assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus obviating the need for a formal hearing on any issues. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007); *Lundy v. Atlantic Marine, Inc.*, 9 BRBS 391 (1978). For a case distinguishing a withdrawal of controversion from a settlement agreement under Section 8(i) of the Act, *see Clefstad v. Perini North River Assoc.*, 9 BRBS 217 (1978). *See also* Section 8(i) of the desk book.

In addition to these requirements, the regulations at 29 C.F.R. Part 18 contain general rules for adjudicatory proceedings which apply where no specific provision of the Act or its regulations is applicable.

**Digests**

If claimant cannot be located because he has failed to notify the Office of Administrative Law Judges or his attorney of his whereabouts, it is not a violation of claimant's right to testify in his own behalf or to confront witnesses, 5 U.S.C. §556(d), for the administrative law judge to close the record more than five months after the second hearing without such testimony; claimant has waived his rights. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges do not apply to the extent they are inconsistent with a rule of special application as provided by statute or regulation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Section 23(a) of the Act and the regulations at 20 C.F.R. §§702.338, 702.339, provide that the administrative law judge is not bound by formal or technical rules of procedure except for those provided for in the Act. In this case, the administrative law judge did not abuse her discretion in using 29 C.F.R. Part 18 and Fed. R. Civ. P. 41(b) to, in effect, dismiss a case for failure to pursue the claim, as use of these provisions is not inconsistent with the Act. *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989).

The Board held that an administrative law judge *may* rely on the Federal Rules where they do not conflict with the Act or regulations to dismiss a case where warranted by the specific circumstances. In a footnote, the Board rejected the argument that Rule 81(a)(6) of the Federal Rules makes them applicable to proceedings under the Act, as it states that the Federal Rules are applicable in proceedings for review or enforcement of compensation orders under the Act and neither review nor enforcement were involved here as no compensation order had been issued. Thus, Rule 81(a)(6) did not apply. *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

The administrative law judge is not bound by formal rules of procedure except those provided for in the Act, and under certain circumstances, the administrative law judge may rely on the Federal Rules in taking an action. However, in this case, the Board reversed the administrative law judge's reliance on Rule 59(e) to find a motion for reconsideration untimely because it was not served on employer. Service is not required under the Act in order for a paper to be filed, and application of the Federal Rules to provide an additional requirement not required under the Act is inconsistent with Section 23, particularly where claimant is not represented by counsel. The Board also noted that Rule 81(a)(6) was inapplicable. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

Because claimant, who was employed to perform work under a contract between employer and Saudi Arabia to service Saudi aircraft including C-130s must prove that he was injured while performing services under a subcontract or subordinate contract entered into by the U.S. in order to establish Defense Base Act jurisdiction and because production of the sales contracts could conclusively establish the extent of U.S. Government involvement in the sales of C-130s, the administrative law judge's failure to compel production of this highly relevant evidence was so prejudicial as to result in a denial of due process by depriving claimant of the opportunity for a fair hearing. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

The Board granted reconsideration regarding LIGA's right to a new hearing on the merits of the claim where the administrative law judge stated at the hearing that he would not address LIGA's liability and then did so in his decision. On reconsideration, the Board held that as LIGA clearly asserted that it should be allowed to contest claimant's entitlement and the administrative law judge's actions at the hearing deprived LIGA of the opportunity to do so, the case was remanded to the administrative law judge to allow LIGA the opportunity to participate in a new hearing limited to consideration of issues regarding claimant's entitlement to benefits under the Act. *Abbott v. Universal Iron Works, Inc.*, 24 BRBS 169 (1991), *modifying in part on recon.* 23 BRBS 196 (1990).

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, in hearing a wrongful death claim brought by claimant, held the testimony of claimant's expert was inadmissible pursuant to Rules 702 and 703 of the Federal Rules of Evidence, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the decision on remand of the Ninth Circuit in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), on the basis that the opinion lacked "scientific reliability" under the *Daubert* standard. As the administrative law judge could properly admit this opinion and find it probative, he had different evidence before him and was not required to give the district court's decision on the issue of causation collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

The Fourth Circuit held that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. The court further rejected employer's contention that its inability to recoup any overpayments that might occur between the date of maximum medical improvement and the date of any Section 22 modification decision would abridge employer's due process right to a hearing prior to being deprived of its property; the court held that the initial hearing and subsequent appeals provided employer with all the process that is constitutionally due. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

In this case, the administrative law judge declared employer in default for failing to attend the hearing, and he awarded claimant permanent total disability benefits on this basis. The Board vacated the administrative law judge's award because the decision was not supported by substantial evidence. Although claimant and the Director were in attendance at the hearing, the administrative law judge did not hear any testimony or admit any documentary evidence; thus, there was no evidence to support an award of permanent total disability benefits. Accordingly, the Board remanded the case for admission of evidence. Moreover, as employer established good cause for its failure to appear at the hearing, the Board held that employer must be allowed to participate in the proceedings on remand. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter

asserted a claim "based on different facts" for an award of permanent total disability benefits. The Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would not accept employer's argument that it did not apply here because under FRCP 15(c), the relation back theory allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading. Here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

The administrative law judge's decision must be based on the evidence of record. The administrative law judge purported to rely on the "testimony" of claimant's counsel at the hearing to find that claimant's chosen physician treats spinal injuries. Claimant's counsel was a not a witness, and his statements at the hearing or in briefs are not part of the evidentiary record. The Board therefore vacated the administrative law judge's finding that claimant's chosen physician was an appropriate spine specialist as it was not supported by substantial evidence. As claimant had ample opportunity to put in evidence on this issue, the Board did not remand the case to the administrative law judge. The case was remanded to the district director to issue an order addressing and resolving the parties' contentions regarding claimant's chosen physician consistent with the Act and regulations governing medical issues. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board, citing *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990) and *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), held that the term "injury" as it is used in Section 23(a) of the Act refers to the harm manifested as the result of an occupational disease rather than to the exposure to the injurious stimuli which allegedly caused the disease. The Board therefore rejected employer's arguments that decedent's exposure to asbestos constituted his injury, and that pursuant to Section 23(a), the declaration of a decedent alone was insufficient to establish that he was exposed to asbestos in the course of his covered employment. Because the "injury" means the lung cancer that resulted from the exposure, and there was ample corroboration that decedent suffered from cancer, the Board held that Section 23(a) did not defeat the claim. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board rejected claimant's assertion that the statements of her deceased husband as to his exposure to asbestos at work and his injury served to conclusively establish that he suffered from a work-related disease. Rather, the Board held that, pursuant to Section 23(a), decedent's statements, which were corroborated by other evidence, were sufficient to establish elements of a *prima facie* case. After invoking the Section 20(a) presumption and finding it rebutted, the administrative law judge was not required to credit decedent's statements in his review of the record as a whole. The evidence on the record as a whole supported the administrative law judge's determination that decedent's disease was not work-related. Therefore, the Board affirmed the denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Where decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death, the Board held that the administrative law judge should consider all the evidence in addressing claimant's *prima facie* case, including decedent's statements to his doctor concerning his exposure to asbestos at the shipyards. In so doing, the Board addressed Section 23(a) and its decision in *Martin*, 24 BRBS 112, stating that *Martin* was incorrect in stating that Section 23(a) applies only to the "harm" element. The Board held that Section 23(a) applies in establishing both the "working conditions" and the "harm" elements of a *prima facie* case. If the decedent's statements are corroborated, then they shall be sufficient to establish the "injury," that is, the elements for invoking the Section 20(a) presumption. If they are not corroborated, then Section 23(a) does not apply, and the statements may be sufficient to establish the injury only if they are otherwise credible and probative. The Board remanded the case for the administrative law judge to reconsider decedent's statements in light of Section 23(a). *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *see Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

The Board affirmed the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d) for the duration of the time claimant refused to undergo a medical examination ordered by the administrative law judge. The Board noted that this action was not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The First Circuit rejected employer's contention that the Board erred in remanding the case after the first appeal, as the administrative law judge had not made the findings with regard to whether the Section 20(a) presumption was invoked and rebutted. Moreover, the First Circuit rejected employer's assertion that the administrative law judge's second decision should be vacated because it was based on what employer called "coerced findings of fact," as (1) the Board did not order the administrative law judge to find that claimant experienced stress and harassment in the workplace, but rather ordered him to find whether they occurred; (2) to the extent that the administrative law judge read the Board's decision as requiring him to find in favor of claimant, he misread the Board's decision; and because (3) most importantly, there was substantial evidence in the record to support the administrative law judge's findings in favor of claimant. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Board rejected employer's contention that the administrative law judge erred in failing to remand the case to the district director pursuant to 20 C.F.R. §702.351 for the entry of a compensation order. The withdrawal of controversion regulation assumes that the parties are in agreement as to the disposition of the case, as it instructs the district director to issue a compensation order as in 20 C.F.R. §702.315. In these cases, claimants opposed the issuance of a compensation order and the administrative law judge therefore properly retained jurisdiction over the cases. As the Board also affirmed the administrative law judge's denial of claimants' motion to withdraw, he should proceed to adjudicate the claims. If the claimants fail to raise issues requiring adjudication, the administrative law judge may address this in disposing of employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

**Allegations of Bias—Disqualification of Judge or Counsel**

Under the APA, 5 U.S.C. §556(b), an administrative law judge may at any time disqualify himself. In cases where disqualification results from allegations of bias, the allegations must be supported by the record in order to show prejudice against the party seeking disqualification. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). Each allegation must be specific for the complaint to be heard, *Pfister v. Director, OWCP*, 675 F.2d 1314, 15 BRBS 139(CRT) (D.C. Cir. 1982), and must be made "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist**.**" *Id.*; *Marcus v. Director, OWCP*, 548 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976). *See also Walker v. Newport News Shipbuilding& Dry Dock Co.*, 10 BRBS 101 (1979), *aff'd*, 618 F.2d 107 (4th Cir. 1980), *cert. denied*, 446 U.S. 943 (1980). To establish bias resulting from *an ex parte* communication, a party must show that such communication formed the basis for the judge's decision. *Nasem v. Singer Business Machines*, 13 BRBS 429 (1981), *aff'd mem.*, 691 F.2d 495 (4th Cir. 1982). The Board will not consider an allegation of bias if not timely raised at the hearing level. *Jones v. S. F. Shea Co., Inc.*, 14 BRBS 207 (1981).

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The Sixth Circuit stated that adverse rulings in the proceedings are not by themselves sufficient to show bias on the part of the administrative law judge. *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986).

The Board held that claimant failed to show that the administrative law judge was biased where he excluded certain evidence. Adverse rulings, alone, are insufficient to show bias. Moreover, since claimant failed to raise the issue of alleged bias and prejudice until after the adverse decision, claimant failed to preserve the issue for appeal. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The Board affirmed the administrative law judge's determination that 29 C.F.R. §18.36 grants him the authority to exclude a representative from appearing in a proceeding before him if that representative refuses to adhere to reasonable standards of ethical conduct. Furthermore, as claimant's counsel practices law in Washington state, and the rules at 29 C.F.R. Part 18 do not delineate what constitutes ethical conduct, the Board held that the administrative law judge rationally relied on state rules of professional conduct to establish the ethical standard to be applied. However, the Board reversed the administrative law judge's decision to disqualify counsel, based upon the uncontradicted evidence of record that a "Chinese Wall" had been established to protect employer's confidences, and the administrative law judge's own findings that the record was devoid of evidence establishing that confidences were exchanged between employer's former counsel and claimant's counsel's firm. *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The administrative law judge properly declined to recuse himself after he characterized claimant's letters to the Office of Administrative Law Judges criticizing him as "possibly defamatory." Written remarks regarding a judge's conduct are insufficient to establish judicial bias towards the author, as are adverse rulings. Moreover, the administrative law judge did not err by declining to advise claimant how to respond to the Director's post-hearing brief. The Act does not require the administrative law judge to provide legal advice to a *pro se* claimant. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

Where an attorney who represents claimant also represents employer's insurance plan administrator, a conflict exists even though the attorney did not represent the administrator in a dispute between claimant and employer. An administrative law judge has the authority to disqualify counsel because of conflict of interest. In this case, the administrative law judge was fully aware of the conflict, and he failed to disqualify counsel. As claimant appealed the conflict issue as well as whether counsel represented her competently, the Ninth Circuit reversed the administrative law judge's finding of no permanent disability and remanded the case for further fact-finding. *Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993), *superseding* 973 F.2d 1463, 26 BRBS 37(CRT) (9th Cir. 1992).

The Board affirmed the administrative law judge’s denial of the Director’s motion seeking to disqualify the administrative law judge from adjudicating this case and vacate his initial decision. Although the administrative law judge had represented employer as a private attorney in a previous claim filed by claimant in the instant case, the Board concluded that case law supported the administrative law judge’s determination that rules governing the disqualification of federal judges do not apply to administrative law judges. Moreover, the Board affirmed the administrative law judge’s finding that grounds for disqualification under the Administrative Procedure Act were lacking, as the Director never alleged any personal bias on the part of the administrative law judge and all other parties in the case opposed the Director’s motion. The Board did note, however, that the administrative law judge exhibited questionable judgment in deciding to adjudicate the instant case. *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998).

**Decisions under the APA**

Section 8 of the APA, 5 U. S.C. §557, applies when hearings are conducted in accordance with 5 U.S.C. §556, and addresses decisions, their contents and the record. Section 8(c)(3)(A), 5 U.S.C. §557(c)(3)(A), requires decisions rendered under the APA to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." The rule is designed to allow reviewing bodies to carry out their function of determining whether decisions have been made according to the applicable statutes. *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800 (1973).

The administrative law judge must adequately detail the rationale behind his decision, and specify which evidence was relied upon and why. *Williams v. Newport News Shipbuilding & Dry Dock Co*., 17 BRBS 61 (1985); *Whittington v. The National Bank of Washington*, 12 BRBS 439 (1980); *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). The administrative law judge should also independently analyze and discuss the medical evidence. The failure to do so will violate the APA's requirement for a reasoned analysis. *Williams*, 17 BRBS 61; *Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981).

The administrative law judge's incorporation of factual and legal assertions from a party's brief is impermissible to the extent it prevents this independent review of the evidence by the adjudicator. *Williams*, 17 BRBS 61.

The Board has remanded cases for clarification where the administrative law judge made conclusory findings of fact without comment on conflicting evidence or without explicit acceptance or rejection of parts thereof. *Id.*; *Williams v. Nicole Enterprises*, 15 BRBS 453 (1983); *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983); *Frazier*, 13 BRBS 436; *Willis v. Washington Metro. Area Transit Auth.*, 12 BRBS 18 (1980). The Board has also remanded in cases where the administrative law judge neglected to make specific findings of fact or made ambiguous findings, *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982); *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982); *Grimes v. Exxon Company, U.S.A.*, 14 BRBS 573 (1981); *Bentley v. Sealand Terminals, Inc.*, 14 BRBS 469 (1981); *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141 (1980); *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979), or where he failed to address issues raised by the parties during the hearing. *Wade v. Gulf Stevedore Corp.*, 8 BRBS 335 (1 978).

In other instances, the Board has directed the administrative law judge to make additional findings of fact or to provide a more complete rationale for his decision. *See generally Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981); *Whitlock v. Lockheed Shipbuilding & Const. Co.*, 12 BRBS 91 (1980); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). In general, an administrative law judge's order must contain a sufficient rationale

for the Board to discern the reasons for his findings and thereby determine whether they are supported by substantial evidence and are in accordance with law. *Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980). At the same time, however, appellate bodies should not review decisions in order to perfect the administrative process to the nth degree, and should uphold the decisions under review even when their findings lack clarity if their reasoning can be discerned. *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974). *See, e.g., Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982); *Hodgson v. Kaiser Steel Corp.*, 11 BRBS 421 (1979); *Caudle v. Potomac Electric Power Co.*, 9 BRBS 502 (1978), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980) (table).

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### Sufficient Rationale

The Board held that the administrative law judge erred in remanding the case to the deputy commissioner so that a direct appeal to the Board on the issue of Section 8(f) relief could be taken. The administrative law judge abdicated his responsibility to resolve disputed issues by remanding the case without making the required factual findings regarding claimant's entitlement as well as the applicability of Section 8(f) and liability of the Special Fund. *Champagne v. Main Iron Works, Inc.*, 20 BRBS 84 (1987).

The administrative law judge's mere statement that each medical exhibit "although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration," does not satisfy the requirements of the APA. The administrative law judge must independently analyze and discuss the medical evidence; the administrative law judge's failure to explicitly accept or reject the medical evidence of record makes it impossible for the Board to apply its standard of review. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

Although employer allegedly discharged claimant for falsifying information on his pre-employment application, the administrative law judge's failure to consider that employer discharged claimant only a few weeks after he filed his workers' compensation claim (possible violation of Section 49) violated the APA and required remand. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

Where the administrative law judge provided only a cursory discussion of his determination that employer was not entitled to Section 8(f) relief, the Board remanded for additional findings on this issue. *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988); *see also Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting).

Because the record contained conflicting evidence as to the cause of claimant's back problems and his chronic pain syndrome, which the administrative law judge failed to

consider in concluding that these conditions were not work-related, the Board remanded for the administrative law judge to reconsider this evidence in light of the Section 20(a) presumption and the Administrative Procedure Act. *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988).

The Board noted that the administrative law judge should fully instruct the deputy commissioner as to which rates should be utilized when calculating compensation rate adjustments pursuant to Sections 6 and 10(f) in order to avoid confusion and possibly default orders. The APA requires that the administrative law judge resolve all factual and legal issues necessary to an award. This insures that a deputy commissioner's actions are purely ministerial. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

Where the administrative law judge denied claimant medical benefits under the Longshore Act because he found no evidence upon which to determine whether the medical expenses paid under the state act were reasonable, and where it was not apparent from the administrative law judge's decision what evidence he considered and relied upon in reaching this determination, the Board remanded for reconsideration on APA grounds. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Board held that the administrative law judge erred in failing to address all of the medical evidence of record, as well as the post-hearing motions made by both parties. Such an omission violates the APA. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The administrative law judge's disposition of a petition for modification must comport with the requirements of the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

The Board remanded the case for the administrative law judge to render findings consistent with the APA where he summarily concluded that employer presented substantial evidence to rebut the Section 20(a) presumption. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

The administrative law judge violated the APA by failing to discuss voluminous and relevant medical evidence relating to claimant's physical and mental conditions. Instead, the administrative law judge relied on the reports of two doctors whom he, without adequate discussion, found to be independent experts under Section 7(e). *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

The Board held that the administrative law judge did not violate the APA where he discussed only the relevant parts of vocational testimony in determining whether employer established suitable alternate employment. Similarly, the administrative law judge did not err in not discussing certain medical testimony as part of his Section 8(f)

findings, since the substance of the testimony actually supported his denial of Section 8(f) relief, and the testimony was irrelevant in determining whether the pre-existing disability was manifest because the physician did not treat claimant until after the work injury. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991).

While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, where administrative law judge found that claimant's continued exposure to asbestos at the workplace resulted in further impairment, but failed to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion, he violated the APA, 5 U.S.C. §557(c)(3)(A), and the case must be remanded. *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting).

The Board vacated the summary denial of Section 8(f) relief and remanded the case for findings on all elements consistent with the requirements of the APA. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting).

The Board remanded the case to the administrative law judge to address the applicable average weekly wage for claimant's permanent benefits. Without explanation, in violation of the APA, the administrative law judge awarded permanent total disability for a 1986 knee injury on the average weekly wage applicable to a temporarily disabling 1988 ankle injury. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

In this case, before the Board after remand after the Supreme Court's decision in *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Board held that, as the administrative law judge discussed the only two relevant medical opinions of record, he did not violate the APA by not discussing every medical opinion of record. Moreover, the Board determined that it was within the administrative law judge's discretion to credit Dr. Derby's opinion over that of Dr. Yazdan, and it was rational for him to conclude that decedent's condition and death were not work-related. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The Board vacated an administrative law judge's findings with respect to the extent of claimant's disability because his failure to resolve conflicts in the record and to explain what evidence he weighed and why on this issue violated the APA, 5 U.S.C. §557(c)(3)(A). The Board was unable to determine on this record whether the administrative law judge simply "disregarded significant probative evidence or reasonably failed to credit it" where he did not explain whether claimant was unable to return to his former longshore work or how employer failed to meet its burden of demonstrating the availability of suitable alternate employment. *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

The Fifth Circuit rejected employer's contention that the administrative law judge's failure to explain why he rejected certain evidence violated the APA, noting that the Fifth Circuit has expressly declined to adopt the rule that an administrative law judge must explain why evidence contradicting his conclusion was rejected. Because the evidence in question was not material to the outcome of the case, the administrative law judge was not required to address the contradictory evidence. *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), *rev'g on other grounds* 32 BRBS 6 (1998).

The Fifth Circuit affirmed the administrative law judge's determination that claimant was temporarily totally disabled during two specified periods of time based on substantial evidence supporting the administrative law judge's factual findings. The court noted that it has not adopted the Third Circuit rule that the administrative law judge must discuss the evidence that was rejected in addition to addressing the specific evidence supporting his decision. Only the latter is required. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Fourth Circuit held that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

The Board rejected employer's contention that the administrative law judge's decision violated the APA, as the administrative law judge set forth the evidence with regard to causation, weighed the evidence, and provided reasons for his findings based on the evidence. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board vacated the administrative law judge's responsible employer determination because of his inconclusive weighing of the evidence, and his failure to address whether employer established that decedent was not exposed to potentially injurious asbestos during the course of his employment for the employer the administrative law judge found responsible. The case was remanded for definitive findings of fact. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005), *aff'd mem. sub nom. Dillingham Ship Repair v. U.S. Dep't of Labor*, 320 F.App'x 585 (9th Cir. 2009).

The Board vacated the administrative law judge's summary conclusion that claimant was not engaged in "maritime employment." Although the administrative law judge adopted and incorporated by reference the transcript of his telephonic conference with the parties into his decision, he neither cited relevant case precedent nor discussed the evidence of record concerning claimant's job duties as a security guard in finding that claimant did not meet the status requirement for coverage under the Act. The case was remanded for the administrative law judge to determine if claimant's work is integral to the shipbuilding process. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).

**Summary Decision**

The OALJ rule applicable to summary decision, 29 C.F.R. §18.40(a), is analogous to Rule 56 of the Federal Rules of Civil Procedure. The administrative law judge did not act prematurely in deciding the status issue in a summary decision. There was no dispute as to the nature of claimant's work duties, only as to the legal significance of those duties. Thus, as there was no genuine issue as to any material fact, the administrative law judge could rule on employer's motion for summary decision. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

The Eleventh Circuit affirmed a district court decision granting the employer's motion for summary judgment under FRCP 56(c), based on the absence of a genuine issue of material fact, incorporating the lower court's opinion in an appendix. The district court relied on the legal principle that the moving party must establish the absence of genuine issues of material fact with all reasonable inferences made in favor of the opposing party. In this case, there was no factual dispute and employer established that the employee's connection with maritime employment was *de minimis* such that there was no coverage under the Longshore Act. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

The Board held that the administrative law judges erred in granting summary judgment in favor of the employers since the cases presented contested issues of material fact which affected the application of Section 33(g). *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, J.J., concurring and dissenting). *See also Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring).

The Board affirmed the administrative law judge's denial of employer's motion for summary judgment. In this case, the compensation claims were settled under Section 8(i), and employer was contesting claimants' right to medical benefits in view of alleged third-party settlements entered into without employer's approval. As the administrative law judge found that there was no evidence in the case from which he could determine whether the claimants were entitled to medical benefits under the Act, a material issue of fact, or the amount of the third-party settlements, he properly denied the motion for summary judgment. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

The Board held that the administrative law judge erred in dismissing the issue of Section 49 discrimination from the case in a summary decision. First, the administrative law judge did not address claimant's contentions that employer's motion for summary judgment exceeded the scope agreed upon at the pre-hearing conference and that claimant was deprived of the opportunity to complete discovery. Second, the administrative law judge's summary decision does not satisfy the requirement at 29 C.F.R. §18.41 that a summary decision contain findings of fact and conclusions of law and the reasons

therefor. Lastly, the administrative law judge did not make the requisite determination that there was no genuine issue as to any material fact with respect to the Section 49 issue. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

The Second Circuit affirmed the district court's grant of summary judgment to employer on claimant's Jones Act claims. In determining whether to grant summary decision, the evidence must be viewed in the light most favorable to the nonmoving party. The court must grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A fact is "material" if it "might affect the outcome of the suit under the governing law." An issue of fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Here, claimant produced no evidence from which a reasonable jury could conclude that he derived his livelihood from sea-based activities. *O'Hara v. Weeks Marine, Inc*., 294 F.3d 55 (2d Cir. 2002).

The Board affirmed the administrative law judges' grants of summary decision in employer's favor on the status issue presented in these cases. Employer moved for summary decision with supporting affidavits, and claimants responded only that they disputed the allegations. This was insufficient to raise the existence of material and genuine issues of fact as mere denial of the assertions cannot defeat a motion supported by affidavits, pursuant to 29 C.F.R. §18.40(c). Thus, the administrative law judges were not required to hold evidentiary hearings. *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003).

The Board held that the administrative law judge erred in granting summary decision in employer's favor on the issue of the timeliness of the widow's claim for benefits, pursuant to Section 13(a). In opposing employer's motion, claimant submitted to the administrative law judge evidence raising a material issue of fact concerning her date of awareness of the work-relatedness of her husband's death. The administrative law judge erred in relying on employer's evidence under such circumstances without holding an evidentiary hearing. It is improper, as the administrative law judge did, to draw inferences against the non-moving party when ruling on a motion for summary decision. The Board noted, however, that claimant did not sufficiently raise before the administrative law judge an issue of fact concerning employer's compliance with Section 30(a). The Board remanded the case for a hearing. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision in this case where claimant did not satisfy the Section 2(3) status requirement. The facts were undisputed: claimant was a janitor who cleaned bathrooms, offices, and the cafeteria. She did not clean shipbuilding equipment or production areas around the equipment, and her job thus was distinguishable from those in which the Board found coverage. The Board affirmed the administrative law judge's reliance on

*Gonzalez*, 33 BRBS 146, and held that the undisputed facts lead to but one legal conclusion – claimant's janitorial job was not integral to employer's shipbuilding operation. Thus, employer was entitled to summary decision as a matter of law. *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision where claimant failed to meet the Section 3(a) situs requirement. The facts concerning the area in which claimant was working were undisputed and the administrative law judge's finding that no loading, unloading, repairing, dismantling, or building of vessels occurred in the area is supported by substantial evidence. Moreover, the bulkhead area where claimant worked the day before his accident was not an enumerated situs (pier) on the facts of this case. Thus, employer was entitled to summary decision as a matter of law. *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP*, 335 F.App'x 79 (2d Cir. 2009).

The Board held that the administrative law judge erred in granting employer's motion for summary decision on the issues of the existence of a contract with the United States or agency thereof under Section 1(a)(4) of the DBA and of independent contractor/employee status. The administrative law judge drew inferences against the non-moving party instead of in claimant's favor. Moreover, claimant put forth sufficient evidence of the existence of genuine issues of material fact with regard to these issues. The Board vacated the grant of summary decision and remanded for an evidentiary hearing on these issues. With regard to the issues of "public work" under Section 1(a)(4) and intent to injure decedent, the Board affirmed the grant of summary decision as claimant did not raise genuine issues of material fact and employer's assertions were supported by law. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

The Board affirmed the administrative law judge's denial of claimant's and employer's motions for summary decision. The issues before the administrative law judge were whether the Coalition Provisional Authority was an agency of the United States, so as to determine whether the contract under which claimant worked in Iraq was covered by the Defense Base Act, as well as average weekly wage and wage-earning capacity. As these issues required additional information beyond that submitted with the parties' motions or raised genuine issues of material fact, the administrative law judge properly denied those motions. *Tisdale v. American Logistics Services*, 44 BRBS 29 (2010).

In this case where claimant was a beach-walker who cleaned up oil debris from a beach, the Board affirmed the administrative law judge's determination that claimant had not established maritime status under Section 2(3) of the Act. As claimant had not established an essential element of his claim, the Board affirmed the administrative law judge's decision granting employer's motion for summary decision and denying the claim. *Smith v. Labor Finders*, 46 BRBS 35 (2012).

The Board affirmed the administrative law judge's order granting employer's motion for summary decision, as he correctly determined there is no genuine issue of material fact in this DBA case, and employer is entitled to summary decision as a matter of law. In this case, the Division of Federal Employees' Compensation (DFEC) had approved employer's application for reimbursement of compensation paid to claimant for his war hazard injuries. Additionally, the DFEC opted to pay claimant directly for his future medical needs. Accordingly, the Federal Government, not employer, is responsible under the WHCA for paying claimant's medical benefits, and it was proper for the administrative law judge to dismiss claimant's claim against employer. *Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.*, 47 BRBS 9 (2013).

The Board held that employer's having fully paid permanent partial disability benefits under the schedule prior to claimant's beginning an OWCP-approved rehabilitation program is not determinative of claimant's entitlement to total disability benefits. The Board reasoned that the same standards apply to the issue of total disability in all cases: a claimant is not limited to an award under the schedule when an injury to a scheduled member results in total disability, *PEPCO*, 449 U.S. 268, 14 BRBS 363, and situations exist which require an employer's payment of total disability benefits even after a scheduled award has been paid. Thus, the Board affirmed the administrative law judge's grant of summary decision to claimant and award of total disability benefits during claimant's enrollment in the approved vocational program during which suitable alternate employment was not reasonably available to him due to the requirements of the program. *Walker v. Todd Pac. Shipyards*, 46 BRBS 57 (2012), *vacated on in pert. part on recon.*, 47 BRBS 11 (2013).

On reconsideration, the Board held that the administrative law judge erred in granting summary decision in claimant's favor on the issue of claimant's entitlement to total disability benefits during his enrollment in a DOL-approved rehabilitation program. In opposing claimant's motion, employer submitted to the administrative law judge evidence raising a material issue of fact concerning whether the rehabilitation program would increase claimant's wage-earning capacity. In issuing a summary decision, the administrative law judge erred in relying on claimant's evidence to find that the program would increase claimant's wage-earning capacity. It is improper, as the administrative law judge did, to draw inferences against the non-moving party when ruling on a motion for summary decision. *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

The Board held that the administrative law judge erred in granting employer's motion for summary decision on the applicability of the Section 33(g) bar. It is undisputed that claimant did not obtain prior written approval of the third-party settlement from employer and its carrier; thus, claimant did not comply with Section 33(g)(1), and, if applicable, that section would bar benefits. Claimant, however, notified employer of the third-party settlement prior to the payment of any benefits and the issuance of any award; thus,

claimant complied with Section 33(g)(2), and, if applicable, that section would not bar claimant's benefits. In order to determine which subsection applies to claimant's case, a comparison must be made between claimant's entitlement under the Act and his third-party proceeds. Because the settlement is confidential, it is unknown whether the proceeds are greater than or less than claimant's compensation entitlement under the Act and which subsection applies. Accordingly, there remains a genuine issue of material fact on the applicability of Section 33(g). The Board vacated the administrative law judge's orders and remanded the case for additional proceedings. The Board noted that *in camera* proceedings may be useful due to the confidentiality of the third-party settlement. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015) ), *modified in part on recon.*, 50 BRBS 7 (2016).

The Board vacated the administrative law judge's grant of employer's motion for summary decision as his findings are not in accordance with 29 C.F.R. § 18.72(f) (2015). Section 18.72(f) states that the administrative law judge may issue a "Decision independent of the motion," but only "[a]fter giving notice and an opportunity to respond." In this case, the administrative law judge granted summary decision for employer based on his finding that claimant had no average weekly wage as of the date of his injury. However, both parties proposed an average weekly wage calculation under Section 10(c) of the Act as of that date of injury. The Board thus held that the administrative law judge erroneously granted employer's motion for summary decision for reasons "independent of the motion," without first giving the parties notice and the opportunity to respond to this particular reason. On remand, the Board instructed the administrative law judge that he may: 1) rule on employer's motion for summary decision on the grounds specifically raised by employer and opposed by claimant; or 2) alternatively, issue a "decision independent of the motion," provided he gives the parties "notice and a reasonable time to respond" to the grounds identified by the administrative law judge. *Maglione v. APM Terminals*, 50 BRBS 29 (2016).

**Admission of Evidence**

As stated above, evidence must be formally admitted into the record by the administrative law judge. Consistent with Section 23(a), the adjudicative inquiry functions primarily to ascertain the rights of the parties without the constraint of common law or statutory rules of evidence or technical rules of procedure. *See Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS l3(CRT) (8th Cir. 1984).

The administrative law judge must fully inquire into matters that are fundamental to the disposition of the issues in a case, and must receive into evidence all relevant and material testimony and documents. *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981); *Bachich v. Seatrain Terminals of California*, 9 BRBS 184 (1978); 20 C.F.R. §702.338. The failure to inquire into a matter which is fundamental to the disposition of the issues in the case is a violation of 20 C.F.R. §702.338. *Gray & Co., Inc. v. Highlands Ins. Co.*, 9 BRBS 424 (1978). Such inquiry is necessary to insure an informed decision. *Sprague v. Bath Iron Works Corp.*, 11 BRBS 134 (1979). *See also Camporeale v. Pittston Stevedoring Corp.*, 8 BRBS 297 (1978).

In *Bachich*, 9 BRBS 184, the administrative law judge erred by refusing to accept two medical reports offered by the employer at the close of the hearing. In that case, the reports were "relevant and material" to the dispute at issue. *Cf. Champion v. S & M Traylor Brothers*, 14 BRBS 251 (1981), *rev'd on other grounds*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Smith v. Ceres Terminal*, 9 BRBS 121 (1978) (administrative law judge properly refused to admit evidence under the circumstances of those cases).

The standards governing the admissibility of evidence in administrative hearings are thus less stringent than those which govern under the Federal Rules of Civil Procedure. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); *Brown v. Washington Metro. Area Transit Auth.*, 16 BRBS 80 (1984), *aff'd*, No. 84-1046 (D.C. Cir. 1984) (rejecting claimant's argument that admissibility of depositions is limited by Fed. R. Civ. P. 32). The administrative law judge has great discretion concerning the admission of evidence, *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 n.1 (1985), and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *Champion*, 14 BRBS 251; *Smith*, 9 BRBS 121.

It is within the administrative law judge's discretion to exclude even relevant and material testimony for failure to comply with the terms of a pre-hearing order. *Williams*, 14 BRBS at 732-733. In *Williams*, a pre-hearing order was issued on April 1, 1980, requiring that, at least 10 days before the hearing, the parties complete discovery, exchange copies of exhibits and the names of witnesses to be called, advise each other of all evidence to be introduced, and notify each other of all issues to be raised. The order

also provided that, "[u]nless good cause is shown, failure to comply with this order may result in exclusion of evidence, testimonial or documentary." An insurer did not file a pre-hearing statement or otherwise comply with this pre-hearing order; specifically, counsel did not inform opposing counsel that a doctor would testify until two days before the hearing. The Board held that the administrative law judge did not err in excluding the doctor's testimony, notwithstanding that an administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents, 20 C.F.R. 702.338, and that the evidence was relevant and material. The Board stated that pre-hearing orders serve a useful purpose, providing the parties advance opportunities to prepare arguments, raise issues, seek discovery and generally facilitating the conduct of a hearing. The Board concluded that the language of the order, which was permissive rather than mandatory, as well as the regulatory framework for administering the Act permits the administrative law judge to make discretionary determinations regarding the admissibility of evidence where the offering party does not comply with a pre-hearing order.

An administrative law judge may allow the admission of videotape and photographic evidence if it is relevant to the issues, *e.g.*, the extent of the claimant's alleged disability. *Walker v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 101 (1979); *see Hughes*, 17 BRBS 153 (administrative law judge properly admitted transcript of video-taped interview of the deceased employee under specific language of Section 23(a) of the Act).

The administrative law judge may also take administrative/judicial notice of facts if it is done in the proper manner. In so doing, the administrative law judge must provide the parties with "the opportunity to contradict the noticed facts with evidence to the contrary." *Jordan v. James G. Davis Constr. Corp.*, 9 BRBS 528.9, 530 (1978). *See Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd mem. sub nom. Maddaleni v. Director, OWCP*, No. 90-9583 (10th Cir. 1992). *See generally Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting) (medical articles cited by dissent were neither part of the record before the administrative law judge nor cited as supporting authority by the Director on appeal, and the parties were not provided the requisite opportunity to respond). Thus, the Board has affirmed an administrative law judge's decision to give little weight to a doctor's testimony based, in part, on the doctor's listing in the Directory of Medical Specialists. *Lindsay v. Bethlehem Steel Corp.*, 18 3RBS 20 (1986). The Board noted that the administrative law judge did not rely solely on the Directory in discrediting the doctor, employer submitted evidence as to the doctor's qualifications which the administrative law judge found uncertain and the administrative law judge properly concluded that the Directory was admissible under Rule 201 of the Federal Rules of Evidence, Fed. R. Evid. 201(e), as a source whose accuracy cannot reasonably be questioned.

The Board in *Lindsay* also affirmed the administrative law judge's refusal to take administrative notice of medical textbooks submitted by employer where the administrative law judge relied instead on medical reports and testimony. The administrative law judge concluded that the doctors' evaluations were more reliable than textbooks as the doctors had personally examined claimant.

The Board has held that an administrative law judge may draw an adverse inference against a party who fails to submit evidence within its control. The adverse inference rule is an evidentiary rule providing that when a party has relevant evidence within his control that he fails to provide, that failure gives rise to an inference that the evidence is unfavorable to him. *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516 (6th Cir. 2008); *Singh v. Gonzales*, 491 F.3d 1019 (9th Cir. 2007). This rule is limited to findings of fact related to evidence within a party's control; it is not applicable to conclusions of law. *See BNSF Ry. Co. v. Brotherhood of Maintenance*, 550 F.3d 418, 424 (5th Cir. 2008). The Board affirmed administrative law judges' decisions drawing adverse inferences against employer where employer had claimant examined by a physician of its choice and failed to submit the doctor's report, *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982), and where employer submitted an affidavit from its vice president but chose not to call him as a witness or have him deposed. *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980). *See Lindsay*, 18 BRBS 20 (any error by administrative law judge in referring to possibility of adverse inference held harmless).

The administrative law judge may admit new evidence which has not previously been offered during informal proceedings. The regulations do not require that all medical evidence be completed and presented to the deputy commissioner before the case is transferred for a formal hearing, unless the new evidence is likely to resolve the entire case. *McDuffie v. Eller & Co.*, 10 BRBS 685 (1979) (rejecting argument that medical examination not completed before transfer to administrative law judge is inadmissible).

The regulations sanction adjourning the hearing and later reopening the proceedings for receipt of additional evidence. An administrative law judge may add a new party under similar procedures. The party joined in this manner is not prejudiced solely because it did not participate in the informal proceedings before the deputy commissioner, where that party was afforded the opportunity to cross-examine the opponent at a second formal hearing. *Bingham v. General Dynamics Corp.*, 14 BRBS 614 (1982).

Hearsay evidence is generally admissible if considered reliable. *See Richardson v. Perales*, 402 U.S. 389 (1971). Inasmuch as hearings before the administrative law judge follow relaxed standards of admissibility, the admissibility of evidence depends only on whether it is such evidence as a reasonable mind might accept as probative. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968). Indeed, where it possesses rational probative force,

hearsay evidence alone may constitute substantial evidence to support an administrative holding. *Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54, 60 (1979).

The relaxed admissibility standard for hearsay evidence does not dispense with the right of cross-examination. *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951). The opportunity to cross-examine has been required in cases involving the introduction of *ex parte* medical reports. *Id.*; *Avondale Shipyards Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *Brown v. Washington Metro. Area Transit Auth.*, 16 BRBS 80 (1984), *aff'd*, No. 84-1046 (D.C. Cir. 1984); *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984). In *Longo v. Bethlehem Steel Corp*., 11 BRBS 654 (1979), the Board, relying on *Richardson v. Perales*, 402 U.S. 389 (1971)**,** upheld the admission into evidence of *ex parte* medical reports, despite their hearsay nature. The Board reasoned that since the administrative law judge permitted a post-hearing deposition of the doctor to be taken, the adverse party's right of cross-examination was protected. The Board thus distinguished holdings by the Fifth Circuit that *ex parte* reports were inadmissible where there was no opportunity to cross-examine. *See Southern Stevedoring*, 190 F.2d 275; *Bethlehem Steel Corp. v. Clayton*, 578 F.2d 113, 8 BRBS 663 (5th Cir. 1978).

In general, the Board will affirm the consideration of *ex parte* reports where the reports' authors are not biased and have no interest in the case, the opposing party has the opportunity to cross-examine or subpoena the witness, and the reports are not inconsistent on their face. *Darnell*, 16 BRBS at 100. *See also Feezor v. Paducah Marine Ways*, 13 BRBS 509 (1981) (Board reversed administrative law judge's exclusion of *ex parte* reports on due process grounds). Although procedural safeguards must be applied, the administrative law judge in this case could both admit the relevant evidence and afford the opposing party the opportunity to challenge them). *Cf. Hughes*, 17 BRBS at 155 (pursuant to Section 23(a), opportunity for cross-examination not applicable to corroborated declaration of deceased employee).

In *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982), *aff'g* 13 BRBS 1083 (1981), the court affirmed the Board's holding that the administrative law judge properly excluded a letter written by a doctor to employer's attorney under the work product rule of Fed. R. Civ. P. 26(b)(3). The Court noted that although the Federal Rules technically apply only to proceedings for enforcement or review of compensation orders, *see* Fed. R. Civ. P. 81(a)(6), application of Rule 26(b)(3) is reasonable on policy grounds.

For further citations regarding the administrative law judge's weighing of evidence, *see* Section 21, Scope of Review.

## Digests

### In General

Since Hanover Insurance was not a party before the administrative law judge, the administrative law judge's findings were not binding on Hanover. The board held that Hanover must have the opportunity for a rehearing to present its own evidence relevant to determining the responsible carrier, *i.e.*, evidence on the date of last exposure. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The administrative law judge's hearing is *de novo*, and he is not bound by the deputy commissioner's opinion or recommendation. Moreover, the administrative law judge has great discretion concerning the admission of evidence, and the Board held his refusal to admit certain exhibits did not demonstrate prejudice or hostility on his part. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

The administrative law judge erred in relying on an assistant deputy commissioner's recommendation, which was erroneously transferred to the OALJ in violation of 20 C.F.R. §702.317(c), to determine claimant's compensation rate. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The administrative law judge has the discretion to order counsel at the formal hearing to cease questioning a witness on a subject which is not relevant to the matter at issue. *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

The Board affirmed the administrative law judge's admission of employer's evidence over claimant's objection that the documents were hearsay or *ex parte* where three of the exhibits objected to were records of the Department of Labor which were regularly kept in the course of its dealings with claimant, the author of a fourth exhibit was subject to cross-examination due to his presence at the hearing, and a fifth exhibit was not inconsistent on its face or authored by anyone with an interest in the case. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

In the context of discussing mistake in fact pursuant to Section 22, the Board held that the administrative law judge violated 20 C.F.R. §§702.336, 702.338 when he failed to resolve the issue of responsible carrier. In the initial proceedings, the administrative law judge dismissed Wausau, as decedent was not exposed to asbestos while it was on the risk. He did not resolve the issue thereafter, despite that employer was at all relevant times insured, and he held employer liable. The Board noted the similarity between this case and *Sans*, 19 BRBS 24, and, on this basis and several others, remanded the case to the administrative law judge for a new hearing on employer's petition for modification. *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting).

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, in hearing a wrongful death claim brought by claimant, held the testimony of claimant's expert was inadmissible pursuant to Rules 702 and 703 of the Federal Rules of Evidence, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the decision on remand of the Ninth Circuit in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), on the basis that the opinion lacked "scientific reliability" under the *Daubert* standard. As the administrative law judge could properly admit this opinion and find it probative, he had different evidence before him and was not required to give the district court's decision on the issue of causation collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

Where employer's vocational witness had been properly identified and the proffered vocational report timely served under the pre-trial order, the administrative law judge's granting claimant's motion to deny admission of this evidence because employer failed to respond to claimant's interrogatories was an extreme sanction unwarranted by the facts of this case, given that suitable alternate employment was a central issue in the case. On remand, the Board held that the administrative law judge must admit the report and determine the extent of claimant's disability. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Pursuant to 29 C.F.R. §18.103, error predicated on the exclusion of evidence requires that "the substance of the evidence was made known to judge by offer or was apparent from the context within which questions were asked." In this case, employer sought to admit a surveillance videotape that was not on its pre-hearing list of exhibits. The videotape was not marked for identification nor did employer make a proffer of its contents. Accordingly, there was no record from which the court could discern the nature of the evidence excluded. Thus, based on the record before the court, the court found no abuse of discretion by the administrative law judge in excluding the videotape from evidence. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

The Board affirmed the administrative law judge's exclusion from evidence of the deposition transcripts of three of employer's employees taken in another claim and offered by employer in this case. As claimant's counsel, who had attended these depositions, was unaware that they would be used in claimant's case, he did not cross-examine the witnesses in furtherance of the instant case. Moreover, assuming the testimony of the employees would be relevant to issues here, nothing prevented employer from taking their depositions in this case or calling them as witnesses at the hearing. Thus, the Board held that the exclusion of the deposition transcripts was not arbitrary, capricious or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

The Board affirmed the administrative law judge's denial of employer's request to reopen the record to submit evidence regarding the noise levels to which claimant was exposed while working on steam winch vessels. Claimant's Form LS-203 generally alleged that he was exposed to loud noise while working for employer, and claimant's pre-hearing statement did not assert entitlement to benefits based solely on his last year of employment. Moreover, claimant testified about the various types of noise to which he was exposed during his entire employment with employer. Thus, the Board held that employer's argument that it was caught off guard with regard to allegations of noise exposure other than during the last year of claimant's employment was unconvincing. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999).

Where claimant contended that the administrative law judge erred in allowing drug and alcohol treatment records into the record, the Board held that the administrative law judge did not commit error by not holding a hearing to determine whether this action violated provisions of the Drug Abuse Office and Treatment Act, as these provisions do not provide for a private right of action and jurisdiction for investigation and prosecution of alleged violations rests solely with the U.S. Attorney's office. The Board further held that the administrative law judge did not commit reversible error by not expunging from the record references to claimant's drug and alcohol treatment and bipolar condition, as claimant did not object to the admission of this evidence and the administrative law judge did not consider it in deciding the case. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5th Cir. 2002).

The Board held that the administrative law judge erred in granting two parties' motions to dismiss without giving notice that he would re-open his previous denials of the same motions. The administrative law judge erred in denying claimant's post-hearing motions to re-open the record for the re-submission of previously provided documentation demonstrating that the administrative law judge's initial rulings were correct. The Board, citing 20 C.F.R. §§702.338, 339, held that the administrative law judge abused his discretion since he effectively prohibited claimant from presenting evidence specifically addressing an issue which the administrative law judge had previously ruled on and which he had re-opened without notice to the parties. *E.B. [Biner] v. Atlantico, Inc.*, 42 BRBS 40 (2008).

In this claim for total disability benefits for a work-related knee injury, the Board affirmed the administrative law judge's allowance of claimant's testimony regarding his pre-existing hearing loss as this testimony is relevant to the disputed issue of the suitability of the alternate jobs identified in employer's labor market survey. The Board rejected employer's contention that the admission of this testimony resulted in unfair surprise and prejudice to employer, noting that it is undisputed that employer had actual or constructive notice of claimant's hearing impairment. *Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011).

**Pre-Hearing Order**

The Board held that the administrative law judge has discretion to exclude even relevant and material testimony for failure to comply with the terms of a pre-hearing order, which stated that failure to exchange names of witnesses at least 10 days before the hearing could result in their exclusion. The exclusion was affirmed despite 20 C.F.R. §702.338, requiring the administrative law judge to receive relevant and material evidence, as the administrative law judge has the discretion to exclude evidence offered in violation of a pre-hearing order. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

The Board affirmed the administrative law judge's decision to admit surveillance evidence offered in violation of a pre-hearing discovery order. As the order stated that evidence which did not comply with the stated time limits *may* be excluded, the Board stated that it could not conclude that the administrative law judge abused his discretion in admitting the evidence. The Board noted that the administrative law judge's decision was further supported by 20 C.F.R. §702.338 which provides that an administrative law judge has a duty to inquire fully into matters at issue and to receive all relevant evidence. *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

The administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. Here, as the administrative law judge misapplied the terms of his own Pre-Hearing Order, the Board vacated the administrative law judge's decision to exclude employer's videotapes and reports and remanded the case for the administrative law judge to consider the admissibility of this evidence. *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The Board held that it was within the administrative law judge's discretion to allow hearing testimony and declarations which were not offered in compliance with a pre-trial order requiring prior notice of proposed witnesses and documents, in that he properly found good cause for noncompliance based on the hearing witness's status as a rebuttal witness, and in that an opportunity to take post-hearing depositions of the declarant was provided. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in part and rev'd in part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

The Board held that the administrative law judge abused his discretion and violated Section 702.338 by excluding a labor market survey offered by employer as it was in direct response to Dr. Cavazos's deposition regarding claimant's ability to perform light duty work which raised, essentially for the first time, the issue of suitable alternate employment only four days before the pre-hearing time limitation for submission of evidence. The Board observed that, given the importance of the excluded evidence in this case, *i.e.*, the administrative law judge explicitly stated that there was no evidence

that suitable alternate employment was available to claimant, and the administrative law judge's use of permissive rather than mandatory language in his per-hearing order, employer's pre-hearing submission of its labor market survey to claimant did not warrant the extreme sanction of exclusion. The Board affirmed the administrative law judge's decision to exclude a physician's report offered by employer in violation of the pre-hearing order. The opinion of claimant's physician on the cause of claimant's injury remained unchanged since his initial report, and the administrative law judge rationally determined that employer could have obtained its doctor's opinion at an earlier date. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

The Board held that the administrative law judge did not abuse his discretion by admitting evidence that was not offered in compliance with the pre-hearing order. The Director provided verbal notice to employer the day before the hearing of his objection to employer's request for Section 8(f) relief, and he faxed employer a copy of Dr. Chun's report the same day. The Director subsequently attached the report as an exhibit to his closing brief. The administrative law judge granted employer's request to file a reply brief. Moreover, the administrative law judge rationally found that employer had actual or constructive notice of Dr. Chun's report approximately 18 months prior to the hearing. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011).

The Board affirmed the administrative law judge's decision to exclude a letter from claimant's treating physician offered by employer for failure to comply with the provision of the pre-hearing order requiring that discovery be completed 15 days prior to the hearing. Employer obtained the letter on an *ex parte* basis and thereafter provided it to claimant's counsel after the discovery deadline had passed. The Board held that employer did not demonstrate that it exercised due diligence in developing its evidence or that the administrative law judge abused his discretion in excluding the physician's letter. The Board rejected employer's contention that its submission of the letter was not governed by the discovery deadline provision of the pre-hearing order, holding that the administrative law judge rationally determined that employer's solicitation of claimant's treating physician's opinion as to the suitability of the jobs identified in employer's labor market survey was subject to that provision of the pre-hearing order. *Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011).

**Post-Hearing Evidence; Reopening Record on Reconsideration and Remand**

The administrative law judge erroneously determined that he did not retain jurisdiction to admit or consider relevant evidence on reconsideration. With regard to the new evidence submitted post-hearing, the Board interpreted it as a request for modification under Section 22 and directed the administrative law judge on remand to consider this evidence. With regard to "old" evidence which may have been discoverable pre-hearing, the Board stated that while it would ordinarily remand for the administrative law judge to consider admitting this evidence, in view of its decision to remand the case for the admission of additional evidence and as the evidence was relevant, it must also be admitted and considered by the administrative law judge. Thus, the administrative law judge was instructed to consider all post-hearing evidence. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986).

The Board held that the administrative law judge abused his discretion in denying employer's motion to reopen the record where the court of appeals, in remanding the case, specifically stated the administrative law judge could admit evidence relating to the applicability of Section 8(f), but not to the issue of causation. Without reopening the record, the administrative law judge could not realistically consider the Section 8(f) issue. *Champion v. S & M Traylor Bros.*, 19 BRBS 36 (1986).

Where employer failed to exercise due diligence in obtaining evidence prior to the hearing, the Board held that the administrative law judge acted within his discretion in declining to hold the record open after the hearing for the receipt of that evidence. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987).

The Board held that since Section 702.338 states that an administrative law judge may reopen a record at any time prior to issuing a compensation order, the administrative law judge acted within his discretion in issuing an initial decision reopening the record, directing that claimant submit additional evidence and ultimately awarding benefits on that evidence. Although captioned a "Decision and Order," the initial decision did not finally dispose of the issues and was thus in effect a non-final order reopening the record. *Cf. Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985) (where decision awarded benefits but raised new issue of Section 49 liability, Board held that the administrative law judge exceeded his authority in raising new issue in a final decision). While the extent of the discussion in the order also suggested that the administrative law judge could have concluded his consideration of the claim at that time, his decision to instead supplement the existing record was not reversible error. The Board also noted that as 29 C.F.R. §18.54, which limits an administrative law judge's authority to receive post-hearing evidence, is more restrictive than 20 C.F.R. §§702.338, 702.339, it is not applicable to an administrative law judge's determination on the admission of evidence, as it is inconsistent with the more specialized regulatory provisions. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

The administrative law judge did not abuse his discretion by refusing admission of post-hearing evidence when counsel waited 2 1/2 months before requesting an extension of time in which to make its post-hearing submission. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

Although the administrative law judge may hold the record open after the hearing for the receipt of additional evidence, the party seeking to admit evidence must exercise diligence in developing the claim prior to the hearing. The administrative law judge did not abuse his discretion by refusing to reopen the record for the submission of evidence regarding the extent of claimant's disability as he had previously held the record open and had granted two extensions of time for the submission of such evidence. *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989).

The administrative law judge has the duty to fully inquire into matters at issue and receive into evidence all relevant and material testimony and documents, and he may reopen the hearing to accomplish this duty. Accordingly, the administrative law judge did not abridge claimant's due process rights by seeking post-hearing the Director's participation and submission of exhibits. The Director submitted relevant evidence, and claimant was afforded the opportunity to respond. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

The Ninth Circuit rejected employer's contention that the administrative law judge erred in rejecting its offer of additional evidence on remand, as it held that the administrative law judge properly restricted the scope of the remand proceedings to the terms of the Board's remand order. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

The Board held that the administrative law judge abused his discretion and violated 20 C.F.R. §702.338 by refusing to reopen the record at the close of the hearing and to formally consider evidence offered by employer -- a labor market survey compiled by its vocational counselor -- and by refusing to allow the counselor to testify regarding his survey. The Board stated that the administrative law judge's denial precluded his consideration of relevant evidence concerning the salient issue in this case, post-injury wage-earning capacity, consisting of evidence of suitable alternate employment; in addition, the administrative law judge's denial violated notions of fundamental fairness because he had previously allowed claimant to depose Dr. Cox post-hearing regarding new restrictions placed on claimant. *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

The Board affirmed the administrative law judge's decision to allow claimant to conduct a post-hearing job search of the jobs identified by employer's vocational consultant, holding it within his discretion since employer did not inform claimant of the jobs prior to the hearing and in view of his duty to inquire fully into all relevant matters. However, the Board vacated the administrative law judge's findings that claimant conducted a diligent search and rebutted the showing of the availability of suitable alternate employment because the administrative law judge failed to allow employer the opportunity to cross-examine claimant or respond to his post-hearing affidavit, thereby violating its right to due process. Therefore, the Board remanded the case for further consideration after employer was given the chance to refute claimant's post-hearing statements. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

Following remand, the Board rejected employer's contention that the administrative law judge abused his discretion in declining to admit new vocational evidence on remand regarding claimant's post-hearing job search, as this evidence went beyond the scope of the Board's remand order. Moreover, the administrative law judge acted within his discretion in finding that employer failed to avail itself of all the opportunities available to it in attempting to rebut claimant's showing that he diligently, but unsuccessfully, sought post-injury employment. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

Where claimant submitted additional evidence post-hearing which the administrative law judge accepted, the Board held that as the administrative law judge directly addressed employer's objections to the admission of claimant's evidence, giving rational reasons for relying on it to rebut employer's evidence, and provided employer with every opportunity to submit additional contravening evidence, employer had not been denied its right to procedural due process. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

The Board affirmed the administrative law judge's ruling excluding from evidence medical reports claimant submitted at the deposition of a vocational counselor, as the reports were untimely and beyond the scope of the deposition. The Board further affirmed the administrative law judge's exclusion of post-hearing medical reports, as claimant failed to meet his burden of establishing that the administrative law judge's decision was arbitrary, capricious or an abuse of discretion. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board held that the administrative law judge acted within his discretion in rejecting evidence and arguments which were first presented to him in claimant's post-hearing brief. Although the insurance issue with which they dealt was listed on claimant's pre-hearing statement, it was not addressed at the hearing and claimant did not request the opportunity to submit post-hearing evidence on the matter. Therefore, the Board affirmed the administrative law judge's decision to reject the post-hearing submission of

evidence. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting on other grounds).

The Board held that the administrative law judge erred in refusing to admit into the record employer's evidence of claimant's acceptance and performance of a post-hearing security guard job in Tanzania. As this evidence was relevant and material to the issue of suitable alternate employment, which was before the administrative law judge for resolution, and as it was not available under after the close of the record but was submitted prior to the issuance of the administrative law judge's decision, it was admissible under 29 C.F.R. §18.54 and 20 C.F.R. §§702.338, 702.339. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

### Adverse Inference

An administrative law judge may draw an adverse inference against a party, concluding that where a party does not submit evidence within his control, that evidence is unfavorable. In this case, the administrative law judge declined to draw such an inference regarding claimant's refusal to only partially waive the attorney-client privilege with regard to the attorney who handled her separation proceeding. The Board affirmed the administrative law judge's finding that even if an adverse inference was drawn, there was substantial evidence that claimant and decedent were husband and wife at the time of his death. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

It is well-established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to it. The administrative law judge's denial of claimant's request for an adverse inference because it was not made at the beginning of the hearing as a preliminary matter is harmless error since claimant failed to establish facts which would indicate that the evidence requested provided relevant information to assist in the disposition of the issues in the case. *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

### Hearsay and Circumstantial Evidence

An administrative law judge may rely on hearsay testimony, as he is not bound by formal rules of evidence. Thus, the Board rejected the contention that the administrative law judge erred in awarding claimant back pay for a Section 49 violation for a number of days based only on hearsay testimony. *Powell v. Nacirema Operating Co., Inc.*, 19 BRBS 124 (1986).

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, in hearing a wrongful death claim brought by claimant, held the testimony of claimant's expert was inadmissible pursuant to Rules 702 and 703 of the Federal Rules of Evidence, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the decision on remand of the Ninth Circuit in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995), on the basis that the opinion lacked "scientific reliability" under the *Daubert* standard. As the administrative law judge could properly admit this opinion and find it probative, he had different evidence before him and was not required to give the district court's decision on the issue of causation collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

The Board rejected claimant's assertion that it was improper for the administrative law judge to base his decision on circumstantial evidence. Provided the evidence is

reasonably probative, it is admissible and the administrative law judge may rely on it in making his decision. Further, the Board may affirm a decision based on circumstantial evidence if that evidence meets the definition of substantial evidence. In this case, the administrative law judge's determinations of witness credibility were reasonable, and it was rational for him to rely on the testimony of those credible witnesses; thus, substantial evidence supported his conclusion that claimant's purpose for venturing into the depths of the darkened vessel was to smoke a marijuana cigarette in private. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

In this case decedent worked in the shipyards for 3 companies between 1956 and 1960, he was exposed to asbestos which caused mesothelioma and his death, and there was no dispute that Lockheed was, chronologically, his last maritime employer. The administrative law judge invoked the Section 20(a) presumption based solely on deposition testimony taken in an unrelated tort case, wherein the deponent testified that asbestos was present at Lockheed's facility during the period decedent worked there. The Board held that, although the deposition in question is hearsay, it was admissible in this administrative proceeding, as the administrative law judge found it to be reliable, probative and relevant, and as circumstantial evidence is permissible. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). *See also K.M. [McAllister] v. Lockheed Shipbuilding*, 42 BRBS 105 (2008); *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007). The Ninth Circuit reversed these decisions on the merits. *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

In a case where claimant submitted portions of a former co-worker's hearing transcript in support of his position that he was a covered employee, rather than having that person testify at claimant's hearing, the Board rejected employer's argument that the transcript was inadmissible. As the administrative law judge is not bound by formal rules of evidence, there was no need for claimant to establish that the transcript satisfied an exception to the hearsay rule. Further, as the evidence was relevant to the issue of claimant's status, the administrative law judge's decision to admit it was rational. *Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

**Parol Evidence**

The parol evidence rule provides that when the parties to a contract put their agreement in writing in a manner so that the terms of the agreement are certain, those terms cannot be varied on the basis of extrinsic evidence, unless the agreement is only partially integrated or is ambiguous. Then additional terms not inconsistent with the written terms or the construction of the terms may be established by extrinsic evidence. In this case, the Board affirmed the administrative law judge's resort to extrinsic evidence to determine if employer waived its Section 33(f) lien, as he rationally found that the third-party settlements were not fully integrated and were ambiguous. *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990), *aff'd in part and rev'd in part*, 954 F.2d 239, 25 BRBS 101(CRT), *modified in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

The Board held that it was within the administrative law judge's discretion to allow hearing testimony and declarations which were not offered in compliance with a pre-trial order requiring prior notice of proposed witnesses and documents, in that he properly found good cause for noncompliance based on the hearing witness's status as a rebuttal witness, and in that an opportunity to take post-hearing depositions of the declarant was provided. The Board further held that the administrative law judge could properly rely on these declarations and testimony, which constituted parol evidence, to determine whether third-party settlements involving claimant had actually occurred. The parol evidence was used not to attack the legal effect of a state court judgment but, rather, to construe the effect of any settlement agreement for purposes of the Longshore Act. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in part and rev'd in part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

While the Board has recognized that parol evidence may be used in construing settlements under Section 33, *see, e.g., Chavez*, 24 BRBS 71, the use of parol evidence appears to be proscribed under Section 702.242(a) in the case of Section 8(i) settlements applications. The administrative law judge violated 20 C.F.R. §702.242(a) by considering an affidavit submitted to him by an attorney from employer's legal department and relying on it to find that employer was represented by counsel. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In this "borrowed employee" case, the Board held that the administrative law judge acted within his discretion in determining that the indemnity clause contained in the contract between the lending and borrowing employers was ambiguous, and in considering parol evidence in interpreting this contract. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

**Discovery; Section 27 Sanctions**

Section 27(a) grants the administrative law judge broad power to direct and authorize discovery in support of the adjudication process. *See* 5 U.S.C. §556(c); 20 C.F.R. §§702.338 - 702.341; 29 C.F.R. §18.14 *et. seq.*; *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983); *Lopes George Hyman Constr. Co.*, 13 BRBS 314 (1981).

Pursuant to this power, the administrative law judge may compel depositions, *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982); *Lopes*, 13 BRBS 314, compel the production of documents, *Sledge v. Sealand Terminals Inc.*, 14 BRBS 334 (1981), and compel a claimant to undergo a vocational rehabilitation evaluation. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99 (1985); *Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983). The administrative law judge's discovery power is discretionary, and a refusal to issue an order is reversible error only if so prejudicial as to result in a denial of due process. *Bonner*, 15 BRBS at 325; *Carter v. General Elevator Co.*, 14 BRBS 90 (1981) (denial of motion to compel deposition affirmed where no prejudice shown).

Where a party fails to attend a deposition, the procedures in Section 27 should be followed to compel attendance. *Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981). The sanctions provided by Rule 37(d) of the Federal Rules of Civil Procedure do not apply.

Section 27(a) states that the administrative law judge may take such actions as compelling testimony and the production of documents, as well as other lawful actions necessary to enable him to effectively perform his duties. Under Section 27(b), where any person disobeys or resists a lawful order of the administrative law judge, neglects to produce any pertinent documents or other materials, refuses to appear after being subpoenaed or refuses to take the oath and testify, the administrative law judge shall certify the facts to the appropriate U.S. District Court which, after a summary hearing regarding the acts complained of, shall punish the offender in the same manner as for contempt committed before the court, or commit such person as if the forbidden act had occurred with reference to the process or in the presence of the court.

As Section 27(b) contains this specific sanction for such acts as violating a discovery order or refusing to provide materials as ordered, the administrative law judge may not utilize the Federal Rules or the general regulations at 29 C.F.R. Part 18 to dismiss a claim. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

**Digests**

In a D.C. Act case, the Board held that the administrative law judge erred in ordering a hospital to produce documents it asserted were protected by a D.C. privilege statute. The Board held that the local law applied, and the administrative law judge must address

whether the documents were discoverable under this statute. In addition, the administrative law judge violated the hospital's due process rights by granting employer's request for an order compelling discovery without allowing the hospital adequate time to respond. *Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987).

The D.C. Circuit held that the administrative law judge did not abuse his discretion in denying a motion to produce certain reports, where the reports would have been of only limited probative value. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Section 27(a) provides that a motion to compel maybe issued where a party refuses to be deposed or to answer interrogatories. If the order is resisted, Section 27(b) provides that the matter shall be referred to the appropriate U.S. district court for the imposition of sanctions. As this sanction is less drastic than the dismissal of the claim pursuant to Fed. R. Civ. P. 41(b), the Board held that the administrative law judge erred in dismissing the claim without considering the availability of less drastic sanctions. *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

The Board stated that a discovery ruling constitutes reversible error only if it is so prejudicial as to result in a denial of due process. In this case, the administrative law judge acted within his discretion in denying employer's motion to remand the case for claimant to undergo a second impartial medical examination where he found the report of the first such exam to be unambiguous, contrary to employer's contention. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Claimant was employed to work under a contract between employer and the Kingdom of Saudi Arabia to service and maintain various aircraft of the Royal Saudi Air Force, including C-130s. The Board held that the administrative law judge erred in denying claimant's motion to compel production of the contracts of sale of the C-130s as claimant sought to establish that his claim was covered under the Defense Base Act because he was injured while performing services under a subcontract or subordinate contract entered into by the United States. The administrative law judge's reliance on the testimony of employer's experts did not justify his denial of claimant's motion because neither expert was familiar with the sale of all of the C-130s. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

The administrative law judge acted within his discretion when he declined to schedule a formal hearing because claimant had repeatedly refused to comply with outstanding discovery requests. The administrative law judge also acted within his discretion in dismissing claimant's claims with prejudice due to his repeated and numerous abuses of the administrative process, including claimant's failure to comply with discovery. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993).

The administrative law judge's broad discretion to direct and authorize discovery includes limiting document requests and testimony based on relevance. The administrative law judge did not abuse his discretion by limiting post-hearing discovery to evidence relevant to the sole issue in dispute. Furthermore, the administrative law judge acted within his discretion and did not violate claimant's due process rights by prohibiting claimant from testifying post-hearing, since the administrative law judge admitted claimant's post-hearing sworn affidavits, which addressed the relevant issue. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

Claimant's Motion for Certification to the district court under Section 27(b) of the Act based on employer's refusal to comply with the administrative law judge's discovery order was held premature where employer had appealed the order to the Board and, therefore, had not yet resisted a lawful order. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

The Board held that employer had no direct remedy for reimbursement against Brad Valdez under the Act. Specifically, employer was not entitled to relief against the fraud committed by Brad Valdez under Sections 19, 27, and 31 of the Act. The Board noted that the Act provides only for a credit of excess payments against unpaid compensation due; no further compensation is due in this case to this claimant. Moreover, Section 31(a) provides the sole remedy against a claimant who has allegedly filed a false claim, and thus, employer's only remedy was to file a complaint with the appropriate United States Attorney. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000).

The Board affirmed the administrative law judge's finding that employer did not withhold relevant material from claimant where two of the four persons claimant subpoenaed could not be located, a third person verified compliance, there was no evidence to establish non-compliance on employer's part and employer's counsel offered to allow claimant to inspect the entire file in employer's office, but claimant declined the offer. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The Board affirmed the administrative law judge's decision to issue a protective order preventing claimant from inspecting employer's premises, as claimant did not sustain any prejudice in the prosecution of his claim as a result of the administrative law judge's denial of access to employer's facility. The Board observed that the administrative law judge did not abuse his discretion and claimant admitted that employer's eventual production of a number of photographs for the record "obviate[d] the need for the inspection." *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003).

The Board held that as employer's complaint was not an action to enforce compliance with a direct order of the administrative law judge, and claimant did not disobey a lawful

process, as he did not resist the administrative law judge's jurisdiction or a discovery order, employer's attempt to recoup benefits allegedly obtained by fraud must fail. Section 31(a) provides the sole remedy for allegations of fraud. The Board therefore reversed the administrative law judge's finding that Section 27(b) was applicable and vacated his certification of facts to the district court and the recommendation that claimant be made to repay employer. *Phillips v. A-Z Int'l*, 30 BRBS 215 (1996), *vacated*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

The Ninth Circuit held that the Board lacked jurisdiction to review the administrative law judge's certification of facts to the district court and the recommendation that claimant be made to repay employer. The court held that the express grant of fact finding and contempt power to the district court pursuant to Section 27(b) implicitly removes review power from the Board. In the absence of a clear statutory directive or interpretive regulations setting forth the procedural mechanism by which an administrative law judge must "certify the facts to the district court," the court held that the administrative law judge's issuance of his Supplemental Decision and Amended Supplemental Decision, which certified his finding that claimant filed a fraudulent claim and recommended sanctions, was a sufficient method of certification to the district court. *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

In a subsequent proceeding, the Ninth Circuit held that the filing by claimant of a fraudulent claim for benefits under the Act does not constitute disobeying or resisting any "lawful order or process" within the meaning of Section 27(b), as the term "lawful process" in the context of the contempt power generally refers to the use of summons, writs, warrants or mandates issuing from a court in order to obtain jurisdiction over a person, and claimant in this case did not refuse to comply in this manner. Moreover, the Act expressly provides mechanisms other than contempt sanctions, under Sections 31(a) and 48, for the filing of a fraudulent claim, demonstrating that Congress did not intend to permit an employer to seek a contempt citation in order to recover damages resulting from filing of fraudulent claims. Therefore, the Ninth Circuit affirmed the district court's dismissal of employer's complaint with prejudice, without addressing employer's arguments on the merits, on the ground that the district court lacked subject matter jurisdiction to impose sanctions on claimant. *A-Z Int'l v. Phillips*, 323 F.3d 1141, 37 BRBS 1(CRT) (9th Cir. 2003).

In light of the holding in *A-Z Int'l*, 179 F.3d 1187, 33 BRBS 59(CRT), the Board declined to review the administrative law judge's certification of facts to the federal district court regarding claimant's alleged misrepresentations, pursuant to Section 27(b). *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

In a case addressing several discovery issues, the Board initially held that the administrative law judge erred in dismissing claimant's claim with prejudice due to his failure to comply with various discovery orders regarding the release of his INS records

to employer. As the conduct cited by the administrative law judge involved claimant's failure to obey a lawful order, it fell within Section 27(b) of the Act, and since the Act contains a specific provision governing this situation, the rules of procedure relied upon by the administrative law judge in dismissing claimant's claim were not applicable. Under Section 27(b), the administrative law judge may certify the facts surrounding a party's sanctionable conduct to the district court for action. The Board affirmed the administrative law judge's finding that employer's motion to compel the release of claimant's INS records was timely where the deadline for discovery was established as September 25, 2001, and employer's initial request for the release was received by claimant's counsel on September 14, 2001. The administrative law judge rationally determined that in not signing the release, claimant made it impossible to know whether the INS would have timely replied to the request. However, the Board remanded the case to the administrative law judge as he did not adequately explain his conclusion that claimant's INS records were relevant to claimant's credibility or how claimant's credibility affected the disability issue presented, as the degree of scheduled impairment was at issue. Moreover, with regard to whether the INS records were relevant to rehabilitation efforts under the Act, Section 39(c) of the Act, and its implementing regulations, 20 C.F.R. §§702.501 *et seq.*, authorize the Secretary of Labor and her designees, the district directors, to provide for the vocational rehabilitation of permanently disabled employees; thus, whether claimant's vocational rehabilitation plan was reasonable or necessary is a discretionary determination for the district director to make, and the administrative law judge cannot review the plan or deny claimant rehabilitation services. With regard to the administrative law judge's denial of claimant's request for a protective order with regard to the release of his entire INS file, the Board held that the administrative law judge should have considered whether less intrusive means of employer's obtaining the relevant information existed due to allegations that claimant's family was in danger. The administrative law judge should have addressed alternative methods, such as releasing only part of the records, holding a telephone conference to discuss a limitation of use of claimant's records solely to this claim, or determining whether it would be in the best interest of both parties to have an *in camera* review of those records. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

The Board rejected claimant's contentions that employer's failure to comply with his pre-trial discovery requests and the administrative law judge's failure to continue the hearing for submission of that evidence resulted in a prejudicial hearing, since claimant's counsel, at the hearing, withdrew his request for a continuance. Moreover, claimant's post-hearing submission of the deposition of employer's worker, Mr. Smith, satisfied claimant's pre-trial discovery requests. Additionally, the Board held that there was no violation of claimant's due process rights, as claimant was provided notice and an opportunity to be heard prior to the administrative law judge's issuance of a decision. *Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009).

The Board rejected claimant's contention that the administrative law judge erred in 2006 in limiting the scope of discovery. At that time, claimant had requested admissions which employer admitted, and the administrative law judge did not err in relying on the admissions to limit deposition testimony to specified issues. Moreover, claimant's allegation of error in this regard is based largely on information that has come to light in the years after the discovery was limited. Nonetheless, as the administrative law judge erred in granting employer's motion for summary decision and the case was remanded, the Board stated that claimant may renew her request for additional discovery. The administrative law judge has the discretion to limit its scope and to set reasonable time frames for its completion. *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

In this case, which arises under the DBA, and is still before the district director, employer requested a subpoena from the administrative law judge ordering claimant to attend a deposition so that it may investigate its potential claim for reimbursement under the WHCA. Based on OALJ rules and on the Board's decision in *Maine*, 18 BRBS 129 (1986) (en banc), the administrative law judge found that he has the authority to issue the requested subpoena. The Board vacated the order and quashed the subpoena on the grounds that the administrative law judge abused his discretion in issuing an unnecessary subpoena, the purpose of which is to obtain information that is irrelevant for resolving the DBA claim. The Board did not address the administrative law judge's authority in general to issue a discovery subpoena while the case is before the district director; rather, it determined that, in this undisputed case, the administrative law judge abused his discretion in issuing a subpoena to compel a deposition in light of claimant's willingness to participate in an informal conference. Thus, although the administrative law judge has the authority to issue subpoenas, discovery is limited to issues relevant to the compensation claim before him, and the issue of employer's eligibility for reimbursement under the WHCA is not "in respect of" the DBA compensation claim. When the case is before the district director, discovery also is limited to those instances where it is "necessary." *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012).

In granting employer's motion to compel claimant to attend its vocational and medical evaluations, the administrative law judge stated that claimant "must attend the defense examinations (psychiatric, orthopedic and vocational)" in San Diego "at his own expense." As the regulations require a formal hearing to be held within 75 miles of a claimant's home, and claimant's home in Rosarito, Mexico, is 30 miles south of San Diego, the Board affirmed the administrative law judge's order setting San Diego as the appropriate venue for the examinations. However, the Board reversed the order that claimant must bear his own expenses for employer's evaluations; parties typically pay their own discovery costs. To the extent that the administrative law judge's order constitutes a sanction for claimant's failure to attend prior appointments, it is not an appropriate sanction in light of Section 27(b). *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014).