BRB No. 03-0523

JAMES E. LEWIS, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SSA GULF TERMINALS, INCORPORATED	)	DATE ISSUED:April 22, 2004
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order Canceling Hearing and Order of Remand and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Craig J. Mordock (The Mordock Law Firm), New Orleans, Louisiana, for claimant.

Scott W. McQuaig and W. Chad Stelly (McQuaig & Stelly), Metarie, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Canceling Hearing and Order of Remand and the Order Denying Motion for Reconsideration (2002-LHC-2632) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim under the Act for total disability due to shoulder and hip injuries sustained at work on February 11, 2001. Claimant fell into the Mississippi River from the port side of the vessel *M/V Hercules*, as he was walking through a dark, narrow passageway. Claimant's injuries necessitated two operations, and he also alleges he has depression and post-traumatic stress disorder as a result of the injuries. Employer voluntarily commenced payment of total disability benefits on March 29, 2001, retroactive to February 19, 2001.[1] In June 2001, claimant filed suit in Civil District Court for the Parish of Orleans, seeking damages under the Jones Act from employer and Ryan-Walsh.

The longshore claim was referred to the Office of Administrative Law Judges on August 14, 2002, apparently at employer's request. On October 30, 2002, the administrative law judge issued a pre-hearing order, setting the case for hearing on March 14, 2003. The parties engaged in discovery and underwent mediation in the hope of reaching an agreement. On March 10, 2003, four days before the scheduled hearing, claimant filed with the administrative law judge a motion to stay the longshore proceedings until his Jones Act suit is complete, alleging that the outcome in that case might render moot his claim under the Act. Claimant stated that the motion was being made at the last minute because of the attempt at mediation, which had failed.

Before employer responded to claimant's motion, the administrative law judge issued an Order on March 12, 2003, canceling the hearing and remanding the case to the district director. He stated that as the Jones Act and Longshore Act are mutually exclusive, he was remanding the case to the district director pending a determination of claimant's status as a seaman in state court. Employer filed a timely motion for reconsideration of the administrative law judge's Order. Employer contended that it was improper for the administrative law judge to issue the order without giving employer the opportunity to respond, and that, moreover, claimant should not be allowed to forum shop when his longshore claim is properly before the administrative law judge. Employer asked the administrative law judge to rescind his Order and to reschedule a formal hearing, or at a minimum, to allow the parties to fully brief the cancellation issue before he issued another order.

[1] Claimant contends in his response brief that employer stopped paying benefits after the informal conference was held in July 2002.

In an Order filed on April 22, 2003, the administrative law judge denied the motion for reconsideration. The administrative law judge stated that pursuant to *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991), claimant has the right to first pursue his Jones Act case, and that employer cannot force claimant to litigate his longshore claim first, as such would cause claimant to potentially forfeit his Jones Act remedy. Employer appeals the administrative law judge's Orders, and claimant responds, urging affirmance.

On appeal, employer contends it was denied the opportunity to respond to claimant's motion for a stay of proceedings before the administrative law judge issued his first order. Employer further maintains that the Jones Act case and the longshore claim can proceed simultaneously and that the cases cited by the administrative law judge do not support his decision to cancel the formal hearing while the Jones Act case plays out.

Claimant responds that the Board should decline to address employer's contentions, as its appeal is interlocutory. Claimant further contends that given the short time frame in which the parties were operating, employer had sufficient time to object to claimant's motion but did not do so and that, moreover, employer had the opportunity to object through its motion for reconsideration. Finally, claimant contends that the administrative law judge properly granted his motion for a stay of the proceedings so that he can first pursue his remedy under the Jones Act.

Initially, we reject claimant's contention that employer's appeal should be dismissed as interlocutory. While the appeal is not of a final order, the appeal is reviewable under the "collateral order doctrine." *See Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989). First, the order conclusively determines the disputed question, *i.e.*, the administrative law judge cancelled the hearing. The second requirement of the doctrine is also satisfied, as the order resolves an important issue that is completely separate from the merits of the action. The third prong of the collateral order doctrine requires that the order be effectively unreviewable on appeal from a final judgment. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988). Failure to review the administrative law judge's order will allow the case to be in indefinite abeyance, and as a result, the issue raised by employer regarding its right to an immediate hearing will evade review if a final decision is ever entered in the Longshore case. Thus, the third prong also is satisfied. *Rivere*, 872 F.2d 1187, 22 BRBS 52(CRT); *see also Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989) (Board will accept interlocutory appeal where it is necessary to direct the course of the adjudicatory process). We therefore will review the merits of employer's appeal.

Employer contends it was error for the administrative law judge to cancel the hearing without giving employer the opportunity to respond to claimant's motion for a stay of the proceedings. Generally, a party is to be given a "reasonable opportunity" to object to a motion. 29 C.F.R. §18.6(a), (b). In this case, claimant's motion was filed with the administrative law judge on March 10, 2003, only four days before the scheduled hearing. Employer's counsel states he was out of the office until March 11, when he received the motion. Employer's counsel contacted the administrative law judge on March 12, but was informed that the Order canceling the hearing had already been issued. We hold that the administrative law judge erred in issuing his Order before employer had the chance to respond, as employer's due process rights were violated. *See Niazy v. The Capitol Hilton Hotel*, 19 BRBS 266 (1987); 29 C.F.R. §18.6(a), (b). Nonetheless, we agree with claimant that this error is harmless as employer filed a timely motion for reconsideration and this opportunity to respond cured any defect in the administrative law judge's initial action. Moreover, employer's substantive contentions will be fully addressed by the Board in this decision.

Employer contends that it was error for the administrative law judge to cancel the hearing so that claimant can first pursue his Jones Act case in state court.[2] Employer contends that, pursuant to Section 19(c) of the Act, the administrative law judge must hold a hearing when one is requested by a party. Section 19(c) states in relevant part: "The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. §919(c). Section 19(d) transfers adjudicatory functions from the deputy commissioners to administrative law judges. 33 U.S.C. §919(d). Pre-1972 case law interpreted Section 19(c) as requiring the deputy commissioner to hold a hearing on a formally filed claim when one party so requested. *See Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir. 1960), *cert. denied*, 364 U.S. 884 (1960) (also discussing difference between Sections 14(h) and 19(c)); *Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794, *on reh'g*, 279 F.2d 75 (5th Cir. 1960). The Act as amended in 1972 also requires that the district director

[2] Employer contends that as claimant filed a claim under the Act and "agreed" in his motion for a stay of the proceedings that there is jurisdiction under the Longshore Act, he cannot subsequently seek another remedy first. In his motion to stay the proceedings, claimant stated he does not object to jurisdiction under the Longshore Act, but that he is first seeking a jury determination in state court on his Jones Act status. Claimant also declined to accept employer's stipulation that jurisdiction lies under the Longshore Act. In view of the entirety of claimant's motion, we reject employer's contention that claimant is precluded from arguing that the Jones Act case should be decided first.

forward a case for a hearing upon the request of either party. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone],* 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994). In the present case, the district director properly forwarded the case to the Office of Administrative Law Judges upon employer's request. This case thus does not present the issue of the district director's duty to forward a case, as this ministerial act has been performed. Rather, it concerns the administrative law judge's decision to cancel the scheduled hearing and stay the proceedings before him.

The Act and the regulations do not specifically address when an administrative law judge may cancel an oral hearing or hold a case in abeyance, except when claimant withdraws his claim, employer withdraws its controversion, or the parties waive their right to a formal hearing. 20 C.F.R. §§702.225, 702.346, 702.351; *see generally Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *but see* 20 C.F.R. §702.337(b) (addressing continuances and postponements); 29 C.F.R. §18.28(a) (allowing continuances for good cause shown). As the administrative law judge is afforded considerable discretion in managing the proceedings before him, *see generally City of San Antonio v. C.A.B.*, 374 F.2d 326 (D.C. Cir. 1967), employer must establish an abuse of that discretion in order to demonstrate error in the administrative law judge's decision to continue the hearing to another date pending the outcome of claimant's Jones Act case in state court. *See generally Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465 (1981).

The propriety of the administrative law judge's exercise of his discretion here rests on case law discussing the interplay between the Jones Act and the Longshore Act, which has been discussed at some length by the Supreme Court. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991), the claimant was a paint foreman, assigned to a vessel in the Persian Gulf. His duties consisted primarily of supervising the sandblasting and painting of fixtures on oil drilling platforms. In holding that a worker need not aid in a vessel's navigation in order to be a Jones Act seaman, the Supreme Court stated that "the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees." *Wilander*, 498 U.S. at 353, 26 BRBS at 82(CRT); *see* 33 U.S.C. §902(3)(G) (excluding from coverage "master or member of a crew of any vessel").

In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991), the Supreme Court addressed the issue of whether an employee who is an "enumerated" employee under Section 2(3) of the Longshore Act, *i.e.*, a shipbuilder, ship repairman, harbor worker, could nonetheless be a "seaman" under the Jones Act. Gizoni was a ship repairman who worked on floating work platforms. He filed a claim under the Longshore Act and received voluntarily paid benefits. He later filed a claim under the Jones Act.

The Court first observed that, due to the operation of Section 2(3)(G), the Longshore Act does not provide the exclusive remedy for enumerated employees as a matter of law. The Court stated, "By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act." *Gizoni*, 502 U.S. at 89, 26 BRBS at 47(CRT). The Court then addressed and rejected the employer's contention that a worker "arguably covered" under the Longshore Act should first have his status as a "member of a crew" adjudicated under the Longshore Act, and have his Jones Act case stayed. The Court stated that such an interpretation was contrary to Section 13(d) of the Act, 33 U.S.C. §913(d),[3] which tolls the time for filing a claim under the Act until one year after recovery is denied, in a suit brought in admiralty (such as a Jones Act suit), on the ground that such person was limited to a longshore recovery. The Court also stated that it is not "essential to the administration" of the Act that coverage decisions first be made by the Department of Labor. Relevant to the case presently before the Board, the Court rejected the employer's contention that the claimant's receipt of voluntary payments without a formal award precludes a subsequent Jones Act suit. The Court stated,

> This is so, quite obviously, because the question of coverage has never actually been litigated**.** Moreover**,** the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA. 33 U.S.C. §903(e).

Id., 502 U.S. at 91, 26 BRBS at 48(CRT). The Court also stated in a footnote that the doctrine of equitable estoppel is inapplicable as between the two statutes because Section

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[3] Section 13(d) states:

> Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.

See Bath Iron Works Corp. v. Director, OWCP [Acord], 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

3(e) prevents there from being any detrimental reliance.[4] *Gizoni*, 502 U.S. at 92 n.5, 26 BRBS at 48 n.5 (CRT).

Claimant in this case seeks to have his Jones Act case decided first because if the administrative law judge issues a formal order awarding benefits under the Longshore Act he could be precluded from pursuing his Jones Act case. The administrative law judge relied on this rationale to grant claimant's motion to stay the proceedings, citing *Sharp v. Johnson Brothers Corp.*, 973 F.2d 423, 26 BRBS 59(CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993). In *Sharp*, the claimant filed a claim under the Longshore Act and a suit under the Jones Act. He settled his longshore claim under Section 8(i), 33 U.S.C. §908(i). The district court dismissed the Jones Act claim on the basis of the election of remedies doctrine, and the Fifth Circuit affirmed. The Fifth Circuit stated that although the coverage issue was not expressly litigated in the settlement agreement, the claimant had had the full opportunity to argue for or against coverage before deciding to settle the claim. The court stated that when an administrative law judge issues a compensation order approving a settlement, a "'formal award' should be deemed to have been made under *Gizoni*, and the injured party may no longer bring a Jones Act suit for the same injuries." *Sharp*, 973 F.2d at 426, 26 BRBS at 62(CRT). The court concluded that Congress did not intend that the claimant be able to "pick and choose" his remedy based upon which will provide the larger recovery.[5] *Id.*, 973 F.2d at 427, 26 BRBS at

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[4] Section 3(e) states,

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e); *see, e.g., Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

[5] The Fifth Circuit in *Sharp* does not explicitly state that it is using either the doctrine of collateral estoppel, *see Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), or that of election of remedies, but merely affirms the district court's dismissal of the Jones Act claim. The district court relied on the election of remedies doctrine. Larson's treatise criticizes the use of the election of remedies doctrine as between these two statutes. The doctrine applies when claimant has two co-existent remedies, and here, the remedies are mutually exclusive. 9 LARSON'S WORKERS' COMPENSATION LAW, §146.05[2][c].

63(CRT). It follows from *Sharp*, which involved a "formal award" based on the parties' settlement, that if a formal award under the Act is issued after the administrative law judge makes findings of fact and conclusions of law, the claimant is precluded from pursuing a Jones Act suit, because he had the *opportunity* to litigate the coverage issue, even if it was not actually litigated.[6]

In this case, the administrative law judge stated in his order on reconsideration that pursuant to the holding in *Sharp,* claimant has the right to first pursue a determination of his status as a seaman in the Jones Act case so as not to jeopardize a potential Jones Act recovery should he first obtain a formal recovery under the Longshore Act. Thus, he stayed the proceedings until such time as the state court decides the Jones Act case. The administrative law judge's reasoning is based on the case law applicable in the Fifth Circuit, and employer has not established error in the administrative law judge's legal analysis. As the administrative law judge provided a rational basis for canceling the hearing and holding the case in abeyance, and as employer has not demonstrated an abuse the administrative law judge's discretion in this regard, we affirm the administrative law judge's action. *See generally Colbert*, 14 BRBS 465.

We cannot, however, affirm the administrative law judge's decision to remand the case to the district director. Rather, the administrative law judge must retain the case on his docket and award or deny benefits after a formal hearing is held. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); 20 C.F.R. §702.348. The Fifth Circuit has held that the district director must forward a case to the administrative law judge at any party's request. *See Boone*, 102 F.3d 1385, 31 BRBS 1(CRT); *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT). The district

[6] The Ninth Circuit has taken a contrary approach to the phrase at issue from *Gizoni.* In *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), the Ninth Circuit stated that the basis for the Supreme Court's holding in *Gizoni* was the presence of the Section 3(e) credit, so that, absent a fear of double recovery, the subsequent Jones Act suit cannot be barred. The Ninth Circuit also relied on a traditional collateral estoppel analysis, which is absent from the *Sharp* decision. The court stated that in the case before it, "coverage" under the Longshore Act was not actually litigated in the administrative proceedings and no findings of fact were made; thus the subsequent Jones Act suit is not barred by *res judicata* or collateral estoppel. *Figueroa*, 45 F.3d at 315-316, citing *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966) and *Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D.La. 1965); *see also Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 29 BRBS 129(CRT) (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548, 31 BRBS 34(CRT) (1997) (holding the subsequent Jones Act case is not barred because the doctrine of equitable estoppel is inapplicable); *Ryan v. McKie Co.*, 1 BRBS 221 (1974).

director having done so here, the administrative law judge may not remand the case to the district director unless a "new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing." 20 C.F.R. §702.336(a). Under such circumstances, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to 20 C.F.R. §702.316. As the administrative law judge essentially placed the case in abeyance, he must retain jurisdiction until such time as claimant moves to withdraw his longshore claim or the parties seek to reschedule the hearing upon the completion of claimant's Jones Act suit. Therefore, we vacate the administrative law judge's decision insofar as it remands this case to the district director.

Accordingly, we affirm the administrative law judge's Orders canceling the hearing. We vacate the administrative law judge's Order of remand to the district director.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge