SECTION 21--APPELLATE PROCEDURE

Section 21 provides for the establishment, composition and authority of the Benefits Review Board, as well as the review of compensation orders by the Board and United States Courts of Appeals.

Section 21(a) states the requirements for a timely appeal of the administrative law judge's decision.

The provisions regarding the Board and its authority are contained in Section 21(b)(1)-(5).

Section 21(c) addresses appeals of Board decisions to the U.S. Courts of Appeals.

Section 21(d) applies to the enforcement of final compensation orders.

Pursuant to Section 21(e), proceedings for suspending, setting aside or enforcing a compensation order, whether making an award or rejecting a claim, may not be instituted except as provided in this section and Section 18.

Section 21(a)--Timely Appeal and Briefing

Section 21(a) provides that a compensation order issued by an administrative law judge becomes effective when filed in the office of the deputy commissioner/district director as required by Section 19 and final unless appealed within 30 days after the date of filing. *See* 20 C.F.R. §§702.350, 802.205. "Filing" requires a formal act by the district director, which in the normal course involves attaching a certificate of filing and service. *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007).

In conjunction with Section 21(a), Section 19(e) provides that the administrative law judge's order "shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail" to the parties. *See* 20 C.F.R. §702.349. This language has led to some disagreement in the appellate courts as to whether mailing is part of "filing." In the context of addressing when an order is effective so that compensation is due under Section 14(f), the Fifth Circuit has held that mailing the order and the parties' receipt of it are not part of the "filing" process. *Carillo v. Louisiana Ins. Guar. Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009). *See Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994) (Section 14(f) case, holding that filing and mailing are two distinct procedures). The argument that proper service is required for a decision to be "filed" has also been raised in cases involving the timeliness of appeals under Section 21(a). *Compare Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989) (stating interpretation that "filing" is not complete until the claimant and employer are mailed copies pursuant to Section 19(e) is at least arguable, but noting that the statute does not explicitly make mailing part of filing), *with Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993) (holding that filing includes service on the parties).

Any appeal filed after the 30-day period must be dismissed as untimely filed; this provision is jurisdictional, and the Board lacks jurisdiction to review an untimely appeal. *Jeffboat*, 875 F.2d 660, 22 BRBS 79(CRT); *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983); *see Dailey v. Director, OWCP*, 936 F.2d 241 (6th Cir. 1991) (Section 802.205 addressing appeals is jurisdictional, but Section 802.407 addressing motions for reconsideration is not jurisdictional). Failure to serve a party may toll this time, *see Nealon*, 996 F.2d 966, 27 BRBS 31(CRT); *Jeffboat*, 875 F.2d at 664 n. 6, 22 BRBS at 82 n.6(CRT), but counsel's failure to receive a copy of the decision does not affect the time for filing, *Jeffboat*, 875 F.2d 660, 22 BRBS 79(CRT); *Gee*, 702 F.2d 411, 15 BRBS 107(CRT). *See Beach v. Noble Drilling Corp.*, 29 BRBS 22 (1995) (order on recon. en banc) (McGranery, J., concurring) (Brown, J., dissenting) (distinguishing *Nealon* as no allegation of improper service on a party and counsel's receipt is not required; sufficient evidence that claimant received decision despite improper mailing); *Benschoter v. Brady-Hamilton Stevedore Co.*, 18 BRBS 15 (1985) (improper mailing of decision or order to counsel does not extend the time for filing an appeal). *Cf. Patton v. Director, OWCP*, 763 F.2d 553 (3d Cir. 1985) (Black Lung case holding that "filing" under the Act and Black

Lung regulations, 20 C.F.R. §§725.478, 725.364, requires service on all parties and their counsel).

The regulation at 20 C.F.R. §802.205(b) allows for the filing a cross-appeals. Where a timely appeal is initiated by a party, any other party may file a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30-day time limit for filing an appeal. Section 802.205(b) also provides that where a party is not properly served with the first notice of appeal, that party may file a cross-appeal by filing within 14 days of the date that service is effected. *See Urso v. MVM, Inc.*, 44 BRBS 53 (2010) (cross-appeal dismissed where it was not filed within the time limits set by the regulation; that initial notice of appeal was not served on correct counsel did not toll limits).

The Board held that 20 C.F.R. §802.221(a), which applies to the computation of "any period of time" under the Board's Rules of Procedure, operates in conjunction with 20 C.F.R. §§802.205, 802.207 to extend the designated filing period by the weekend/holiday rule, as well as the date of mailing rule. Thus, the Board determined that when the 30th day was a Saturday, the filing period concluded on the following Monday, and it therefore accepted claimant's cross-appeal, dated and post-marked on that Monday, as timely filed. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

A notice of appeal is considered filed as of the date it is received in the Office of the Clerk of the Board. 20 C.F.R. §802.207. However, a notice of appeal filed with any other government office must be forwarded to the Board and will be considered filed with the Clerk as of the date it was received by that office. 20 C.F.R. §802.207(a)(2). If the notice of appeal is mailed and would be untimely based on the date of receipt by the Board, it may be considered filed as of the date it was mailed. 20 C.F.R. §802.207(b).

A timely request for reconsideration of an administrative law judge's decision will toll the time for appeal. 20 C.F.R. §802.206. *See McCabe v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 923 (1978), *rev'd on other grounds*, 593 F.2d 234, 10 BRBS 614 (3d Cir. 1979); *Gen. Dynamics Corp. v. Hines*, 1 BRBS 3 (1974). The OALJ and Board regulations provide that a timely motion for reconsideration is one filed within ten days of the service (OALJ) or filing (Board) of the administrative law judge's decision. 29 C.F.R. §18.93 (2015); 20 C.F.R. §802.206(b)(l). In *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, 52 BRBS 17 (2018) (en banc), *aff'd*, 796 F. App'x 930, 53 BRBS 89(CRT) (9th Cir. 2019), the Board held that the timeliness of a motion for reconsideration is controlled by 20 C.F.R. §802.206(b)(1) rather than 29 C.F.R. §18.93 because it is a program-specific regulation. *See infra*. An appeal of the original decision and the decision on reconsideration may be filed after the administrative law judge acts on the motion for reconsideration. 20 C.F.R. §802.206(d), (e).

Where a timely request for reconsideration is filed with the administrative law judge, any appeal to the Board must be dismissed as premature, regardless of whether it was filed prior or subsequent to the filing of the notice of appeal. A new appeal must be filed once the administrative law judge acts on the motion for reconsideration. 20 C.F.R. §802.206(f). *See Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996); *Tideland Welding Serv. v. Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

In *Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981), the Board dismissed an appeal as untimely on the ground that the time for filing an appeal of the original decision was not tolled by the administrative law judge's *sua sponte* issuance of an order correcting a clerical error. The administrative law judge issued an order multiplying the compensation rate by $66^{2/3}$ percent, which he had neglected to do in the initial decision. The Board relied on FRCP 60(a) which states that the correction of a clerical error does not affect the finality of the original order or toll the time for filing an appeal. *See also Burnham v. Amoco Container Co.*, 738 F.2d 1230 (11th Cir. 1984); *Schultz v. U.S. Marine Corps/MWR*, BRB No. 03-0473 (Mar. 17, 2004) (unpub.); *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 02-0486/A (Mar. 25, 2003) (unpub). However, when the administrative law judge issues a subsequent, substantive order, the time for filing an appeal begins to run only after the filing of the subsequent order. *See Grimmett v. Director, OWCP*, 826 F.2d 1015 (11th Cir. 1987). The premature appeal regulation is thus potentially applicable in this latter situation. *See, e.g., Burroughs v. SSA/Cooper Stevedoring*, BRB No. 13-0340 (Aug. 22, 2013) (unpub.).

A petition for review, accompanied by a brief, is due 30 days after the Board acknowledges a party's notice of appeal. 20 C.F.R. §802.211. Response briefs are due 30 days after receipt of the petition for review, 20 C.F.R. §802.212, and reply briefs are due 20 days after receipt of this document, 20 C.F.R. §802.213. Additional briefs may be allowed in the discretion of the Board. 20 C.F.R. §802.215. Extensions of these time periods may be granted by the Board. 20 C.F.R. §802.217. The requirements for filing an effective petition for review and brief are discussed in the section on Inadequate Briefing, *infra*.

If a petitioner fails to file its petition for review within these time limits, the Board will issue an order for the petitioner to show cause why the appeal should not be dismissed. 20 C.F.R. §802.217(b). If, due to a clerical oversight, the Board fails to issue such an order, it has entertained the appeal in the interests of justice where the claimant had assumed that her appeal had been properly filed and accepted, and was pending for two years. *Franklin v. Port Allen Marine Serv.*, 16 BRBS 304 (1984).

Failure to respond to a show cause order or submit a petition for review and brief generally results in the dismissal of the appeal. 20 C.F.R. §802.211(d). Where a party appears *pro se*, Section 802.211(e) allows the Board, in its discretion, to waive formal briefing and prescribe an alternate method of providing information necessary for the Board to decide the appeal. In general, a party who is *pro se* may file a statement in support of the appeal, but is not required to do so. The Board reviews appeals filed by parties without representation under its statutory standard of review, looking to whether the administrative law judge's decision is supported by substantial evidence, rational and in accordance with law.

Digests

Filing, Service and Mailing

On reconsideration of an earlier order dismissing claimant's appeal, the Board held that improper mailing of the administrative law judge's decision to claimant's counsel does not extend the time for filing an appeal with the Board. Although the service sheet also indicated that the decision was mailed to claimant at the wrong address, claimant's receipt of the decision was established by a Postal Service delivery receipt. As claimant's appeal was not filed within 30 days of the date the decision was filed, the Board properly dismissed claimant's appeal. *Benschoter v. Brady-Hamilton Stevedore Co.*, 18 BRBS 15 (1985).

The Seventh Circuit affirmed the Board's dismissal of employer's appeal as untimely, holding that the 30-day period for filing an appeal to the Board from an adverse administrative law judge decision begins to run on the day the administrative law judge's decision is filed in the office of the deputy commissioner. Under 20 C.F.R. §702.349, the failure to serve a copy of the administrative law judge's order on employer's counsel did not prevent the order from being "filed" and becoming effective for the purpose of the appeal period. The court noted that a different result could be reached if a party was not served at all, as that could involve a denial of due process. *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989).

The Ninth Circuit reversed the Board's determination that an appeal must be filed within 30 days from when the district director files the administrative law judge's order regardless of whether the parties have been served. The court held that under Section 19(e), service on the parties, i.e., claimant and employer, must be effected by certified mail before a compensation order is deemed filed. The court noted that 20 C.F.R. §702.349 is ambiguous on this, but that the black lung regulation, 20 C.F.R. §725.478, requires service on the parties and the court read the sections compatibly. In this case, because there was a dispute as to when claimant received the administrative law judge's order, the court instructed the Board to remand this case to the administrative law judge to give him the opportunity to conduct an evidentiary hearing as to when petitioner was served with the order. *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993).

The Board reaffirmed an earlier order dismissing employer's appeal as untimely. The time for filing a notice of appeal runs from the date the decision is "filed" by the district director, and not from the date counsel actually received the decision. Moreover, the Board held that *Nealon* was distinguishable, as there was no allegation of improper service on a party and the inquiry under the Act does not concern service on counsel. The Board also rejected the contention that FRCP 6(e) applies to add three days to the end of the 30-day period. Under Rule 81(a)(6), the Rules apply to "proceedings for enforcement or review" under Sections 18 and 21, and thus are not by their terms applicable to administrative proceedings. Furthermore, Rule 6(e) applies when the time period runs from "service" and

the Section 21(a) time period runs from "filing," and the Rule does not apply to extend jurisdictional provisions, such as enlarging the time in which a notice of appeal must be filed. *Beach v. Noble Drilling Corp.*, 29 BRBS 22 (1995) (order on recon. en banc) (McGranery, J., concurring) (Brown, J., dissenting).

"Filing" of a compensation order with the district director under Sections 19 and 21 of the Act and 20 C.F.R. §702.349 requires more than mere receipt of the administrative law judge's order by the district director. Filing requires a "formal act" by the district director, which in the normal course of events is attaching a Certificate of Filing and Service to the order. In this case, the district director did not take any formal action after he received the compensation order because the administrative law judge had already served the parties with an order of dismissal. Therefore, the order was not "filed" in the district director's office, and the 30-day period for filing a notice of appeal with the Board had not yet begun. Therefore, the Board improperly dismissed claimant's appeal as untimely filed. The court declined to address whether "filing" requires service (i.e., mailing) of the order upon the parties by the district director. *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007).

In affirming a Section 14(f) assessment where benefits were not paid until more than 10 days after a compensation order was filed, the Fifth Circuit held that the "filing" of a compensation order under Section 21(a) occurs, and thus the 10-day period for payment commences, once the district director formally dates the order and files it in his office. The court held that neither mailing the order nor the parties' receipt of the order is part of the "filing" process. *Carillo v. Louisiana Ins. Guar. Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009)

Where employer's cross-appeal was not filed within the time limits set by 20 C.F.R. §802.205(b), the cross-appeal was dismissed. Although the initial notice of appeal was not served on the correct counsel for the employer and the regulation provides that failure to properly serve a party with the initial notice of appeal will toll the time for filing until 14 days after proper receipt, that provision does not apply here as the insurance carrier was served and counsel is not a "party" as defined by Section 801.2(10). That the Board's acknowledgment of the initial appeal was not served on either carrier or the proper counsel also did not alter the result, as the time limits run from the filing of the notice of appeal and not the Board's acknowledgment of it. *Urso v. MVM, Inc.*, 44 BRBS 53 (2010).

Appealable Decisions

The Board viewed a deputy commissioner's letter purporting to alter language regarding reimbursement contained in an administrative law judge's decision as an impermissible Section 22 modification. As the deputy commissioner lacked authority to modify the administrative law judge's decision, and thus 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 without legal effect. Thus, as the administrative law judge's initial decision conclusively resolved the reimbursement issue, the Director's recourse was to appeal this determination within thirty days of the date this decision was filed in the office of the deputy commissioner. 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).

On reconsideration of its decision in *Maria v. Del Monte/S. Stevedore,* 21 BRBS 16 (1988) (McGranery, J., dissenting), which held that a letter from the Associate Director, OWCP, delaying the commencement date for the Special Fund's payment of benefits was a final decision appealable to the Board, the Board vacated that decision. The Board held that the letter was not an attempted modification of the administrative law judge's decision and was not a final appealable action. Rather, the letter notified claimant that the Fund was suspending compensation until a statutory credit was recouped. The associate director's actions in withholding compensation were similar to those of an employer who withholds benefits, taking the risk of incurring additional liability. Claimant's remedy in cases involving a unilateral termination of compensation is to seek a default order pursuant to Section 18. *Maria v. Del Monte/S. Stevedore,* 22 BRBS 132 (1989), *vacating on recon. en banc* 21 BRBS 16 (1988) (McGranery, J., dissenting).

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

The Board held that it lacked jurisdiction to review the merits of a decision approving a settlement as claimant did not file an appeal to the Board within 30 days of the date the decision was filed Claimant filed a motion to rescind the settlement with the administrative law judge within 30 days, but this motion could not be considered an appeal of the settlement order under 20 C.F.R. §802.207(a)(2) as the motion was not a misdirected notice of appeal to the Board and did not evince an intent to seek Board review of the approved settlement but was directed to the administrative law judge, who ruled on it. Additionally, the Board held that it was not in the interest of justice to consider claimant's motion to rescind the settlement agreement as a timely appeal of the approval of the settlement in

light of the policy favoring the finality of settlements. *Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff'd on recon.*, 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999)(table), *cert. denied*, 528 U.S. 1184 (1999).

The Fifth Circuit dismissed for lack of subject matter jurisdiction claimant's appeal of the Board's dismissal of his appeal. Claimant appealed an unfavorable recommendation of the district director directly to the Board prior to an evidentiary hearing before an administrative law judge. The Board dismissed the appeal as a memorandum of informal conference is not a final appealable action. The court stated that the Board correctly dismissed the appeal because it was not presented with anything within its statutory purview to review, pursuant to Section 21(b) and 20 C.F.R. §802.301. Rather, claimant was required to pursue his claim before an administrative law judge. As the Board did not issue a final order, the court of appeals similarly lacked jurisdiction over the appeal pursuant to Section 21(c). *Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

Timely Motion for Reconsideration to Administrative Law Judge

A motion for reconsideration directed to the administrative law judge must be timely to stay the appeal period to the Board. In 2015, the OALJ Rules of Practice and Procedure were amended to state that "A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party." 29 C.F.R. §18.93. Previously, as neither the regulations establishing procedures for hearings under the Act, 20 C.F.R. §702.331 *et seq.*, nor the general OALJ regulations at 29 C.F.R. Part 18, addressed the timeliness of a motion for reconsideration, the Board stated it would be guided by its regulations, 20 C.F.R. §802.206, in determining the timeliness of an appeal to the Board where a motion for reconsideration is filed; thus, the administrative law judge's resort to FRCP 59(e) was unnecessary. Claimant's motion was timely under the Board's regulations, rendering his appeal filed after the decision on reconsideration was issued also timely. There is no requirement for service on the parties in order for a motion for reconsideration to be considered filed. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

The Board held that claimant's motion for reconsideration of the administrative law judge's decision was filed in a timely manner because it was filed within 10 business days of the date the administrative law judge's decision was filed in the district director's office. The Board applied its regulations as neither the regulations at 20 C.F.R. Part 702 nor those at 29 C.F.R. Part 18 address this issue. As the10-day period for filing motions for reconsideration under the Board's regulation at 20 C.F.R. §802.206(a) is based on Rule 59(e) of the FRCP, and as Rule 6(a) of the FRCP applies to Rule 59(e) motions, the Board held Rule 6(a) applicable in determining the timeliness of a motion for reconsideration of an administrative law judge's decision for purposes of Section 802.206(a). As claimant's motion to the administrative law judge in this case was timely, Section 802.206(a) applied to toll the time for filing the appeal to the Board; consequently, claimant's appeal to the Board was 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 Fifth Circuit affirmed the Board's determination that, as claimant's motion for reconsideration of the administrative law judge's decision was timely, the regulation at 20 C.F.R. §802.206(a) tolled the time for filing an appeal to the Board. According deference to the Director's interpretation of the regulations, the court held that the 10-day period for filing motions for reconsideration under Section 802.206(b)(1) must be calculated using the computation method set forth in Rule 6(a) of the FRCP, which excludes intermediate weekends and holidays. *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *cert. denied*, 534 U.S. 1002 (2001).

Note, however, that the FRCP were amended in 2009. Rule 6(a) no longer excludes intermediate weekends and holidays. In *Zumwalt v. Nat'l Steel & Shipbuilding Co*., 52 BRBS 17 (2018) (en banc), *aff'd*, 796 F. App'x 930, 53 BRBS 89 (CRT) (9th Cir. 2019), the Board stated that the holding in *Galle* was superceded by amended FRCP 6(a). *See* digest, *infra*.

Effect of a Timely Motion for Reconsideration on Appeals to the Board

The Board's regulation, 20 C.F.R. §802.206 (formerly §802.205A), stating that the time for filing an appeal is tolled when a timely motion for reconsideration is filed, is not in conflict with Section 21(a) of the Act. Thus, the regulation is valid and enforceable, and the Board properly dismissed an appeal pursuant to the regulation. The rule serves the purpose of administrative and judicial economy. *Jones v. Illinois Cen. Gulf R.R.*, 846 F.2d 1099 (7th Cir. 1988) (black lung case).

The Fifth Circuit held that where an administrative law judge grants a party's motion to withdraw its motion for reconsideration, the time for filing a notice of appeal is measured from the date that the administrative law judge rules on the motion to withdraw. The Board therefore erred in not dismissing employer's appeal as premature pursuant to 20 C.F.R. §802.205A (now §802.206(f)), which states that any appeal shall be dismissed where a motion for reconsideration is pending regardless of whether the motion was filed prior to or after the appeal. The Board was required to dismiss the appeal as it was filed prior to the administrative law judge's dismissal of the motion for reconsideration. The Board's regulation makes no exceptions for motions for reconsideration which are later withdrawn. *Tideland Welding Serv. v. Sawyer,* 881 F.2d 157, 22 BRBS 122(CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

The Board dismissed a carrier's appeal as premature pursuant to Section 802.206(f) where it was filed prior to the date that the Director filed a timely motion for reconsideration with the administrative law judge. The fact that employer was precluded from filing a new appeal after the administrative law judge issued a decision on reconsideration, as the time for doing so had already expired, could not alter this result. Even though the regulation states that the dismissal is to be without prejudice, given the mandatory language of the regulation and the circuit precedent of *Sawyer*, the Board held it must dismiss the appeal. *Jourdan v. Equitable Equip. Co.*, 29 BRBS 49 (1995) (order) (Brown, J., dissenting), *aff'd sub nom. Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996).

The Fifth Circuit affirmed this decision, holding that the Board properly dismissed a party's appeal as premature where another party subsequently filed a timely motion for reconsideration before the administrative law judge. The court held that under Section 802.206(f), when a party files a motion for reconsideration any previously filed notice of appeal is nullified, and any party desiring Board review must wait until the motion for reconsideration has been resolved, and after the administrative law judge has filed his decision on reconsideration must file a new notice of appeal with the Board. *Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996).

In this case which was before the Board once previously, the Board rejected claimant's argument that it did not have authority to render its prior decision. The Board held that, although employer's appeal had been dismissed as premature pursuant to 20 C.F.R. §802.206(f), employer timely renewed its appeal following the administrative law judge's action on the motions for reconsideration. Specifically, employer's written communications with the Board complied with 20 C.F.R. §802.208 and established that it sought appeal of all of the administrative law judge's decisions, giving the Board jurisdiction over all issues raised. The Board rejected claimant's assertion that employer's second motion for reconsideration did not toll the time for appealing the

administrative law judge's initial decision. The Board held that there is no regulatory limit on the number of times a party may move for reconsideration of an administrative law judge's decision. In this regard the Board distinguished Black Lung appellate decisions stating that successive motions for reconsideration to the Board do not necessarily toll the time for filing an appeal with the courts. *Midland Coal*, 149 F.3d 558 (7th Cir. 1998). As only final decisions may be appealed to the Board, and as 20 C.F.R. §802.206(f) contemplates only one appeal of a case, the Board held that the case could not be appealed until after the administrative law judge acted on the second motion for reconsideration. Employer filed its appeal within six days of the issuance of the denial of the second motion for reconsideration, making the appeal timely. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd*, 303 F. App'x 928 (2d Cir. 2008).

In an unpublished decision, the Ninth Circuit held that where, as in this case, an administrative law judge "entertains" an untimely motion for reconsideration on its merits, the time for filing an appeal to the Board is tolled until the order on reconsideration is filed, citing *Bowman v. Loperena*, 311 U.S. 262 (1940). The court thus reversed the Board's dismissal of the appeal on the ground of untimeliness. Note that the court did not address 20 C.F.R. §802.206(a), (b)(1). *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017).

The Board affirmed its order dismissing the appeals as untimely because claimant's motion for reconsideration to the administrative law judge was untimely and the appeals were not filed within 30 days of the date the original decision was filed by the district director. The Board first held that the decision in *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017) does not apply because the administrative law judge denied reconsideration on the ground that the motion was untimely (in addition to ruling in the alternative on the merits). The Board next held that the ten-day period for filing a motion for reconsideration is controlled by the Board's regulation at 20 C.F.R. §802.206(b)(1) because it is a governing program regulation that takes precedence over the OALJ regulation at 29 C.F.R. §18.93, pursuant to 29 C.F.R. §18.10. The Board further held that due to the amendment of FRCP Rule 6(a), *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.), *cert. denied*, 534 U.S. 1002 (2001), no longer applies. Thus, the 10-day period for filing a motion for reconsideration with the administrative law judge counts only calendar days and does not exclude intermediate weekends and holidays. If the last day falls on a weekend or a holiday, the period will run until the next business day. 20 C.F.R. §802.221(a). In this case, claimant's motion for reconsideration was filed 13 calendar days after the administrative law judge's decision was filed in the district director's office. Therefore, the time for filing a notice of appeal was not tolled until the administrative law judge acted on the motion and the appeals were not timely filed with respect to the filing of the original decision. *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, 52 BRBS 17 (2018) (en banc), *aff'd*, 796 F. App'x 930, 53 BRBS 89(CRT) (9th Cir. 2019).

In dicta, that Board rejected the contention that pursuant to a combination of 29 C.F.R. §§18.30(a)(2), 18.32(c) and 18.93 a party is afforded a total of 13 days to file a motion for reconsideration with the administrative law judge. The service by mail provision of Section 18.30(a)(2)(ii)(C), (D), as referenced in Section 18.32(c), applies to service *on the parties* of items filed *with* the OALJ. It does not refer to service *by* either the district director or the administrative law judge. In addition, the OALJ Rules were specifically modeled on and intended to conform to

the Federal Rules of Civil Procedure. 29 C.F.R. §18.32(c) is modeled on FRCP 6(d), which is not applicable to a time period running from the date of entry of a judgment. *Zumwalt v. Nat'l Steel & Shipbuilding Co.*, 52 BRBS 17 (2018) (en banc), *aff'd*, 796 F. App'x 930, 53 BRBS 89(CRT) (9th Cir. 2019).

Notice of Appeal in General

The Board properly dismissed an appeal of a district director's fee award which was not filed within 30 days. A request for a hearing before an administrative law judge, which was made within the 30-day period, does not constitute a notice of appeal to the Board. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531 U.S. 956 (2000).

The Board held that as the administrative law judge acted upon the settlement agreement submitted by the parties within the statutory time-frame for approval directed by Section 8(i)(1), the language contained therein which provides for approval of a settlement agreement by operation of law "unless specifically disapproved within thirty days," was not applicable. The Board therefore rejected the Director's contention that employer's appeal was untimely, since in this case, the date of filing of the administrative law judge's decision by the district director, September 3, 1998, is the pertinent date for determining the timeliness of the parties' subsequent actions, and employer's motion for reconsideration before the administrative law judge and appeal to the Board each fall within the statutory time-frames set out in the Act and regulations, 33 U.S.C. §921; 20 C.F.R. §§702.350, 802.206(a). *Cochran v. Matson Terminals, Inc*., 33 BRBS 187 (1999).

The Board rejected the employer's contention that claimant did not timely appeal the first administrative law judge's forfeiture order under Section 8(j) as claimant had not been adversely affected or aggrieved by that decision until the second administrative law judge relied on the order to deny permanent partial disability benefits. Moreover, the first forfeiture order did not conclusively resolve the issue, as the parties raised the issue before the second administrative law judge and he independently addressed it. *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd*, 161 F. App'x 178 (2d Cir. 2006).

The Board denied employer's motion to dismiss in a case where the injured employee died prior to the filing of the notice of appeal. The Board held that decedent's attorney had the authority to file the timely notice of appeal on behalf of decedent's estate. The Board relied on Section 19(f)'s provision that benefits may be paid after the death of an injured employee, Section 802.402(b)'s provision that an appeal may be dismissed only if there is no person who wishes to continue the action, and FRAP 43(a)(2)'s provision that a decedent's attorney of record, if there is no personal representative, may file a notice of appeal. Additionally, the Board granted decedent's widow's motion to substitute her as the claimant of record, as she was named the representative of decedent's estate, albeit outside the 30-day appeal period. *M.M. [McKenzie] v. Universal Mar. APM Terminals*, 42 BRBS 54 (2008).

Timely Petition for Review

The Board rejected an employer's request, made in a response brief, that claimant's appeal to the Board be dismissed because claimant did not file a timely Petition for Review and brief. The Board stated that employer's motion had not been presented in a separate document, as is required by 20 C.F.R. §802.219(b), that it was unclear from the case file whether claimant's Petition for Review and brief had in fact not been filed in a timely fashion, and that the documents had been submitted "within a reasonable period of time." *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

The Board denied employer's "motion" to dismiss claimant's petition for review and brief as untimely, as that "motion" was included in employer's response brief and did not comply with Section 802.219(b) which requires motions to be made in separate documents. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting on other grounds).

Section 21(b) – Establishment of the Benefits Review Board

Section 21(b)(l), enacted in the 1972 Amendments, provides for the establishment of the Benefits Review Board. 20 C.F.R. §§801.101 to 801.203.

Prior to the 1972 Amendments decisions of the deputy commissioners were appealed to the U.S. District Court for the area in which the injury occurred. 33 U.S.C. §921(b) (1970) (amended 1972). Under the 1972 Amendments, decisions are issued by administrative law judges, 33 U.S.C. §919(d), and are appealed to the Board and then to the U.S. Courts of Appeals. *See Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976).

The members of the Board are appointed by and serve at the discretion of the Secretary of Labor. *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), *cert. denied*, 462 U.S. 1119 (1983); 20 C.F.R. §801.201(d). The *Kalaris* decision contains a comprehensive discussion of the creation of the Board and its jurisdiction, holding that the Board is not an Article III tribunal but a quasi-judicial agency whose members serve indefinite terms at the discretion of their appointing officer.

The Board was created to perform the functions formerly performed by the U. S. District Courts. *See Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73, 4 BRBS 190 (3d Cir. 1976). As a quasi-judicial agency, the Board is not a party in the courts of appeals. *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975) (granting the Board's unopposed motion to dismiss itself as a respondent in a section 921(c) review proceeding). *Accord Director, OWCP v. E. Coal Corp.*, 561 F.2d 632, 648-49 (6th Cir. 1977) ("Just as a District Court is not a necessary party in this court for review of its decision, we hold the Benefits Review Board is likewise not a necessary party to this litigation."); *Nacirema*, 538 F.2d 73, 4 BRBS 190 (Board now performs the function which prior to 1972 LHWCA amendments was performed by a district court; Board, like the district court, has no duty or interest in defending its actions on appeal); *ITO Corp. of Baltimore v. Benefits Review Board*, 529 F.2d 1080, 3 BRBS 88 (4th Cir. 1975) (sufficient adversity between employer and claimant; Board's participation unnecessary to ensure proper litigation), *dismissal of Board noted and left undisturbed upon rehearing en banc*, 542 F.2d 903, 907 n.4 (1976), *cert. denied*, 433 U.S. 908 (1977); *Offshore Food Serv. v. Benefits Review Board*, 524 F.2d 967, 3 BRBS 139 (5th Cir. 1975) ("Neither [Section 21(c) nor Rule 15(a)] requires the Board to be a party nor is its presence as a party necessary to effectuation of orders this court may enter").

Under the 1972 Act, the Board was composed of three members. The 1984 Amendments increased this number from three to five, and the five members appointed by the Secretary are referred to as the permanent members of the Board. The 1984 Amendments also provided the Chairman, who is designated by the Secretary, the authority, as delegated by the Secretary, to "exercise all administrative functions necessary to operate the Board." 33 U.S.C. §921(b)(l).

Section 21(b)(2) changes a quorum from two members to three, and it states that official action can be taken on the affirmative vote of three members. This provision applies where the five permanent members are sitting en banc. 20 C.F.R. §801.301. Section 21(b)(5) states that, notwithstanding subsections (1) through (4), up to four Department of Labor administrative law judges may be designated by the Secretary to serve as temporary Board members for a period not to exceed one year. The Board is authorized to delegate any or all authority it may exercise to three-judge panels; each panel shall have no more than one temporary judge and two members shall constitute a quorum of a panel. 20 C.F.R. §801.301(b). Any aggrieved party can petition the entire permanent Board for review of a panel's decision within 30 days after entry of the decision. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. If the majority of the permanent members agree, the petition shall be granted.

Authority of the Benefits Review Board

Introduction

Section 21(b)(3) contains the Board's statutory grant of authority. It authorizes the Board to hear and determine appeals that raise "a substantial question of law or fact taken by a party in interest from decisions with respect to claims of employees" under the Act and its extensions. The Board's orders must be based upon the hearing record, and the findings of fact in the administrative law judge's decision "shall be conclusive if supported by substantial evidence in the record considered as a whole." The subsection concludes by stating that the payment of the amounts due under an award shall not be stayed pending final decision unless ordered by the Board upon a showing that "irreparable injury would otherwise ensue to the employer or carrier."

With regard to factual issues, the Board reviews the decision being appealed to determine whether the findings of fact are supported by substantial evidence; if so, they must be affirmed. The Board is not empowered to engage in *de novo* review or to accept new evidence. 20 C.F.R. §802.301. Any new evidence sent to the Board will be returned. 20 C.F.R. §802.301(b). If a party considers new evidence necessary to the claim, modification may be sought under Section 22 in accordance with the procedures laid out in Section 802.301(c).

In Section 21(b)(3) Congress authorized the Board to decide questions of law, which include determinations of the consistency of a regulation with the underlying statute. As the Board was created to perform the functions formerly performed by the U. S. District Courts, s*ee Nacirema Operating Co., Inc. v. Benefits Review Board*, 538 F.2d 73, 4 BRBS 190 (3d Cir. 1976), and the district courts had authority to decide the legal question of the validity of a regulation, that authority was transferred to the Board. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984); *Carozza v. U. S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984). *See Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994). *See also Rivere v. Raymond Fabricator, Inc.*, 18 BRBS 6 (1985), *rev'd sub nom. Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989) (holding 20 C.F.R. §802.105 invalid as inconsistent with Section 21(b)(3)). The Board also has the authority to decide the constitutional validity of the statutes and regulations within its jurisdiction. *Gibas*, 748 F.2d 1112; *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020); *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002); *Herrington v. Savannah Mach. & Shipyard Co.*, 17 BRBS 196 (1985).

Section 21(b)(4) states that the Board may, on its own motion or at the request of the Secretary, remand a case for further action; the consent of the parties is not a prerequisite to remand by the Board. 20 C.F.R. §802.404. Where a case is remanded, additional

proceedings shall be initiated and actions taken as directed by the Board. 20 C.F.R. §802.405(a).

The Board can issue summary *per curiam* opinions. *Kicklighter v. Ceres Terminal, Inc.*, 12 BRBS 323 (1980), *aff'd on recon.*, 13 BRBS 109 (1981), *aff'd mem.*, 665 F.2d 1040 (4th Cir. 1981) (note that the portion of the Board's reasoning in its decision on reconsideration has been superseded by the decision in *Kalaris*, 697 F.2d 376).

The Director of the Office of Workers' Compensation Programs of the Department of Labor (Director, OWCP) has no review authority over Board decisions and does not speak for the Board; the Board is not bound by the Director's interpretation of regulations, *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985), although the Board does accord deference to his reasonable interpretations. *See* Deference, *infra*. The Act gives the Board final review authority within the Department of Labor, and its decisions are reviewed by the United States Courts of Appeals. 33 U.S.C. §921(b)(3), (c). In *Boating Indus. Ass'ns v. Marshall*, 601 F.2d 1376 (9th Cir. 1979), the Ninth Circuit concluded that employers who had brought suit challenging Notice No. 21 issued by the Director, OWCP, wherein the Department indicated its opinion that recreational boat builders were subject to the Act, lacked standing to do so. The court reasoned that the Director's legal opinion had no adverse effect on the industry and that the industry would have to wait for a ruling by the Board on an actual case as to whether the particular employers were covered under the Act. The Ninth Circuit observed that neither the Secretary nor the Director, OWCP, could dictate to the Board the manner in which the Longshore Act should be interpreted. *See also Kalaris*, 697 F.2d 376.

The tribunal vested with authority to determine compensation liability also has authority to adjudicate insurance contract disputes arising out of claims filed under the Act. *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984) (the administrative law judge has such authority). In *Brady v. Hall Bros. Marine Corp.*, 13 BRBS 854 (1981), the Board concluded that it had the authority to hear appeals involving whether an insurance contract has been issued. However, in *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981) (Smith, S., dissenting), the Board concluded it had no jurisdiction to entertain an appeal by two insurance companies disputing a right to reimbursement where the claim underlying the dispute was no longer in issue. The Board concluded that without claimant's presence in the appeal, accepting jurisdiction would be inappropriate. Subsequent cases on these issues have focused on the administrative law judge's authority to hear insurance issues rather than the Board's authority on appeal; if the administrative law judge properly has jurisdiction over an issue because it involves an "question in respect of" a claim under the Act, *see* 33 U.S.C. §919(a), it may be appealed to the Board. These cases are discussed under Section 19, and essentially hold that the administrative law judge may address all issues necessary to determining the employer or carrier liable for benefits, but purely contractual disputes between two carriers regarding indemnification are not "questions in respect of a claim." *Compare Temp. Emp't Services v. Trinity Marine Grp., Inc. [Ricks]*,

261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), and *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996).

Once a party appeals an administrative law judge's order to the Board, jurisdiction over the case is transferred to the Board, and the administrative law judge is without authority to conduct a hearing. *Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465 (1981).

Beginning in 1996, Congress included a provision in the Department of Labor Appropriations Act, Public Law No. 104-134, 110 Stat. 1321-211, 1321-219, under which the Department was prohibited from using appropriated funds after September 12, 1996, to review cases which had been pending for more than a year before the Board as of that date. Those pending for that time and not acted upon were to be considered affirmed and final on September 12, 1996, and thus appealable to the courts of appeals under Section 21(c). Thereafter, annual appropriations acts through 2005 contained similar language, stating that an appeal pending for more than one year before the Board without action would be considered affirmed by the Board on its one-year anniversary. This language has been omitted since the 2006 appropriation act.

Digests

In General

In the absence of a decision on an issue by the Eleventh Circuit, decisions issued by the Fifth Circuit prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981). *See Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982).

Determining it had the authority to decide the constitutionality of the 1984 Amendments, the Board held that retroactive application of the retiree provisions was constitutional. *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989).

The Fourth Circuit held that the Board had the authority to dismiss the Director's appeal as abandoned pursuant to 20 C.F.R. §802.402(a) because the deputy commissioner did not forward the record to the Board after three years and two requests for the record. For purposes of transmitting the record to the Board, the deputy commissioner is the Director's agent and the principal is accountable for the agent's failure to perform delegated duties. *Director, OWCP v. Hileman*, 897 F.2d 1277 (4th Cir. 1990).

The Fifth Circuit held that a potential three-year delay in the Board's review of the case does not violate the aggrieved party's due process rights absent an explanation as to why the delay was unreasonable. *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989).

The Board stated that it regards its unpublished Decisions and Orders as lacking precedential value. Therefore, unpublished Board decisions generally should not be cited or relied upon by parties in presenting their cases. *Lopez v. S. Stevedores*, 23 BRBS 295 (1990).

The Board followed a Fifth Circuit case, *Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), in a case presenting the same issue arising in the Fourth Circuit. The Board reasoned that it was the only appellate case on point, and that the law of another circuit was instructive in the absence of definitive precedent. *Barnard v. Zapata Haynie Corp.*, 23 BRBS 267 (1990), *aff'd*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991).

The Board followed a Fourth Circuit case, *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), in a case arising in the Fifth Circuit, since the Fourth Circuit's law on suitable alternate employment was developed based on Fifth Circuit law. *Green v. Suderman Stevedores*, 23 BRBS 389 (1990), *rev'd sub nom. P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). On appeal, however, the Fifth Circuit disagreed with the Fourth Circuit's interpretation.

Claimant's failure to respond to one of employer's arguments on appeal does not constitute an admission, as the Board is not bound by technical rules of appellate pleading and procedure. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

The Board rejected claimant's argument that it possessed the equitable authority to set aside a settlement approved under Section 8(i) fifteen years earlier in order to sidestep the law that settlements are not subject to modification. The Board stated it is not a "court," *citing Kalaris*, 697 F.2d at 381, and held that the subject matter jurisdiction of the Board is confined to rights created by Congress. While claimant may have possessed new medical literature which may have bolstered the theory of his case in 1983, he was precluded from setting aside an accord on the grounds specified in Section 22. The Board noted fraud was not alleged. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

The Eighth Circuit held that a delay of more than four years from the filing of employer's notice of appeal of the administrative law judge's decision to the issuance of the Board's Decision and Order was not unreasonable or a denial of due process where the delay resulted from employer's prior appeal to the Eighth Circuit of the Board's order denying employer's motion to stay payments and where the record had to be reconstructed upon appeal to the Board after it was lost. *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Where INA settled with claimant after the administrative law judge's decision on remand, the Board held that 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 which remained. The Board explained that this case did not involve a contract dispute and thus was not analogous to *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT). Rather, it involved the question of who was liable for claimant's benefits and, regardless of the fact that claimant had been paid in full, the issue was one "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, *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), which is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

The Board rejected employer's argument that claimant could not raise the issue of the Board's jurisdiction in this appeal because he failed to do so after the Board issued its orders accepting the appeal and declaring the issues it would address. As subject-matter jurisdiction may be raised at any time, and as only final decisions may be appealed, the Board rejected employer's arguments against claimant's raising the issue at this time. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd*, 303 F. App'x 928 (2d Cir. 2008).

The Board on reconsideration rejected employer's assertion that the district director's order suspending claimant's compensation precluded the Board's jurisdiction over claimant's appeal pursuant to Section 19(h). The Board stated that while Section 19(h) would affect proceedings on the merits of the claim for compensation, it does not affect a timely appeal challenging the validity of the suspension order itself. *L.D. [Dale] v. Northrop Grumman Ship Sys., Inc.*, 42 BRBS 46, *denying recon. in* 42 BRB 1 (2008).

The Board denied employer's motion to dismiss in a case where the injured employee died prior to the filing of the notice of appeal. The Board held that decedent's attorney had the authority to file the timely notice of appeal on behalf of decedent's estate. The Board relied on Section 19(f)'s provision that benefits may be paid after the death of an injured employee, Section 802.402(b)'s provision that an appeal may be dismissed only if there is no person who wishes to continue the action, and FRAP 43(a)(2)'s provision that a decedent's attorney of record, if there is no personal representative, may file a notice of appeal. Additionally, the Board granted decedent's widow's motion to substitute her as the claimant of record, as she was named the representative of decedent's estate, albeit outside the 30-day appeal period. *M.M. [McKenzie] v. Universal Mar. APM Terminals*, 42 BRBS 54 (2008).

The Board declined claimant's request that the Board convene an informal conference pursuant to Section 28(b). Although Section 28(b) states that the "deputy commissioner or Board shall set the case for informal conference," the Board concluded that under Section 21, the statutory basis for its authority, Board does not have the authority to hold informal conferences, but is restricted to its review function. The Board noted that claimant faces a predicament regarding fee liability should the district director's memorandum of informal conference recommendations be accepted by employer, but stated that this concern can be addressed only by Congress. *J.R. [Robinson] v. NGSS/Ingalls Operations*, 43 BRBS 86 (2009).

The Board rejected the contention that the requirement of Section 2(14) that acknowledged illegitimate children be dependent upon the decedent violates the Equal Protection Clause of the Fifth Amendment. Applying the Supreme Court's decision in *Mathews v. Lucas*, 427 U.S. 495 (1976), the Board held that Section 2(14) does not "broadly discriminate between legitimates and illegitimates, without more," but merely withholds a presumption of dependency "in the absence of any significant indication of the likelihood of actual dependency." *Lucas*, 427 U.S. at 513. In

so doing, the Board distinguished this case from Supreme Court decisions in *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), which invalidated statutes denying all benefits to illegitimate children solely because of their status. The Board held that the administrative law judge properly looked to the common meaning of the term "dependency," *i.e.*, not self-sustaining, relying on for support, or relying on for contributions to meet the reasonably necessary expenses of living, in determining whether decedent's illegitimate daughter was, at the time of his death, dependent upon him for purposes of determining her entitlement to survivor benefits under the Act. The Board affirmed the administrative law judge's finding that the child was not dependent on decedent, and thus not entitled to survivor's benefits, as it is supported by substantial evidence. *Duck v. Fluid Crane & Constr. Co.*, 36 BRBS 120 (2002).

The Board has the authority to address constitutional challenges to the Act or regulations. The Board addressed and rejected claimant's constitutional challenges to Section 8(c)(23), 2(10), and Section 702.601(b) concerning which version of the AMA *Guides* is applicable. Following a thorough discussion of the non-delegation doctrine, the Board held Congress and the Department did not improperly delegate authority to the AMA because the statute and the regulation merely rely on the AMA's work as a technical tool for rating permanent impairment. The Board also rejected Claimant's *ex post facto*, due process, and vested right arguments. The Board affirmed the award of benefits for a 65% impairment under the 6th Edition of the AMA *Guides* as supported by substantial evidence and in accordance with law. *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020).

One Year Period for Decision

The Board denied claimant's motion to maintain his appeal on the Board's docket for 60 days beyond the one-year anniversary of the appeal, noting that Public Law 104-208 does not contain the election provision that was contained in Public Law 104-134. The Board noted, however, that it considered the one-year period to run from the date the last appeal is filed in a case. *Barker v. Bath Iron Works Corp.*, 30 BRBS 198 (1996) (order).

The Eleventh Circuit held that an administrative law judge's decision which was administratively affirmed by the Board without review pursuant to Public Law No. 104-134 under which the Department of Labor was prohibited from using appropriated funds after September 12, 1996, to review cases which had been pending for more than a year as of that date, was final and ripe for review by that court. The court stated that Congress has the power to amend the substantive law governing review of these cases through an appropriations bill. *Donaldson v. Coastal Marine Contracting Corp.,* 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997).

The Fifth Circuit noted that the Act affords employer a full pre-deprivation, trial-type hearing before an administrative law judge, as well as a post-deprivation hearing in the Courts of Appeals. Consequently, the Fifth Circuit concluded that employer was not deprived of property without due process because of the administrative affirmance of the administrative law judge's decision after it was pending before the Board for more than one year, and thus, affirmed the constitutionality of the "one-year legislation." *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *see also Hall v. Consol. Emp't Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The Ninth Circuit held that Public Law 104-134, which limited the time an appeal may remain pending before the Board to one year, did not violate the constitutional separation of powers principles. The court stated that the Board is a "constitutionally permissible adjunct tribunal" over which Congress has broad authority. Consequently, the court had jurisdiction to review the two cases before it. Moreover, the court held that Public Law 104-134 does not preclude a motion for reconsideration to the Board of a case which was administratively affirmed because it remained pending for over one year; therefore, a motion for reconsideration tolls the sixty-day period during which a party may appeal a case to the court. Consequently, the court held that the appeals in these two cases were timely. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The D.C. Circuit held that the Public Law 104-134 is without effect on the District of Columbia Workmen's Compensation Act of 1928 inasmuch as since 1982 the D.C. Act

may no longer be amended by cross-reference to the Longshore Act. *Washington Metro. Area Transit Auth. v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

The Third Circuit held that by issuing a decision on September 12, 1996, more than three years after the Director filed an appeal, the Board was deprived of jurisdiction pursuant to Public Law 104-134. The court held that the language of the appropriations bill required that the Board act "before" Sept. 12 on any appeal pending for more than one year. The court held that the Board's delay caused its remand of the case to become a nullity, thereby making the administrative law judge's grant of Section 8(f) relief to employer a final order which the court had jurisdiction to review. *Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132(CRT) (3d Cir. 1998), *vacating Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996); *see also Burton v. Stevedoring Services of Am.*, 196 F.3d 1070, 33 BRBS 175(CRT) (9th Cir. (1999).

The automatic affirmance provision of Public Law 104-134 applies in cases brought under the Defense Base Act, due to provision of that Act incorporating the Longshore Act. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998).

The Board rejected employer's contention and held that its decision on the merits was issued in a timely manner and in accordance with Public Law 104-134. Specifically, the Board stated that, within one year of the date of appeal, it dismissed employer's appeal of the administrative law judge's decision and remanded the case to the district director for reconstruction of the record. Thus, action was taken within the appropriate time limits. Upon receiving the reconstructed record, the Board then commenced a new one-year time limit, and it rendered a decision on the merits within that time. *McKnight v. Carolina Shipping Co.*, 32 BRBS 251 (1998), *aff'g on recon en banc* 32 BRBS 165 (1998).

In its motion for reconsideration, employer contended that, pursuant to the Appropriations Act of 1998, Pub. L. 105-78, the administrative law judge's decision was automatically affirmed on the one year anniversary date of the appeal's filing, the day the Board's decision was issued. Following a discussion focusing on, and comparing, the language and interpretation of the Appropriations Acts of 1996 and 1998, the Board's regulations, and relevant case law, the Board held that the one year time period begins to run on the day following the filing of an appeal; accordingly, in the instant case, the Board acted within the statutory time period. *Pascual v. First Marine Contractors, Inc.*, 32 BRBS 289 (1999).

Substantial Question of Law or Fact

The Board is authorized to decide appeals raising a substantial issue of law or fact pursuant to Section 21(b)(3). This includes the authority to address Constitutional issues and the validity of the Act and regulations. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984); *Carozza v. U. S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994).

Where the Board declined to exercise jurisdiction over a dispute involving $144 in costs for travel to an informal conference by an out-of-state claimant, the D.C. Circuit reversed the Board's decision that no substantial issue of law or fact was presented. *Potomac Iron Works v. Love*, 673 F.2d 537, 14 BRBS 777 (D.C. Cir. 1982). Remanding the case to the Board for determination on the merits, the court held that it presented a pure question of law as to whether an administrative law judge could award such expenses, and while the amount in question was miniscule here, larger sums could be at stake in the future.

Similarly, in *Powell v. Brady Hamilton Stevedore Co.*, 17 BRBS 1 (1984), the Board reconsidered an order dismissing Director's appeal as not raising a substantial question of law or fact affecting the administration of the Act and held that, as Section 8(f) was at issue, the Director had a legitimate interest in protecting the Special Fund against undue distribution, however slight.

In *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982), the Board discussed the district court's entry of an order enforcing an attorney's fee award against employer despite an appeal of the fee by employer to the Board. The Board held that the interpretation of the Longshore Act is within the jurisdiction of the Board unless district court enforcement proceedings under Section 18 or Section 21(d) are involved. Inasmuch as an attorney's fee is not compensation, the Board held that it is unenforceable during the pendency of an appeal. Jurisdiction thus lay with the Board, and the district court should not have accepted claimant's case. In this case, the Seventh Circuit reached the same result, reversing the district court's enforcement of the award since the fee award was not final and enforceable as all appeals had not been exhausted. *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982).

In *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981), the Fifth Circuit addressed the distinction between jurisdiction under Section 21 and enforcement proceedings under Section 18. The court held that the Board had jurisdiction to decide an appeal concerning interpretation of language in a compensation order issued by the deputy commissioner as to the amount of compensation due. This proceeding did not involve enforcement, but rather raised questions of legal interpretation. On the other hand, the Board lacks jurisdiction to decide appeals of supplementary orders assessing default and additional compensation under Section 14(f) as this issue involves enforcement under

Section 18. *Providence Washington Ins. Co. v. Director , OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). The Board has jurisdiction to address Section 14(f) issues only where the district director declines to find a default or employer pays the amounts due. This issue is discussed in detail in Sections 14(f) and 18 of the desk book.

In *Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 160 (1982), employer appealed the administrative law judge's finding of coverage under the Outer Continental Shelf Lands Act (OCSLA). At oral argument the employer reversed its position, contending that coverage under the OCSLA was proper. The Board held that employer's request for the Board to resolve the question of whether the Jones Act or the OCSLA applied to this case was a request for an advisory opinion since employer was no longer contesting the administrative law judge's finding of coverage. Employer's appeal was dismissed since the Board does not render advisory opinions. *See Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985) (where hearings had been held, claimants had been paid benefits, and claimants had not sufficiently demonstrated the probability of future injury such that an issue regarding timely hearings and decisions would recur as to them, the Ninth Circuit held there was no case or controversy and reversed a district court holding that the Department of Labor had unreasonably delayed a hearing on the claim, holding that the issue was moot). *Compare Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73(CRT) (1st Cir. 1998) (court rejected argument there was no case or controversy where claimant had been paid all benefits under state act, but held request for a holding on coverage under the Act was essentially a request for declaratory relief and that such could be granted upon a showing of a significant possibility of future disability).

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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 settlement. Inasmuch as there had not yet been any settlements to credit, the Board held that the issue was not ripe for adjudication. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *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).

The Board dismissed employer's appeal of the district director's order granting, without prejudice, claimant's request to withdraw his claim, holding that there was no controversy ripe for adjudication. The Board reasoned that employer would not be adversely affected or aggrieved unless or until a new claim was filed, and its attempt to have the claims barred by Section 33(g) was not ripe for adjudication. *Boone v. Ingalls Shipbuilding, Inc.*, 27 BRBS 250 (1993) (en banc) (Brown, J., concurring), *aff'd on recon. en banc*, 28 BRBS 119 (1994) (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 561, 30 BRBS 39(CRT) (5th Cir. 1996); *Crandle v. Ingalls Shipbuilding, Inc.*, 27 BRBS 248 (1993) (en banc) (Brown, J., concurring) (appeal additionally dismissed as untimely).

The Fifth Circuit reversed the Board's dismissal of employer's appeal for lack of ripeness. The court held that the district director was without authority to act on claimants' motions to withdraw after employer requested that the cases be referred to OALJ. This error was not harmless as the district director's action stripped employer of the valuable procedural right of having the cases adjudicated by an administrative law judge. The court noted that an administrative law judge can act on a motion to withdraw in adjudicative proceedings. The court thus vacated the district director's orders, and remanded the cases for further proceedings. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996) (reaching same result under a mandamus order later determined to be inapplicable to the cases on appeal).

In a case where claimant and employer settled a claim in 1985, but left the issue of medical benefits open, and claimant had not yet filed a claim for medical benefits, the Board affirmed the administrative law judge's finding that the issue of whether Section 33(g) barred a future claim for medical benefits was premature. The Board held that where no claim has been filed, there are no issues to address and the case is not ripe for adjudication. The Board distinguished this case from *Chavez*, 961 F.2d 1409, 25 BRBS 134(CRT), by noting the "traditional ripeness analysis" and determining that the dismissal of a non-existent claim, the issue raised by employer in this case, presented neither an issue fit for review nor a hardship which outweighed the interest in postponing adjudication until an actual claim is filed. Therefore, the issue was not ripe for adjudication. *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

In a case claimant and employer settled a claim in 1983, but left the issue of medical benefits open, and claimant later died without having filed a claim for medical benefits, and claimant's survivors did not file a timely claim for death benefits, the Board affirmed the administrative law judge's finding that the issue of whether employer can be held liable for additional benefits was moot. The Board held that where no claim has been filed, there are no issues to address; therefore, the Section 33(g) issues raised by employer in this case were not ripe for adjudication. *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994).

In this case, the claimants had settled their claims for compensation and there was no evidence that they had requested medical benefits. The Board held that *Parker*, 28 BRBS 339 (1994), was dispositive of employer's claim that the Section 33(g) issue was ripe, as there were no claims pending and no issues to decide. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

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 *Metro. 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 the surgery was related to) was ripe for adjudication because it did not depend on undeveloped facts for resolution and there was 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).

The Board rejected employer's assertion that the issue before it, whether interest is awardable on Section 14(e) payments, is moot because its overpayment of compensation would cover any amount that might be awarded by virtue of a successful appeal. The Board concluded that, without modifying the administrative law judge's decision, the credit/interest issue remains viable and, without review, the challenge to the Board's decision in *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), would inevitably recur. Consequently, the Board determined the issue before it was not moot. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021) (holding issue was moot).

Retroactivity

Of Decisions

There is a strong presumption that federal judicial decisions should be retroactively applied. *Simpson v. Director, OWCP*, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), *vacating & remanding Simpson v. Bath Iron Works Corp.*, 13 BRBS 970 (1981), *cert. denied*, 459 U.S. 1127 (1983).

In *Simpson*, the First Circuit vacated the Board's decision that the Supreme Court's decision in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), did not apply retroactively. The court found that the Board erred in its application of the factors for determining retroactivity stated by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971) (citations omitted):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for, "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

The First Circuit stated that, in general, "the presumption of retroactivity...is outweighed when there are sufficient indications of justifiable societal reliance on a different rule." *Simpson*, 681 F. 2d at 86, 14 BRBS at 907. Reviewing the holding in *Calbeck* in light of the *Chevron* factors, the court concluded that they did not support a conclusion that *Calbeck* was decided in the face of such widespread justifiable reliance on the prior case law which would overcome the general presumption of retroactivity. *Calbeck* was thus entitled to retroactive application.

The Supreme Court subsequently modified its approach to retroactivity in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), holding that where the Court applies a rule of law to the parties in the case before it, that rule becomes the controlling interpretation and must be applied in all cases still open on direct review. *See Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

The Board rejected employer's argument that the Supreme Court's Decision in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983), was not entitled to retroactive application as it overruled past precedent, noting that *Perini* was the initial interpretation of the coverage issue present by the Court and that the lower courts had disagreed on this issue. The Board thus held that *Perini* is entitled to retroactive application. *Bowen v. Allied Chem. Corp.,* 16 BRBS 212 (1984).

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On reconsideration, the Board rejected employer's contention that it erred in relying on Louisiana cases decided more than one year after the hearing which were not a part of the record before the administrative law judge. Because the Louisiana cases merely reaffirmed *Wilkerson v. Jimco, Inc.*, 499 So. 2d 1245 (La. App. 4th Cir. 1986), which had been issued prior to the administrative law judge's decision, the Board's reliance on these cases did not result in manifest injustice. *Abbott v. Universal Iron Works*, 24 BRBS 169 (1991), *aff'g and modifying on recon.* 23 BRBS 196 (1990).

The Board held that under the decisions in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the *Cowart* decision must be given retroactive effect to the parties in the instant case inasmuch as the Court in *Cowart* applied the ruling to the parties before it. Inasmuch as the claimant failed to obtain employer's prior written approval of her third-party settlements, her claim for death benefits was barred under Section 33(g). *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994).

Of Statutes

In applying the 1972 Amendments, procedural provisions such as the statute of limitations, *see Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), and repeal of benefit ceilings, *see Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), have been applied retroactively. Jurisdictional provisions have not been applied retroactively. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Bowman v. Riceland Foods*, 13 BRBS 747 (1981).

The 1984 Amendments specify effective dates for the amended provisions. *See* the "Effective Dates" section of this desk book.

In analyzing retroactive application of amendments to the Act, the Board has relied on the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In *Landgraf*, the Court addressed what it described as two rules of statutory interpretation which appeared on the surface to be at odds: the presumption against retrospective application of a statutory provision, stated in many cases, versus the principle set forth in *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974), that a court should apply the law in effect at the time it renders its decision unless it would be "manifestly unjust to do so." The court found no real conflict between the *Bradley* principle and a *presumption* against retroactivity where the statute in question is unambiguous. *See Landgraf*, 511 U.S. at 273 (emphasis in original). The Court set forth a two-step analysis for resolving statutory retroactivity disputes, stating

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has specifically prescribed the statute's proper reach. If Congress has done so . . . there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Id., 511 U.S. at 280. *See Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994).

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Contrary to LIGA's contention, where an amendment to the definition of "insurance policy" under Louisiana law does not contain any express provision that it be applied retroactively, and the legislation is substantive, not procedural, Louisiana law supports a conclusion that the amendment is to be applied prospectively only. *Abbott v. Louisiana*

Ins. Guar. Ass'n, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994).

The Board applied *Landgraf* to the issue of retroactivity of the 1984 Amendments to Section 33(g) and held that since Congress specifically provided that the changes made to this section of the Act were effective upon enactment of the amendments and applicable to both claims filed after such date and claims pending on such date, the amendments applied in a case where claimant settled a third-party suit prior to the enactment of the amendments as the claim was pending. *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995). *Accord Pool v. Gen. Am. Oil Co.*, 30 BRBS 183 (1996).

Addressing retroactivity of the 1984 Amendments to Section 8(j), which the statute stated were effective 90 days after the date of enactment, the Board held as the Act did not specifically state that this section was entitled to retroactive application, Section 8(j) was applicable prospectively from the effective date of the amendment. Thus, claimant's benefits could not be subject to forfeiture prior to this date. *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994).

For purposes of the liability of the Texas insurance guaranty fund, the law in effect at the time an insurer is "impaired" controls. Thus, the guaranty fund could be liable for attorney's fees for work after the date the insurer became impaired based on the statutory language at that time. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009).

Scope of Review

The Board's review of an administrative law judge's decision is limited to consideration of evidence in the formal case record. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). Only the record developed before the administrative law judge may be considered on appeal; no new evidence can be considered, nor can the Board conduct a *de novo* review. *Hansley v. Bethlehem Steel Corp.*, 9 BRBS 498.2 (1978).

The Board's scope of review thus is limited by the substantial evidence standard. *See Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). Substantial evidence has been defined as "more than a mere scintilla," or "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Abosso v. D. C. Transit Sys., Inc.*, 7 BRBS 47 (1977).

The Board must affirm a decision if the findings of the administrative law judge are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968); *O'Keeffe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947). In reviewing findings of fact, the reviewing body may not reweigh the evidence, but may only inquire into the existence of evidence to support the findings. *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *S. Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, 659 F.2d 252 (D.C. Cir. 1981) (table).

Questions of witness credibility are for the administrative law judge as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13 (1978); *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978), *aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

The reviewing body, however, is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965), nor must it accept the fact-finder's decision when it is unable to

conscientiously conclude that the decision is supported by substantial evidence. *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968).

A finding lacking the support of substantial evidence is not in accordance with law and therefore must be set aside. *Director, OWCP v. Gen. Dynamics Corp.*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986); *S. Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951). In *Carper v. Dominion Cassion Corp.*, 14 BRBS 186 (1981) (Miller, dissenting), *rev'd mem.*, 679 F.2d 260 (D.C. Cir 1982) (table), the Board reversed an administrative law judge's disability award, concluding that it was unreasonable for the administrative law judge to rely on a doctor's testimony and therefore the award was not supported by substantial evidence. This decision, however, was reversed on appeal in a summary decision.

An administrative law judge may assess whether physicians' opinions are rationally based on their underlying documentation, *S.K. [Kamal] v. ITT Indus., Inc.*, 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011), but an administrative law judge may not substitute his judgment for that of the physicians, *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), *rev'g* 14 BRBS 1 (1981), the Second Circuit held that the Board, in affirming the administrative law judge, erred in finding that claimant's heart attack was not work-related since the Board engaged in impermissible fact-finding to supplement a deficient administrative law judge's decision. *Accord Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). However, the First Circuit in *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 14 BRBS 811 (1st Cir. 1980), held that while the Board's holding on status was based on certain fact-finding, such fact-finding was permissible since the record was clear on these points. Moreover, a reviewing tribunal can take cognizance of uncontradicted evidence. *Stancil v. Massey*, 436 F.2d 274, 278 (D.C. Cir. 1970).

In its reviewing capacity, the Board functions as a "quasi-judicial body empowered to resolve legal issues, not to engage in the overall administration of [the Act] through the promulgation of rules." *Ryan-Walsh Stevedoring Co. v. Trainer*, 601 F.2d 1306, 1317 n.7, 10 BRBS 852, 857 n.7 (5th Cir. 1979) (reversing Board's determination of status as a "widow" based on national guidelines rather than on state domestic relations law).

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In vacating and remanding the Board's decision, the Seventh Circuit held that the Board erred in finding that an administrative law judge's mistaken belief that claimant returned to work as soon as he was reinstated by employer was "harmless" error. The court stated

that an administrative law judge's mistake can be deemed harmless only if his ultimate ruling did not depend on his erroneous factual finding. In the instant case, the administrative law judge's conclusion that claimant failed to show that he was unable to perform the duties of his job was based, at least in part, on his erroneous belief that claimant returned to work as soon as employer permitted. *Moore v. Director, OWCP*, 835 F.2d 1219, 20 BRBS 68(CRT) (7th Cir. 1987).

Where claimant's notice of appeal was of only the administrative law judge's Decision and Order, the Board disregarded claimant's contentions pertaining to the deputy commissioner's award of an attorney's fee. *Leon v. Todd Shipyards Co.*, 21 BRBS 190 (1988).

The Board remanded for the administrative law judge to make explicit findings, stating that the absence thereof made the decision unreviewable. The Board also discussed the administrative law judge's mischaracterization of certain testimony, noting that it is not bound to accept an ultimate finding if the decision discloses that it was reached in an invalid manner. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

Claimant did not circumvent proper appellate procedure by simultaneously appealing to the Board and requesting Section 22 modification before the administrative law judge, as the Board may not consider new evidence. Claimant advised the Board of the pending modification request, and the appeal was dismissed and the case remanded for modification proceedings in accord with Board procedure. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

The Second Circuit held that the Board exceeded its scope of review by engaging in fact-finding and making assumptions regarding claimant's post-injury average weekly wage. The case should have been remanded, as it is the role of the administrative law judge, not the Board, to consider the Section 8(h) factors to determine whether there was a loss of residual earning capacity. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT) (2d Cir. 1989), *rev'g LaFaille v. Gen. Dynamics Corp.*, 18 BRBS 88 (1986).

The propriety of the deputy commissioner's granting of an "excuse" to employer under Section 14(e) was properly before the Board where the administrative law judge declined to reach the issue, finding there was no factual dispute, and claimant timely appealed the administrative law judge's decision. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd in pert. part and rev'd on other grounds sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The administrative law judge is not obligated to rule in favor of a party simply because his medical experts are more numerous or more highly trained. The administrative law judge is a fact-finder and is entitled to consider all credible inferences. He can accept any part of

an expert's testimony, or he may reject it completely. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990).

The Board is not required to follow a state court decision in a case interpreting a state statute with a burden of proof for establishing total disability that differs from that of the Act. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991).

The D.C. Circuit held that where the administrative law judge denied benefits on the ground that a claim was time-barred, the Board exceeded its scope of review in affirming the administrative law judge's denial on the basis of lack of causation, as the administrative law judge made no findings on this issue. *Brown v. I.T.T./Cont'l Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990).

Where a statutory interpretation issue of first impression is raised, the Board first must determine whether Congress, in promulgating the Act, directly addressed the precise issue in dispute. The Board held that it must give effect to unambiguously expressed congressional intent. The Board held that the plain language of Section 3(e) allows the Special Fund to credit employer's state payments against its liability under Section 8(f). *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

The Board affirmed the administrative law judge's finding that claimant's injury was work-related where the administrative law judge rationally found alleged discrepancies in the evidence were insignificant. Employer failed to establish that the administrative law judge's credibility determinations were irrational. *Simonds v. Pittman Mech. Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Fifth Circuit reversed a Board decision affirming an administrative law judge's finding on remand that claimant could perform suitable alternate employment where the Board had previously vacated and remanded an award of permanent total disability benefits. The court held that the Board exceeded its standard of review in its initial decision. While the evidence could support a finding in favor or either party, the choice among reasonable inferences is left to the administrative law judge. The Board does not have the authority to engage in *de novo* review of the evidence, nor may the Board substitute its credibility determinations for those of the administrative law judge. The administrative law judge is free to disregard parts of some witnesses' testimony while crediting other parts of their testimony. In this case, the administrative law judge credited testimony that claimant was in constant pain and noted that credible complaints of pain can support an award of disability. The Board erred by vacating the administrative law judge's award on grounds that he failed to give sufficient weight to expert medical testimony, as the administrative law judge chose not to rely on evidence that claimant could work and fully explained his reasoning. While he did fail to mention one doctor, that expert did not account for

claimant's taking pain medication or his pain and deferred to other medical experts on the issue of the effect of claimant's pain on his ability to work. As the administrative law judge's award of permanent total disability benefits was supported by substantial evidence, it should have been affirmed. The initial decision was thus reinstated. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

The Board held that an administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of the symptoms and physical effects of his injury in assessing the extent of his disability under the schedule. The Board also rejected claimant's assertion that the administrative law judge erred in denying temporary total disability benefits, rejecting claimant's argument that the administrative law judge erred in relying on a doctor's opinion to deny disability benefits after having rejected that doctor's opinion in finding causation established. The Board stated that the administrative law judge did not explicitly reject the doctor's opinion regarding causation but, even if he had, it would not constitute error as causation and disability are separate issues and the administrative law judge may accept or reject all or any part of any witness's testimony according to his judgment. *Pimpinella v. Universal Mar. Serv. Inc.*, 27 BRBS 154 (1993).

The Fifth Circuit held that the Board properly reversed the administrative law judge's finding of causation and remanded the case for reconsideration where the administrative law judge relied on one doctor to the exclusion of six others and failed to note significant problems with the testimony of the doctor on whom he relied; thus, his finding of causation was patently unreasonable. The administrative law judge's decision on remand finding no causation was supported by substantial evidence and properly affirmed by the Board. *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

The D.C. Circuit reversed the Board's decision that employer was entitled to Section 8(f) relief, holding that the Board exceeded its statutory scope of review in second-guessing the findings and credibility determinations of the administrative law judge rather than determining whether the findings were supported by substantial evidence. As the finding that the work injury alone resulted in total disability was supported by substantial evidence, it should have been affirmed. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994).

The D.C. Circuit reversed the Board's decision, which had twice vacated and remanded a finding that claimant's stroke was work-related. The court held that the Board exceeded its statutory authority, initially in re-characterizing a physician's testimony, rather than accepting the administrative law judge's reasonable interpretation of it and then in failing to review whether the administrative law judge's conclusion was supported by substantial evidence. The court held that the evidence was sufficient to support the administrative law judge's findings of fact; the Board must accept the administrative law judge's findings even

where it believes that a finding is not the more reasonable of two opposite inferences, as long as it is supported by substantial evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

The Second Circuit noted the administrative law judge's discretion in evaluating the evidence of record but stated that the expert opinion of a treating physician as to the existence of disability is binding unless contradicted by substantial evidence to the contrary. In this case, the administrative law judge erred in refusing to credit the opinion of claimant's treating psychiatrist because the opinion was based on claimant's subjective complaints, which the administrative law judge found were not credible. The court noted that the opinions of all of claimant's physicians were unanimous, and the administrative law judge therefore erred in substituting his judgment for that of the uncontradicted medical evidence. The court held that, given that claimant was being treated with a powerful anti-depressant, the administrative law judge erred in dismissing claimant's symptoms as merely subjective. Quoting *Wilder v. Chater*, 64 F.3d 335 (7th Cir. 1995), the court stated that "severe depression is not the blues. It is a mental health illness; and health professionals, in particular psychiatrists, not lawyers or judges are the experts on it." Accordingly, the court reversed the administrative law judge's denial of medical benefits for claimant's psychiatric condition which the doctors found was work-related. *Pietrunti v. Director OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

The First Circuit held that the Board appropriately remanded the case where it determined that there was evidence in the record which, if credible, could support a finding of an aggravation and the administrative law judge failed to discuss his reasoning for finding no aggravation. The court stated that remanding the case for clarification was clearly the appropriate course of action since the Board is constrained from making findings of fact itself. On remand, the administrative law judge cited additional evidence in awarding benefits, and the Board did not err in affirming his decision. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999).

The Board rejected the parties' contentions requesting that it reject the attachments to each party's brief. In this case, both parties submitted Louisiana state court documents with their appellate briefs to demonstrate the sequence of events which took place in the Louisiana court system. These documents were not a part of the record before the administrative law judge. Nevertheless, the Board held that, as all the attachments are relevant official court documents which are consistent with each other and with which no party has a dispute, they are properly the subject of judicial notice. Therefore, the Board took judicial notice of the court documents and denied the parties' motions to strike. *Hill v. Avondale Indus., Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

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 Indus., Inc.*, 33 BRBS 174 (1999).

On reconsideration of its initial decision reversing an administrative law judge's determination of the liable carrier based on a determination that the insurance policies did not cover the injury in this case, the Board rejected the assertion that, because it initially remanded the case to the administrative law judge to decide the responsible carrier issue, it could not later hold that neither carrier was liable. Although the underlying facts did not change, the Board properly reviewed the evidence under its statutory standard and was not required to accept the administrative law judge's finding as it was not supported by the record. The Board distinguished this case from *Temp. Emp't Services, Inc. v. Trinity Marine Grp., Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (holding administrative law judge lacks authority to address contractual indemnification agreements between different employers and carriers) as it involved whether a carrier was liable for paying benefits to claimant rather than contractual indemnification rights between employers. Thus, the Board reaffirmed its conclusion that neither carrier could be held liable for benefits under the Act and employer was liable. However, the Board clarified that its decision did not affect Chubb's liability under Pennsylvania law based on its policy with employer and stated that employer would be entitled to a credit for these payments. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

Where the administrative law judge declared employer in default for failing to attend the hearing and awarded claimant permanent total disability benefits on this basis, the Board vacated the 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 the award. The Board remanded the case for the 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).

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 treated spinal injuries. Claimant's counsel was a not a witness, and his statements at the hearing or in briefs were 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 reviews the district director's implementation of a vocational rehabilitation plan under the "abuse of discretion" standard, which is a narrow standard and involves consideration of whether the decision was based on consideration of the relevant regulatory factors. The Board struck documents attached to employer's brief that attempted to establish that claimant had a wage-earning capacity without vocational retraining equal to that which he would have upon completion of the program. The documents were not submitted to the district director and therefore could not be considered by the Board for the truth of the matter asserted. *Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003).

The First Circuit rejected employer's contention that the Board erred in remanding the case in the initial appeal, based on the administrative law judge's failure to make necessary findings with regard to whether the Section 20(a) presumption was invoked and rebutted. The court rejected employer's assertion that the administrative law judge's second decision finding causation 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. The court affirmed the decisions after remand as the finding that the presumption was invoked is supported by substantial evidence. The court also rejected the argument that the Board exceeded its scope of review by making factual findings regarding rebuttal of Section 20(a), holding that the Board properly addressed the legal sufficiency of the evidence. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). *See also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010).

The Board declined to address employer's contention that the DBA was not applicable because employer's contract was with the Coalitional Provisional Authority of Iraq, and not with the United States or a subdivision, as the administrative law judge must address this issue in the first instance. *J.T. [Tisdale] v. Am. Logistics Services*, 41 BRBS 41 (2007), *decision after remand*, 44 BRBS 29 (2010).

The Second Circuit held that the Board erred in affirming an administrative law judge's finding that Section 20(a) was rebutted where she had rejected the reasoning underlying the medical report she relied on. The court stated that an employer cannot satisfy its burden of production simply by submitting any "evidence" whatsoever, and the administrative law judge erred in finding that the report rebutted the presumption where she made clear her view that a reasonable mind would not

accept it as evidence that the decedent's lung cancer did not arise from his work-related asbestos exposure. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

The Ninth Circuit rejected employer's contention that the administrative law judge erred in crediting Dr. Keller's opinion. The court stated that the administrative law judge's reasons for crediting Dr. Keller's explanation about the changes to his report were not "inherently incredible" or "patently unreasonable." Employer had argued that because the doctor admitted to strengthening the conclusions in his revised report after he talked to claimant's attorney his opinion was not credible. The administrative law judge, however, found Dr. Keller's opinion credible based on his testimony at trial that he changed the language to more accurately reflect his opinion, but did not change the substance of his opinion because he was unfamiliar with how medical reports are used in litigation. The court also held that any error by the administrative law judge in "decertifying" post-hearing employer's expert, Dr. Scaff, a cardiologist, can only be harmless. The decertification had no legal effect because the administrative law judge discussed Dr. Scaff's report and testimony in detail and provided numerous valid reasons why the doctor's opinion was not credible. The administrative law judge made these findings in his decision prior to decertifying Dr. Scaff as an expert and employer had not challenged the administrative law judge's credibility findings. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

It is axiomatic that, when interpreting a statute, the starting point is the language of the statute. In ascertaining the proper construction of a specific statutory provision, it is appropriate and helpful to view the disputed language in context; that is, to interpret the specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part. Like phrases should be interpreted the same throughout a statute whenever possible, and words should be given their usual meaning if not defined in the statute. Based on these rules of statutory construction, the Board held that Section 8(c)(22), which states that "in any case" two or more scheduled awards are to be paid consecutively, encompasses "any" situation in which the claimant is entitled to multiple scheduled awards, regardless of whether they arise from one accident or claim or from multiple accidents or claims. *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010).

In holding that payments under Section 14(e) are "additional compensation," the Board considered the language of the Act. Finding the language unclear, the Board looked to titles and subtitles for guidance, as they are instructive tools when the meaning of a statute is in doubt. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

In holding that payments under Section 14(e) are "additional compensation" and that interest is awardable thereon, the Board noted the courts' statements that casual reference by courts to the Section 14(e) or (f) payments as "penalties" does not change their nature as compensation – it is merely a convenient way of distinguishing the Section 14(e) or (f) payments from the underlying awards. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

Claimant was awarded permanent total disability benefits for 1983 knee injuries. Employer sought modification of the award, alleging that any ongoing disability was no longer related to the work

injury. The administrative law judge credited claimant's testimony regarding his limitations and pain and awarded permanent total disability benefits until employer established the availability of suitable alternate employment, and permanent partial disability benefits under the schedule thereafter. On appeal, the Board rejected employer's assertions that claimant's felony conviction and discrepancies in his testimony about his criminal activities impeached his testimony overall and, essentially, precluded his right to benefits. The Board stated that while such evidence may be used to impeach a witness, the administrative law judge retains the authority to make credibility determinations. The Board thus affirmed the administrative law judge's finding that, despite claimant's lack of credibility regarding his crimes, his testimony regarding his knee pain and disability had been consistent for over 25 years and is credible. In addition, the administrative law judge rationally credited the opinion of claimant's doctor regarding the cause of claimant's knee pain, as he had treated claimant and his opinion was consistent with medical records. *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

The Board rejected claimant's contention that administrative law judge should have concluded from the evidence that he did not voluntarily retire. Claimant did not establish that the administrative law judge's findings and inferences are not rational or are unsupported by the evidence and the Board may not reweigh the evidence or draw other inferences from the record. *Gindo v. AECOM Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018), *vacated and remanded*, No. 4:19-CV-01745 (S.D. TX March 23, 2022).

The Ninth Circuit affirmed the Board's decision affirming the administrative law judge's award of disability benefits. The court concluded that substantial evidence (claimant's credible testimony, the opinion of his treating psychiatrist, and his demonstrated inability to earn his former wages upon his return from Iraq) supports the award, and other evidence, which might support a contrary conclusion, does not negate the substantial evidence supporting the administrative law judge's conclusion. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

Claimant first raised an Appointments Clause challenge based on *Lucia v. SEC*, 138 S.Ct. 2044 (2018), in a motion for reconsideration to the administrative law judge. The administrative law judge denied the motion for reconsideration, finding the issue forfeited because it was not raised prior to the issuance of her decision, which was decided more than two months after Lucia. She further found the forfeiture was not excused because claimant offered no reasons; thus, she concluded that claimant's contention amount to "judge-shopping" and "sand-bagging" after the receipt of an adverse decision. The Board affirmed the administrative law judge's finding the issue was forfeited and not excused, as claimant did not establish an abuse of her discretion. The administrative law judge correctly found that she could have addressed an "as-applied" Appointments Clause challenge. The Board rejected the contention that the issue was a "pure question of law" that could be raised before the Board irrespective of when the issue was raised. Accordingly, the Board denied claimant's motion for summary vacatur and directed claimant to file his petition for review. *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019).

Where Decedent died while working in Croatia assisting in the overhaul of the USS *Mt. Whitney*, the Board reversed the ALJ's denial of benefits based on his determination that Decedent was not covered by the Defense Base Act. The Board held the death was covered

and remanded for consideration of remaining issues. In the decision, the Board explained it has the authority to take judicial notice of official documents and websites. *Duvall v. Mi-Tech, Inc.*, 56 BRBS 1 (2022).

Direct Appeals from Deputy Commissioner to Board

In an ordinary case when entitlement to compensation benefits under the Act is in dispute, the controversy is referred from the district director to the Office of Administrative Law Judges for formal resolution. *See generally Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). The Board has held, however, that in certain situations, such as disputes over attorney's fee awards for work before the district director, the dispute is typically not within the adjudicatory power of the administrative law judge and therefore should be appealed directly to the Board. *See* 20 C.F.R. §802.201(a) (stating that any party or party in interest "may appeal a decision or order of an administrative law judge or district director").

The Board has enunciated three basic principles regarding whether a case involving action by a district director should be referred to an administrative law judge or directly appealed to the Board for review. First, review of discretionary acts of the district director, such as attorney's fee awards for work before his office, is properly undertaken by the Board. *Mazzella v. United Terminals, Inc.*, 8 BRBS 755 (1978), *aff'd on recon.*, 9 BRBS 191 (1978). Second, a district director's determination of strictly legal issues may be directly appealed to the Board. *Tupper v. Teledyne Movable Offshore*, 13 BRBS 614 (1981); *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). Finally, when a dispute involves questions of fact, the case must be referred to an administrative law judge. *Mazzella*, 8 BRBS 755.

A district director's attorney's fee determination addressing the amount of a fee award for work before him or whether employer is liable for this fee is appealable directly to the Board unless a disputed question of fact is at issue. *Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205 (1986) (overruling language in *Taylor v. Cactus Int'l, Inc.*, 13 BRBS 458 (1981), and *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 423 (1979), to the extent it is inconsistent).

In *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), *rev'g* 5 BRBS 573 (1977), the Seventh Circuit reversed a decision by the Board which reviewed a deputy commissioner's denial of commutation under Section 14(j) (a subsection since repealed by the 1984 Amendments), characterizing it as a discretionary determination. The court stated that the case should have been referred to an administrative law judge for a hearing on the commutation issue and that the Board should have refused to hear the appeal as there was no hearing record to review, it had no authority to consider the evidence gathered by the deputy commissioner, and it should not have substituted its views for those required to have been set forth in an administrative law judge's decision. The court also rejected the argument that the substantial evidence standard did not apply to this issue.

In *Tupper*, 13 BRBS at 615 n. 1, the Board stated it would not follow *Pearce*. In *Glenn*, 18 BRBS 205, the Board distinguished *Pearce* with regard to attorney's fee awards as there is generally no need for a hearing record on this issue and the administrative law judge has no role if no factual issues are raised. The Board stated that in cases raising only legal issues or discretionary acts of the deputy commissioner, the Board's jurisdiction is invoked because a substantial question of law is raised under Section 21(b)(3). Determining the amount of an attorney's fee for work at that level is within the deputy commissioner's discretion, as Section 28 requires that each level in the

administrative process award the fee for work before it, and fee liability, if no factual issues are raised, involves a strictly legal determination.

In agreeing with the Board's position, which was also advocated by the Director, that discretionary and purely legal issues which do not require fact-finding may be directly appealed to the Board, the Ninth Circuit addressed the decision in *Pearce*, finding it had not been followed or cited with approval by any other court. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531U.S. 956 (2000). The court thus rejected the conclusion in *Pearce* and held that Section 19(d) does not establish an absolute right to a hearing before an administrative law judge. The court relied on its construction of Section 21 and the fact that not all decisions by a district director are subject to a hearing before an administrative law judge, *citing Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988) (issue involving Section 8(i) settlement approved after employee's death need not be referred to an administrative law judge because it involved a purely legal issue and there were no evidentiary disputes requiring a fact-finding hearing); *Lauzon v. Strachan Shipping Co.*, 602 F. Supp. 661, 664 (S.D.Tex. 1985), *aff'd*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985) (where disputed issues were purely legal and no relevant facts required presentation of evidence, resolution of Section 14(f) issue by the deputy commissioner was not inappropriate despite 19(d)); *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982) (deputy commission and not administrative law judge had authority to approve Section 8(i) settlements under 1972 Act).

With regard to Section 14(f), the Board initially held that, unless a factual dispute exists, direct appeal to the Board was appropriate. *Patterson v. Tidelands Marine Serv.*, 15 BRBS 65 (1982), *rev'd*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983); *Lawson v. Atl. & Gulf Stevedores*, 9 BRBS 855 (1979). However, it is now well established that the Board and administrative law judge lack jurisdiction to review a deputy commissioner's supplemental default order finding an employer in default of its obligation to pay, *inter alia*, additional compensation owing under Section 14(f). This issue falls under Section 18(a), which requires that default orders be enforced by the federal district court for the judicial district in which employer has its principal place of business, or maintains an office, or in which the injury occurred. *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). *Cf. Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981) (where a compensation order is ambiguous or unclear and thus does not explicitly answer a question which emerges during the period of payment, the Board has jurisdiction to hear an appeal regarding a matter of law or fact in a supplementary order; Board also had jurisdiction to hear claimant's appeal as no amount was found in default).

The Board continues to hear appeals involving Section 14(f) where no default order has been issued. *See Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993) (employer paid penalty; nothing left to enforce); *McCrady v. Stevedoring Services of Am.*, 23 BRBS 106 (1989) (appeal raising a legal issue regarding the propriety of the assessment rather than enforcement); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (deputy commissioner denied Section 14(f) compensation; Section 18 does not apply where no default order is issued); *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *aff'd in pert. part*, 830 F.2d 1188 (D.C. Cir. 1987) (table) (employer paid all amounts due, but appealed Section 14(f) assessment; issue of law properly before the Board). Thus, for example, where the district

director refuses to issue a default order for purely legal reasons, or the amount due is paid and the remaining dispute is a legal one, the district director's order may be appealed directly to the Board. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting); *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990). However, if a factual dispute is raised, the case must go to the administrative law judge. *See D.G. [Graham] v. Cascade Gen., Inc.*, 42 BRBS 77 (2008).

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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 Fifth Circuit affirmed a Board decision holding a settlement entered into prior to the employee's death and approved thereafter was binding on the employer. The Board accepted a direct appeal of the deputy commissioner's order approving the settlement, and the court rejected the argument that the dispute should have been referred to an administrative law judge and consolidated with the widow's claim, stating that the issue regarding approval of the settlement "presented exclusively an issue of pure law" and thus no fact-finding by an administrative law judge was required nor were there evidentiary issues in dispute requiring a hearing under Section 19(d). *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988), *aff'g* 20 BRBS 18 (1987).

The Board dismissed an appeal of an assistant deputy commissioner's Order for lack of jurisdiction, reasoning that review of assistant deputy commissioner's assessment of a Section 30(e) penalty would involve factual determinations and that the case should thus be referred to an administrative law judge rather than appealed to the Board. *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988).

The Board held that where employer has voluntarily paid both compensation and the Section 14(f) assessment and there is no basis for district court enforcement proceedings under Section 18(a), the question of whether a Section 14(f) assessment is proper raises an issue of law which the Board may properly hear and decide on appeal. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990).

The Board has jurisdiction over an order of a deputy commissioner in cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring Section 18 enforcement. *McCrady v. Stevedoring Services of Am.*, 23 BRBS 106 (1989).

The Board held it had jurisdiction over an appeal where the deputy commissioner denied a Section 14(f) penalty, as Section 18 does not apply where no default order is issued. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

The Board vacated the administrative law judge's order that the Special Fund is liable for claimant's rehabilitation expenses, holding that the Secretary, through the deputy commissioner, must make this determination and that such a determination is directly appealable to the Board as it involves a discretionary act. *Cooper v. Todd Pac. Shipyards Corp.*, 22 BRBS 37 (1989).

The Board stated that this case denying rehabilitation services was properly appealed to the Board directly from the deputy commissioner, as none of the parties challenged the Board's jurisdiction. The Board also noted that the Board's taking this appeal was consistent with the Board's case precedent and the position of the Director. *Olsen v. Gen. Eng'g & Mach. Works*, 25 BRBS 169 (1991).

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 had the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. Gen. 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).

On appeal, the Ninth Circuit affirmed the Board's decision, rejecting the argument that employer was entitled to a hearing on the propriety of a vocational rehabilitation program prior to its implementation. The court followed its decision in *Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT), holding that a hearing is not required on all contested issues and that since the Act authorizes the Secretary to approve vocational rehabilitation, it was within the district director's discretion to approve the plan. In addition, the lack of a hearing at this point did not violate employer's right to due process as it had a full hearing on the merits of the claim. *Gen. 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 only the Secretary, as delegated to the district director, has the authority to determine whether reports required under Section 7(d)(2) were timely filed and whether any failure in this regard should be excused. Such findings are directly appealable to the Board, even though the practical effect of this holding may be to bifurcate cases. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

In an appeal taken from the district director's Supplementary Compensation Order, the majority held that the Board had jurisdiction to decide the appeal inasmuch as the district director's order involved only a question of law regarding the propriety of a Section 14(f) penalty. In response to the dissenting opinions, the majority noted that a hearing before an administrative law judge was not requested in the instant matter, and that resolution of the issue presented required only a legal interpretation of the 10-day time limit contained in Section 14(f) and did not require any factual

determinations with regard to time of filing, time of payment or method of proof. Moreover, the Board's regulation, 20 C.F.R. §802.201(a), permits an aggrieved party to appeal a decision of the district director to the Board. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting).

In a case where the Board accepted employer's appeal of the district director's denial of its request to refer the case for a hearing before an administrative law judge and held that the district director must transfer the case upon a party's request, the majority reaffirmed its authority to accept direct appeals from the district director that raise a purely legal issue and rejected the dissenting opinion that the Board's remand order was tantamount to an order of mandamus. *Eneberg v. Todd Pac. Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting).

The Board held that the district director's authority to change claimant's treating physician under Section 7(b) is discretionary. Consequently, a direct appeal to the Board for review under the abuse of discretion standard was proper, and the Board rejected claimant's contention that the case belonged before the OALJ. *Jackson v. Universal Mar. Serv. Corp.*, 31 BRBS 103 (1997) (Brown, J., concurring).

The Ninth Circuit held that not all decision-making by the district directors is subject to a hearing before an 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. 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. 956 (2000).

In a case where employer paid the 20 percent assessment awarded by the district director under Section 14(f), the Board had jurisdiction to accept an appeal of the district director's order and to address the argument that the additional assessment was not due based on claimant's agreement in a Section 8(i) settlement to waive the Section 14(f) assessment in the event he did not provide a "valid street address for purposes of delivery of the settlement proceeds." Claimant supplied his correct street address but the USPS refused delivery because claimant did not have a mailbox at that address. Consequently, delivery of the proceeds was late. On the legal issue, the Board held that the parties may negotiate such a waiver as part of a settlement and vacated the Section 14(f) assessment. Holding that construction of the waiver clause in the settlement agreement required fact finding, the Board remanded the case to the OALJ to determine whether claimant's provided address complied with the settlement contract. *D.G. [Graham] v. Cascade Gen., Inc.*, 42 BRBS 77 (2008).

The Fifth Circuit dismissed for lack of subject matter jurisdiction claimant's appeal of the Board's dismissal of his appeal. Claimant appealed an unfavorable recommendation of the district director directly to the Board prior to an evidentiary hearing before an administrative law judge. The Board dismissed the appeal as a memorandum of informal conference is not a final appealable action. The court stated that the Board correctly dismissed the appeal because it was not presented with anything within its statutory purview to review, pursuant to Section 21(b) and 20 C.F.R. §802.301. Rather, claimant was required to pursue his claim before an administrative law judge. As the Board did not issue a final order, the court of appeals similarly lacked jurisdiction over the appeal

pursuant to Section 21(c). *Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

Stay of Payments

The last clause of Section 21(b)(3) provides that compensation required by an award must be paid even while a case is on appeal, unless a stay of payments is granted by the Board. A stay of payments shall not be issued unless the employer/carrier can establish "irreparable injury" will ensue if it is required to pay the award. *See Associated Indem. Corp. v. Shea*, 325 F. Supp. 1100 (S.D. Ala. 1971), *aff'd on other grounds*, 455 F.2d 913 (5th Cir. 1972); *Holland Am. Ins. Co. v. Rogers*, 308 F. Supp. 1031 (N.D. Cal. 1970); 20 C.F.R. §802.105.

That payment will be difficult or that payments made will be impossible to recoup if an award is reversed are insufficient to establish irreparable injury. *Maxon Marine, Inc. v. Director, OWCP*, 63 F.3d 605, 29 BRBS 109(CRT) (7th Cir. 1995); *Meehan Seaway Serv. Co. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993); *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993); *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991); *Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989).

In *Rivere*, the Fifth Circuit stated that an early decision by a district court in *Cont'l Cas. Co. v. Lawson*, 2 F. Supp. 459 (S.D. Fla. 1932), *rev'd on other grounds*, 64 F.2d 802 (5th Cir. 1933), has stood the test of time and the resistance of employers and insurers. It establishes that irreparable injury is demonstrated only when "the compensation award may be too heavy for the employer [or insurer] to pay without practically taking all his property or rendering him incapable of carrying on his business, or by reason of age, sickness, or other circumstances [of the payer], a condition is created which would amount to irreparable injury." *Id.* at 461.

In *Smith v. Aerojet Gen. Shipyards*, 16 BRBS 49 (1983), the Board rejected employer's assertion that it is unconstitutional to require it to pay compensation benefits while an appeal is pending. The Board held that since employer had been afforded a full hearing before an administrative law judge on the issue of liability, employer had been afforded due process of law.

The Board initially held that in granting a stay, it need not make a specific finding of irreparable damage based on evidence submitted to it as required by the applicable regulation, 20 C.F.R. §802.105. *Rivere v. Raymond Fabricator, Inc.*, 18 BRBS 6 (1985), *rev'd*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989) (invalidating 20 C.F.R. §802.105 as contrary to congressional intent as it adopted language in Section 21(c) applicable to the Courts of Appeals rather than that in Section 21(b)). Rather, the Board stated that it can exercise its discretionary authority to weigh the relative hardships in each case, and it ordered employer to pay periodic payments but stayed the payment of past-due benefits. Following reversal of this decision by the Fifth Circuit, the Board has followed case precedent holding it must identify the irreparable injury in accordance with the standards set out by the courts.

The Board's decision in *Rivere* involved a permanent stay issued after an earlier order had granted a temporary stay of accrued benefits pending claimant's response. In this regard, the regulation states that, where circumstances require, the Board, in its discretion, may issue a temporary order not to exceed 30 days where the time period for response to a motion, i.e., 10 days, has not yet passed. 20 C.F.R. §802.105(b). Following either receipt of a response or the expiration of this

time period, the Board must issue a subsequent order ruling on the stay request. This provision enables the Board to act with a temporary stay in cases where the employer is in financial jeopardy and may incur additional liability if it does not promptly pay benefits, e.g., where a stay is requested prior to the expiration of the Section 14(f) time period, while preserving the right to respond.

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The Fifth Circuit held that pursuant to Section 802.105, an order by the Board staying payments must contain specific findings based upon evidence submitted to it identifying the irreparable injury that will result to employer. That payment will be difficult or that payments made will be impossible to recoup if an award is reversed are insufficient to establish irreparable injury. Since employer did not even attempt to prove or allege irreparable injury, the court vacated the Board's order. Further, the court reversed the Board's finding that Section 802.105, which requires that specific findings be made, is invalid, holding that the regulation is consistent with Section 21, legislative history, and jurisprudential development. *Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989).

The Ninth Circuit held that the Board erred in ordering a stay of payments because there was no showing of an irreparable injury that would result to employer if required to pay benefits. The Ninth Circuit rejected employer's contention that for a stay of payment to be issued, irreparable injury need not be shown where the appeal filed before the Board involves subject matter jurisdiction rather than the merits of the case. *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991).

On reconsideration, the Board held that LIGA's request for an expedited hearing on its motion to stay payments pending the Board's resolution of its motion for reconsideration was moot in view of the issuance of the Board's decision on reconsideration. Also, while the Board granted reconsideration and remanded the case for a new hearing to allow LIGA to raise issues regarding claimant's entitlement which the administrative law judge precluded it from raising initially, the Board concluded that because LIGA failed to assert any specific error regarding the administrative law judge's findings regarding claimant's entitlement, LIGA must continue to pay claimant the benefits previously awarded by the administrative law judge pending resolution of the case on remand. *Abbott v. Universal Iron Works, Inc.*, 24 BRBS 169 (1991), *aff'g and modifying on recon.* 23 BRBS 196 (1990).

Where employer asserted fraud and a state-law counterclaim in response to claimant's enforcement action, the First Circuit determined that Congress intended the affirmative defenses be adjudicated by DOL in a Section 22 modification hearing, and not by the district court, so as to prevent the needless duplication of judicial/administrative efforts and the possibility of inconsistent outcomes. The court noted that an appeal in either proceeding would end up in the court of appeals. Further, it concluded that the Act divests the district court of the power to stay Section 21(d) enforcement pending the outcome of the modification hearing unless employer established "irreparable injury," which is found only in extraordinary circumstances and must be more than a showing of financial difficulty in making payments or that the payments would be unrecoverable. *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

The Eighth Circuit affirmed the Board's denial of a motion for a stay of payments and held that an award of benefits may only be stayed pending review upon a showing of irreparable injury, i.e., extreme financial hardship to employer or its insurer. The court further held that the traditional irreparable injury standard is constitutional even if the administrative law judge's award is challenged on due process grounds. *Meehan Seaway Serv. Co. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993).

In affirming the Board's denial of a stay of payments, the Seventh Circuit held that since employer's insurance carrier was making the compensation payments, the burden was upon employer to demonstrate that payment of benefits would cause the *carrier*, not employer, irreparable injury under Section 21(b)(3). Since there was no evidence that irreparable injury would ensue to employer's carrier, the court held that a stay of payments was not appropriate. *Maxon Marine, Inc. v. Director, OWCP*, 63 F.3d 605, 29 BRBS 109(CRT) (7th Cir. 1995).

Remand by Board

Section 21(b)(4) authorizes the Board to remand a case on its own, or at the request of the Secretary, to the administrative law judge for further appropriate action. Where a case is remanded by the Board, "such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." 20 C.F.R. §802.405(a). *See also* 20 C.F.R. §802.404.

In accordance with the regulation, it is error for an administrative law judge to fail to follow the Board's instructions on remand. *See Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989). As the Board stated *in Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988), "the United States judicial system relies on the most basic of principles, that a lower forum must not deviate from the orders of a superior forum, regardless of the lower forum's view of the instructions given it."

Rehearing the evidence or reopening the record is generally not required when the Board remands a case to an administrative law judge where the parties were afforded ample opportunity prior to the issuance of the original decision to develop the evidence which they seek to have admitted after remand. *See Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984). *See also Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982) (on remand, the administrative law judge may reopen record if necessary); *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980) (convening of second hearing not an abuse of discretion).

However, when the administrative law judge is unavailable, different rules apply. *See Gamble-Skogmo, Inc. v. Fed. Trade Comm'n*, 211 F.2d 106 (8th Cir. 1954). An administrative law judge on remand may not rely on the record developed before another administrative law judge where credibility determinations are at issue and a party requests a *de novo* hearing. *Id.* In order to preserve the issue for appeal, a party must object to a substitute administrative law judge's failure to conduct a new evidentiary hearing at the fact-finding level. *Pigrenet v. Boland Marine & Mfg. Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981) (en banc), *vacating* 631 F.2d 1190, 12 BRBS 710 (5th Cir. 1980) (right to a new hearing where credibility is at issue may be waived if not raised); *Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981) (same). *See Phillips v. California Stevedore & Ballast Co.*, 14 BRBS 498 (1981) (where case had been reassigned to a new administrative law judge on prior remand and was again remanded for other reasons, Board instructed administrative law judge on remand to determine whether credibility was at issue and if so, to hold a new hearing); *Kendall v. Bethlehem Steel Corp.*, 3 BRBS 255 (1976), *aff'd*, 551 F.2d 307 (4th Cir. 1977) (determinations requiring an evaluation of the credibility of witnesses' testimony could be made by a second administrative law judge when the judge who heard the live testimony had retired).

The Board has, in some instances, remanded a case to an administrative law judge different from the one who originally heard the case. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *Wade v. Gulf Stevedore Corp.*, 8 BRBS 335 (1978). *See Webb v. Corson & Gruman*, 14 BRBS 444 (1981) (despite some concerns regarding administrative law judge and claimant's counsel in the case, Board stated that it was reluctant to direct that the case be assigned to another administrative law judge on remand, as the remand would involve credibility determinations requiring a new hearing).

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The administrative law judge is bound by Board's mandate on remand and cannot reconsider questions on which the Board has ruled. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

The Board remanded for the administrative law judge to make explicit findings, stating that the absence thereof made the decision unreviewable. The Board also discussed the administrative law judge's mischaracterization of certain testimony, noting that it is not bound to accept an ultimate finding if the decision discloses that it was reached in an invalid manner. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

The Board vacated an administrative law judge's Decision and Order on Remand and remanded the case again, as the administrative law judge did not follow the Board's instructions in its initial Decision and Order. The administrative law judge erroneously concluded that the Board's decision resolved the maximum medical improvement and Section 8(f) issues, whereas the Board had merely remanded these issues for reconsideration due to legal errors of the administrative law judge. *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989).

In remanding the case, the Board directed that it be assigned to a different administrative law judge on remand where the administrative law judge acted unreasonably in dismissing claimant's claim without a hearing. *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989).

The Ninth Circuit directed reassignment of the case to a different administrative law judge on remand to avoid the appearance of partiality. The court determined that the tone of the administrative law judge's fee award and her evaluation of the fee evidence suggested she may not be able to render a fair and impartial decision on remand. *Seachris v. Brady Hamilton Stevedore Co.*, 994 F.3d 1066, 55 BRBS 1(CRT) (9th Cir. 2021).

The Board held that an administrative law judge violated 20 C.F.R. §802.405(a) when he disregarded Board's remand order instructing him to consider whether employer established rebuttal of the Section 20(a) presumption and instead reconsidered claimant's

entitlement to invocation of the Section 20(a) presumption. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

The Fifth Circuit held that the Board erred in vacating and remanding an administrative law judge's award of permanent total disability benefits. The court held that the Board exceeded its standard of review in its initial decision, and as the administrative law judge's award of permanent total disability benefits was supported by substantial evidence, it should have been affirmed. The initial decision was thus reinstated. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986).

The Fifth Circuit held that the Board properly reversed the administrative law judge's finding of causation and remanded the case for reconsideration where the administrative law judge relied on one doctor to the exclusion of six others and failed to note significant problems with the testimony of the doctor on whom he relied; thus, his finding of causation was patently unreasonable. The administrative law judge's decision on remand finding no causation was supported by substantial evidence and properly affirmed by the Board. *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

The D.C. Circuit reversed the Board's decision, which had twice vacated and remanded a finding that claimant's stroke was work-related. The court held that the Board exceeded its statutory authority in remanding the case, as the evidence was sufficient to support the administrative law judge's findings of fact. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

The Board denied employer's motion for reconsideration alleging that the Board erred in remanding the case for consideration of a narrow status issue. That the original administrative law judge was deceased did not justify affirming a decision containing an error of law. The Board noted that it might not be necessary to hold a new hearing on remand, but if it was, the scope of remand was narrow and would not involve the use of extensive adjudicatory resources. *Garmon v. Aluminum Co. of Am. - Mobile Works*, 29 BRBS 15 (1995), *aff'g on recon.* 28 BRBS 46 (1994).

The First Circuit held that the Board appropriately remanded the case where it determined that there was evidence in the record which, if credible, could support a finding of an aggravation and the administrative law judge failed to discuss his reasoning for finding no aggravation. The court stated that remanding the case for clarification was clearly the appropriate course of action since the Board is constrained from making findings of fact itself. On remand, the administrative law judge cited additional evidence in awarding benefits, and the Board did not err in affirming his decision. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999).

Where the administrative law judge declared employer in default for failing to attend the hearing and awarded claimant permanent total disability benefits on this basis, the Board vacated the award because the decision was not supported by substantial evidence and remanded the case for the admission of evidence. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (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 necessary 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. The court also rejected the argument that the Board exceeded its scope of review by making factual findings regarding rebuttal of Section 20(a), holding that the Board properly addressed the legal sufficiency of the evidence. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

Board Appellate Procedure

Standing Before the Board

Section 21(b)(3) provides that the Board may determine appeals raising a substantial question of law or fact taken by any party in interest from decisions under the Act. The pertinent regulation, 20 C.F.R. §802.201, provides that any party or party in interest "adversely affected or aggrieved by a decision or order" under an Act over which the Board has jurisdiction may appeal by filing a notice of appeal to the Board. The Director, OWCP, when representing the Special Fund or appealing a decision affecting the administration of the Act shall be considered a "party adversely affected." The regulation further provides that the prevailing party may file a cross-appeal to challenge any adverse determinations.

In *White v. Ingalls Shipbuilding Div.*, 12 BRBS 905 (1980), *aff'd in pert. part*, 681 F. 2d 275, 14 BRBS 988 (5th Cir. 1982), the Board held that this language and Section 802.201(a) of the regulations permit automatic Director standing in any case before the Board and further that the Director has standing to appeal settlement agreements to ensure proper administration of the settlement provisions of the Act.

The Director ordinarily has standing to appeal any case to the Board whenever an erroneous legal or factual determination is alleged regardless of whether he participated at the administrative law judge level. *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *Capers v. Youghiogheny & Ohio Coal Co.*, 6 BLR 1-1234 (1984); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). The Director may raise issues for the first time on appeal, especially when the liability of the Special Fund is at issue, where the Director's contentions allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. *Id.* In such cases, the Director has a legitimate interest in protecting the Special Fund against undue distribution. *Powell v. Brady Hamilton Stevedore Co.*, 17 BRBS 1 (1984).

The Director is not limited by the rules applicable to the appellate courts under Section 21(c), as Section 21(b)(3) permits appeals by any "party in interest" while Section 21(c) limits appeals to the circuit courts to "persons adversely affected or aggrieved." *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996) (en banc). *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 29 BRBS 87(CRT) (1995) (Director does not have standing to appeal the Board's decision on disability because it does not affect the Director's administration of the Act or the fiscal integrity of the Special Fund). *See also Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997) (Director is a proper party respondent in court of appeals under Federal Rules of Appellate Procedure); *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 15 BRBS 62(CRT) (1983) (as a party respondent before Second Circuit, Director entitled to petition for writ of certiorari in case involving the scope of coverage under the Act); *Director, OWCP v. Newport News Shipbuilding & Dry Dock*

Co., 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982) (in case involving Section 8(f), Director has standing to bring an appeal under Section 21(c)).

The Board has held that a claimant has no interest in the source of his compensation and therefore has no standing to appeal the applicability of Section 8(f). *Dove v. Sw. Marine of San Francisco*, 18 BRBS 139 (1986); *Price v. Greyhound Bus Lines, Inc.*, 14 BRBS 439, 440 n.1 (1981), *appeal dismissed*, No. 81-1934 (4th Cir. Jan. 4, 1982), *cert. denied*, 459 U.S. 831 (1982); *Creasy v. J. W. Bateson Co.*, 14 BRBS 434, 437 (1981); *Jackson v. Willamette Iron & Steel Co.*, 13 BRBS 908, 909 (1981); *Sims v. Singleton Elec. Co.*, 9 BRBS 1068, 1071-72 (1978); *Nobles v. Children's Hosp.*, 8 BRBS 13, 16 (1978); *Schuster v. Roger Smith Hotel*, 7 BRBS 255, 258 (1977).

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The Board held that employer lacked standing to appeal a denial of benefits based on finding that an injury is not work-related, which opened up a possibility of suit in tort against employer, to the Board because it was not an aggrieved party. *Sharpe v. George Washington Univ.*, 18 BRBS 102 (1986).

The Director may appeal an administrative law judge's Section 8(f) findings even if he did not participate at the hearing. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987).

In a footnote, the Board declined to consider claimant's contentions pertaining to a Section 8(f) determination, because claimants possess no cognizable interest in dispositions of requests for Section 8(f) relief. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).

The Director ordinarily has standing to appeal any case to the Board whenever an erroneous legal or factual determination is alleged, even though the Director did not participate at the administrative law judge level. The Board granted the Director's Motion for Reconsideration despite the fact that was his first participation in the case, noting that he raised a novel issue, but stating that his initial participation might have obviated the need for further proceedings. *Brown v. Bethlehem Steel Corp.*, 20 BRBS 26 (1987), *aff'g on recon.* 19 BRBS 200 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The Board declined to place the Director in the caption and attorney appearance listing in Longshore Act cases wherein he has not filed a timely pleading and where Section 8(f) is not an issue. The Board also held that the Director did not timely appear before the Board where the Board notified the parties that it was holding oral argument, instructed the parties to file a statement of their positions with supporting authority at least fifteen calendar days prior to the argument, and the Director filed its statement of position fourteen days before

the argument. *Thompson v. Potashnik Constr.*, 21 BRBS 63 (1988) (Order on Recon.) (McGranery, J., dissenting).

The Director, as a party-in-interest, had standing to raise the issue of whether claimant was entitled to benefits for a siderosis claim, despite a purported settlement, as it affected the proper administration of the Act. Moreover, claimant, in effect, also raised the issue. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989).

The Board stated that the Director had standing to appeal an administrative law judge's findings regarding onset and extent of a retiree's permanent partial disability benefits. The Director may raise issues for the first time on appeal, especially when the liability of the Special Fund is at issue, where the Director's contentions allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. The Board rejected employer's contention that, pursuant to 29 C.F.R. §18.20, the Director's standing on appeal was limited due to his failure to respond to a request for an admission that decedent had a 50 percent permanent partial disability. The OALJ Rules, 29 C.F.R. Part 18, are superseded to the extent they are inconsistent with a rule of special application as provided by statute or regulation, and the Board's regulations specifically apply here. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

The Director had standing to move for reconsideration despite a failure to participate in the initial appeal where issues properly the subject of a motion for reconsideration were raised. In the instant case, the Board addressed the Director's objections to its Section 33 holding, since it was a subject of employer's appeal. The Board, however, declined to address the Director's Section 10(f) argument, since no party appealed the absence of findings by the administrative law judge concerning claimant's entitlement to Section 10(f) adjustments. *Mills v. Marine Repair Serv.*, 22 BRBS 335 (1989), *modifying in part on recon.* 21 BRBS 115 (1988).

The Board rejected employer's contention that the Director may not appeal the administrative law judge's decision on remand because he did not participate before the administrative law judge or the Board in the original appeal. The Director's objections were not untimely because this was the first opportunity to allege error in the administrative law judge's decision on remand, and he raised the same issue addressed by employer in its original appeal. *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989).

Rejecting the Director's contention that the appeal lacked ripeness since employer had yet to be "adversely affected or aggrieved" under 20 C.F.R. §802.201(a), the Board stated that employer was adversely affected by the district director's denial of its right to have the case

referred for a hearing. *Eneberg v. Todd Pac. Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting on other grounds).

Employer filed a motion to dismiss the Director as a party before the Board, contending that pursuant to the Supreme Court's decision in *Harcum*, 514 U.S. 122, 29 BRBS 87(CRT) (1995), the Director lacked standing to appear as an independent party in a claim under the Act. In denying employer's motion, the Board noted that in *Harcum*, the Court concluded that the Director was not "a person adversely affected or aggrieved" under Section 21(c) in that case and thus, lacked standing to appeal a decision by the Board to the appropriate United States Court of Appeals under that subsection of the Act. In contrast, this case involved the appeal of an administrative law judge's decision to the Board under Section 21(b)(3), which authorizes the Board to hear appeals of any "party in interest" Pursuant to the Board's regulation, the Director has standing to appear or to respond to an appeal before the Board as a party-in-interest. 20 C.F.R. §§802.201(a), 802.212; *see also* 20 C.F.R. §801.2(a)(10). *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995) (order).

The Board rejected employer's contention that the Director's appeal should have been dismissed pursuant to *Harcum*, 514 U.S. 122, 29 BRBS 87(CRT), as Section 21(b)(3) permits appeals by any "party in interest" while Section 21(c) limits appeals to the circuit courts to "persons adversely affected or aggrieved." *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (en banc).

The Director appealed the administrative law judge's approval of the parties' Section 8(i) settlement of a claim for medical benefits in his capacity as the Act's administrator. He also appealed the parties' stipulations on the grounds that they were not supported by substantial evidence or in accordance with law, and thus cannot support the award of Section 8(f) relief. *Bomback v. Marine Terminals Corp.*, 44 BRBS 95 (2010).

Although the Director did not participate before the administrative law judge, he has standing to appeal the administrative law judge's order based on the parties' stipulations because he may challenge before the Board erroneous legal and factual determinations which affect the proper administration of the Act, as well as the applicability of Section 8(f). The Director contended that the stipulations were not supported by substantial evidence or in accordance with law. *Aitmbarek v. L-3 Commc'ns*, 44 BRBS 115 (2010).

The First Circuit rejected the contention that the administrative law judge and the Board erred in permitting the Director, OWCP, to appear pursuant to applicable regulations. The court further noted the Director's interest in the administration of the Act and status as administrator of the Special Fund, noting it was reasonable for the Director to assume that the Special Fund could be implicated if the claimants' claims were successful because the employer was bankrupt. *Harcum*, 514 U.S. 122 (1995) does not proscribe the Director's participation before an administrative law judge or the Board. *Carswell v. E. Pihl & Sons*,

999 F.3d 18, 55 BRBS 27(CRT) (1st Cir. 2021), *cert. denied,* 2022 WL 515886 (Feb. 22, 2022).

The Board granted intervenors' motion for reconsideration of the Board's Order dismissing their appeal. Intervenors were officers of the employer of the deceased employee who had been named in a tort suit. The Board held that under Section 802.201(a), intervenors were "adversely affected or aggrieved" as they showed that they were "injured in fact by agency action and that the interest [they] seek to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute.'" Intervenors contended that they were entitled to a declaration of tort immunity under Section 33 of the Act irrespective of the dismissal of claimant's claim. The Board reinstated intervenors' appeal, but ultimately denied relief on the merits. *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd sub nom Bailey v. Hymel*, 104 F. App'x 415 (5th Cir. 2004).

The Board rejected the employer's contention that claimant did not timely appeal the first administrative law judge's forfeiture order under Section 8(j) as claimant had not been adversely affected or aggrieved by that decision until the second administrative law judge relied on it to deny permanent partial disability benefits. Moreover, the first forfeiture order did not conclusively resolve the issue, as the parties raised the issue before the second administrative law judge and he independently addressed it. *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd,* 161 F. App'x 178 (2d Cir. 2006).

Although employer conceded liability to two "widows" and two children of the decedent under Section 9(b), the Board held that employer had standing to challenge the administrative law judge's decision in this case, as his findings regarding employer's entitlement to a credit for benefits paid and ability to apply for commutation of the benefits was adverse to employer. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

New Issue Raised on Appeal

The Board has held that in order to be considered on review, an issue must first be raised below. *Moore v. Paycor Inc.*, 11 BRBS 483 (1979). The Board will not award benefits on appeal based on a theory that was neither presented nor argued before the administrative law judge. *Jackson v. Giant Foods, Inc.*, 11 BRBS 186 (1979). *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982) (the Section 20(a) presumption attaches only to the claim for injury alleged by claimant).

Although the Fifth Circuit has recognized an exception to the rule that issues must be raised below to be addressed on appeal where a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice, *Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976), the court held that the exception did not apply in *Bernuth Marine Shipping Inc. v. Mendez*, 638 F.2d 1232 (5th Cir. 1981), *aff'g* 11 BRBS 21 (1979) (Kalaris, concurring) (affirming Board's refusal to consider claimant's refusal to submit to rehabilitation evaluation as the issue was not raised before administrative law judge).

Cases finding an issue could not be raised on appeal include: *Minick v. Levin Metals Corp.*, 14 BRBS 893 (1982) (Board will not consider psychological claim made for first time on appeal); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982) (Board will not consider alleged discriminatory threat to fire where it was not raised below); *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981), *modified*, BRB No. 76-244 (Oct. 16, 1984), *aff'd on other grounds*, 772 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985) (employer's failure to raise notice issue in its first appeal precludes it from raising the issue in its second appeal; failure to raise Section 8(f) at first hearing precludes its consideration); *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483 (1981), *aff'd*, 673 F.2d 1297 (1st Cir. 1981) (table) (Board rejects argument that accident aggravated pre-existing emotional condition on basis that the aggravation theory was not discussed at the hearing before the administrative law judge); *Luna v. Gen. Dynamics Corp.*, 12 BRBS 511 (1980) (where claimant failed to raise the issue of employer responsibility for safety glasses at the hearing below, Board will not consider issue on appeal). *See also Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985) (where claimant did not object to admission of affidavit before administrative law judge, court refused to consider objections); *Burbank v. K.G.S., Inc.*, 13 BRBS 467 (1981) (in a decision following remand, the Board declined to consider argument relating to Director's standing to bring an initial appeal where the issue had not been raised before the Board at that time).

Similarly, the Board will not consider employer's attorney's fee contentions on appeal where employer did not object to the fee at the administrative law judge level. *See, e.g., Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Biggs v. Ingalls Shipbuilding, Inc.*, 27 BRBS 237 (1993) (Brown, J., dissenting), *aff'd in pert. part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Burch v.*

Superior Oil Co., 15 BRBS 423 (1983); *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798 (1981). Additional decisions on this holding are digested in Section 28 of the desk book.

There are exceptions to the rule that issues not raised below will not be addressed. The Board has held that a Section 14(e) assessment and interest on unpaid benefits are mandatory and thus entitlement to these amounts may be raised at any time. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Cuellar v. Garvey Grain Co.*, 11 BRBS 441 (1979), *aff'd sub nom. Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981).

In two decisions reversed by the Ninth Circuit, the Board raised the issue of Longshore Act coverage *sua sponte*. The Board reasoned that this issue involved the subject matter jurisdiction of the administrative law judge and the Board, and even though not raised below or on appeal, it could not be waived. Addressing the issue, the Board held claimants lacked coverage. In rejecting the Board's reasoning, the court distinguished coverage from subject matter jurisdiction and held that the latter was not lacking under the facts of those cases. Thus, the Board's decisions that claimants were not within the coverage of the Act were reversed. *Ramos v. Universal Dredging Corp.*, 10 BRBS 368 (1979), *rev'd*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981); *Perkins v. Marine Terminals Corp.*, 12 BRBS 219 (1980), *rev'd*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982).

The Director may appeal to the Board when an erroneous legal or factual determination is alleged, even though he did not participate in the proceedings before the administrative law judge. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). In such an appeal, the Director may only challenge the administrative law judge's analysis of the existing evidence and may not raise any new issues which would require new fact-finding by the administrative law judge. *Id.*; *Outland v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 552 (1981). *See* Standing, *supra*.

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The Board held that the Director may raise contentions for the first time on appeal where they allege erroneous legal determinations and effectively challenge only the administrative law judge's analysis of existing evidence. This is especially true where the liability of the Special Fund is at issue. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Where claimant argued that the doctrine of laches applied to preclude employer from challenging the occurrence of an injury on the basis that employer conceded that the 1977 injury occurred by voluntarily paying compensation and by entering into a 1980 stipulation

and agreement, the court affirmed the Board's decision that the issue was improperly raised for the first time on appeal and held that the Board properly refused to consider the argument. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

The Board stated it would not address an issue regarding a subsequent supervening injury since employer did not raise the issue before the administrative law judge. Employer asserted that the issue was raised during the formal hearing, but the record revealed that the parties merely offered evidence relevant to the issue. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

The Board held that the Director was not precluded from raising for the first time on appeal a Section 12 issue affected by statutory and regulatory amendments, as the Director may generally appeal any erroneous legal determination regardless of his participation at the hearing. In addition, an issue may be considered for the first time on appeal where a pertinent statute or regulation has been overlooked or when there is a change in law while the case is pending on appeal and the new law might materially alter the result. In this case, the issue involved whether the employer was prejudiced by claimant's failure to give timely notice pursuant to Section 12(d)(2), as amended in 1984. At the time of the administrative law judge's decision, the case law and an interim regulation established that untimely notice could only be excused if employer had knowledge of the injury *and* was not prejudiced by the untimely notice. Subsequent holdings and a new regulation established that under the 1984 Amendments, lack of prejudice alone would excuse untimely notice. The case was remanded for the administrative law judge to address prejudice. *Bukovi v. Albina Eng./Dillingham*, 22 BRBS 97 (1988).

Since Section 14(e) provides for a mandatory assessment of additional compensation, it may be raised for the first time at any time. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

Noting that it has consistently adhered to the longstanding principle that an issue cannot be presented initially when the case is on review, the Board held that employer could not raise the issues of situs and status under the Act for the first time in its appeal before the Board. The Board rejected employer's reliance on its decision in *Ramos*, 10 BRBS 368, in light of its reversal by the Ninth Circuit and held that as employer did not contest coverage below, employer's right to contest this issue was waived. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

The Board decided to address the issue of whether employer was entitled to a credit under Section 14(j), even though it was not raised before the administrative law judge. In cases arising within the Fifth Circuit, the Board will follow *Martinez*, 544 F.2d 1233, and address an issue not raised below where a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice. In this case, since Section 14(j) of the Act gives employer a statutory right to credit voluntary payments against subsequently found

liability, and resolving the credit issue will not require new findings of fact, the issue could be considered for the first time on appeal. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991) (table).

The Board declined to consider the commencement date of employer's liability for purposes of Section 8(f) relief as it was raised for the first time on appeal. *Shaw v. Todd Pac. Shipyards Corp.,* 23 BRBS 96 (1989).

The Board did not address employer's argument that claimant should be barred from recovery of medical benefits because of his failure to comply with Section 7(d) as it was raised for the first time on appeal. *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991).

The Board refused to allow employer to argue for the first time on appeal that claimant did not give timely notice of his cervical injury, as the Act requires that a Section 12 defense be raised at first hearing on the claim. The Board distinguished the facts of this case from *Bukovi,* 22 BRBS 97. The Board also rejected employer's contention that it should be permitted to raise Section 12 on appeal because since the time of the hearing, when it stipulated to having received timely notice, there had been a change in law; the Board concluded that employer was incorrect in asserting a change in the law. *Alexander v. Ryan-Walsh Stevedoring Co., Inc.*, 23 BRBS 185 (1990), *vacated and remanded mem.*, 927 F.2d 599 (5th Cir. 1991).

When claimant's LS-18 did not list nature and extent of disability as a contested issue and his counsel twice stated at the hearing that he was seeking only temporary partial disability benefits, claimant was precluded from raising a claim for temporary total disability benefits on appeal. *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990).

The Board rejected employer's argument that the Director could not raise the Special Fund's entitlement to a Section 3(e) credit for the first time on appeal. The Director was permitted to raise this issue for the first time on appeal as the liability of the Special Fund was at issue and the Director argued that a pertinent statutory provision had been overlooked. *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

In response to a dissent, the majority noted that issues not raised before the Board would not be addressed *sua sponte* based upon errors uncovered during a review of the record. Absent plain error on the face of the decision below, only issues raised by the parties will be addressed. The majority thus declined to reverse the administrative law judge's award of a Section 14(e) penalty based on evidence it found in the record indicating that employer timely controverted the claim. *Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992) (Stage, C.J., dissenting).

Where counsel represented claimant and employer's insurance plan administrator, and claimant was unaware of counsel's possible conflict of interest until after he represented her, it was proper for her to raise the issue on appeal to the Board. The court held that the issue was sufficiently raised before the Board, and thus stated that the issue was not raised for the first time before it, and it remanded the case for proceedings on the conflict and informed consent issues. *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 declined to address employer's argument that claimant did not properly or timely file a request for medical benefits, as this issue was not raised before the administrative law judge. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

The Board declined to address employer's contention that claimant's disability was the result of an intervening injury, as employer failed to first raise that issue before the administrative law judge. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000).

The Board addressed the issue of whether Section 9(g) of the Act violated a treaty between the United States and Greece, even though it was raised for the first time on appeal. The issue was purely one of law, and the Board stated it was appropriate for it to address the issue. *Logara v. Jackson Eng'g Co.*, 35 BRBS 83 (2001).

The Board denied claimant's motion for reconsideration of its decision where claimant raised issues that were not properly before the Board. One issue challenged the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal and not in a cross-appeal. The other two issues were not raised on appeal after the administrative law judge's decision on remand, and the Board held that they could not be raised for the first time in a motion for reconsideration. In any event, the issues related to the administrative law judge's initial decision, and the Board's first decision in this case constituted the law of the case. *Ravalli v. Pasha Mar. Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The administrative law judge properly addressed claimant's pending Section 22 claim for a *de minimis* award when he addressed the later filed claim for additional temporary total disability benefits. Employer, in its motion for reconsideration to the administrative law judge, did not contend that the administrative law judge erred in addressing this issue, but argued only that the medical evidence did not support a nominal award. Employer cannot contend for the first time on appeal that it was deprived of the right of additional discovery on the deteriorating nature of claimant's condition, although it can file a motion for modification. *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 F. App'x 333 (4th Cir. 2004).

A subsequent employer raised before the administrative law judge the liability of the first employer for claimant's loss of wage-earning capacity due to the first injury. However, the subsequent employer denied any liability for claimant's aggravating work injuries, and it did not alternatively raise the possibility of concurrent awards. Moreover, the subsequent employer stipulated that if it

was found liable, then claimant's average weekly wage was her average weekly wage at the time of the first injury. The Board therefore declined to address the applicability of concurrent awards for the first time on appeal. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

As claimant's argument that employer should be estopped from contesting DBA coverage was not merely an ancillary argument supporting coverage but a new theory requiring additional findings of fact, the Board declined to address this issue which claimant raised for the first time on appeal. The Board stated that the exception to this rule, which applies where a pure question of law is concerned and failure to address it would result in a miscarriage of justice, did not apply since whether estoppel applies is not a pure question of law but rather is a question which requires determinations of fact by an administrative law judge. *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008).

The Eleventh Circuit held that the Board did not abuse its discretion in refusing to consider on appeal employer's argument, which the administrative law judge had declined to address as it was raised for the first time in a post-hearing brief, that it was due a credit for an alleged overpayment of benefits, particularly in light of the fact-intensive nature of the new argument and the calculation of wage-earning capacity it would involve. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009).

Where claimant suffered a heart attack while working for a subsequent employer in non-covered employment, the Board declined to address the issue of whether the prior employer was liable for claimant's heart condition or its underlying disease, as there was no evidence that claimant raised the theory that his heart condition developed and/or worsened during his employment with the first employer. Moreover, the Board noted that the administrative law judge rationally credited a doctor's opinion that claimant's heart attack and underlying disease were not work-related. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

In a case involving the question of whether claimant is decedent's "widow," the Board declined to address claimant's assertion on appeal that she is his widow because she was dependent upon him at the time of his death. This issue had not been raised before the administrative law judge. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014).

The Board rejected employer's argument that the Director could not argue for the first time on appeal that employer waived its right to claim Section 8(f) relief. The Director was permitted to raise the waiver issue for the first on appeal as the Director's argument raised a legal issue and as the liability of the Special Fund was at issue. *Anderson v. Yusen Terminals, Inc.*, 50 BRBS 23 (2016).

The Board affirmed the administrative law judge's denial of a few days of permanent total disability benefits. The administrative law judge rationally found that claimant's inability to work on those days was not due to his injury, as he had been released to return to his usual work and was attempting to get a job through the hiring board. Rather, claimant's inability to work on those days was solely due to the number of jobs available on the hiring

board. The Board also rejected claimant's newly-raised theory that his injury caused him to be placed too far down on the board; that theory was not raised before the administrative law judge. *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring).

The Fifth Circuit held that the Board did not err in refusing to consider claimant's theory that his shoulder surgery was intended to address a joint sprain, as the issue was raised for the first time in his motion for reconsideration to the Board and was not raised before the administrative law judge. *Bourgeois v. Director, OWCP*, 946 F.3d 263, 53 BRBS 91(CRT) (5th Cir. 2020).

Claimant raised *Lucia v. SEC*, 138 S.Ct. 2044 (2018), on appeal, contending she timely raised the issue in her first brief to the Board. The Board held that claimant forfeited her *Lucia* challenge because she did not raise it before the administrative law judge. The Board noted that *Lucia* was decided two months before the administrative law judge issued her decision, giving claimant sufficient time to raise the *Lucia* issue before the administrative law judge rather than waiting until after the administrative law judge issued an adverse decision. Accordingly, the Board denied claimant's motion to vacate the decision based on *Lucia*. *Powell v. Serv. Employees Int'l, Inc.*, 53 BRBS 13 (2019).

The Sixth Circuit held that employers failed to preserve their Appointments Clause challenges for appeal to the Board because they did not raise the issue before the administrative law judges. The black lung regulations at 20 C.F.R. Part 725 and the Board's regulation at 20 C.F.R. §802.301(a) require issue exhaustion, or else the issue is forfeited on appeal to the Board. The court held there is no basis to excuse the forfeiture in these cases, as the Appointments Clause issue raised a facial constitutional challenge which administrative law judges have the authority to address – assignment of the case to a properly appointed judge. The court rejected the contention that *Lucia* represented a change in law and further warned that "sandbagging" could result if a party could raise an Appointments Clause challenge at a late stage of the proceeding. *Joseph Forrester Trucking v. Director, OWCP*, 987 F.3d 581 (6th Cir. 2021).

Inadequate Briefing

A party seeking review of an administrative law judge's decision must submit a petition for review to the Board that specifies the petitioner's contentions. 20 C.F.R. §802.211. The petition for review must be accompanied by a supporting brief which states the issues to be considered by the Board, presents an argument with respect to each issue with citations to the transcript and exhibits of record, and concludes with a statement of the precise result sought on each issue and supporting legal authority. 20 C.F.R. §802.211(b).

Thus, a party challenging an administrative law judge's decision must address that decision and demonstrate why substantial evidence does not support the result reached. A decision contrary to the party's expectations, or contrary to some aspect of the record, is not necessarily an erroneous decision. Where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *See Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Shelton v. Washington Post Co.*, 7 BRBS 54 (1977).

The Board will not address issues appealed but inadequately briefed unless the party seeking review is not represented by counsel or the alleged errors are basic to the proper administration of the Act or to the rendering of justice in the individual case. *Sweitzer v. Lockheed Shipbuilding & Constr. Co.*, 8 BRBS 257 (1978); *Pendleton v. Gen. Constr. Co.*, 9 BRBS 755 (1978); *Shelton*, 7 BRBS 54. *See Bonner v. Ryan-Walsh Stevedoring Co.*, 15 BRBS 321 (1983) (issues raised, but not briefed); *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798 (1981) (same); *see also Prater v. Upper Beaver Coal Co.*, 6 BLR 1-448 (1983) (where claimant does not identify error by the administrative law judge but merely contends certain evidence establishes entitlement, Board does not review evidence and affirms administrative law judge); *Fish*, 6 BLR 1-107 (brief inadequate which makes general statements without identifying errors).

Failure to submit a petition for review and brief may, in the discretion of the Board, cause the appeal to be dismissed. 20 C.F.R. §802.211(d). Where a party appears *pro se*, Section 802.211(e) allows the Board, in its discretion, to waive formal briefing and prescribe an alternate method of providing information necessary for the Board to decide an appeal. In general, a party who is *pro se* may file a statement in support of the appeal, but is not required to do so. The Board reviews appeals filed by parties without representation under its statutory standard of review, looking to whether the administrative law judge's decision is supported by substantial evidence, rational and in accordance with law.

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Where party is represented by counsel, mere assignment of error is insufficient to invoke Board review. Where counsel failed to cite any relevant law or identify any error in administrative law

judge's consideration of the evidence, the Board held counsel had failed to raise a substantial issue for review and affirmed the decision below. *Carnegie v. C & P Tel. Co.*, 19 BRBS 57 (1986).

The Board declined to address a Section 8(i) issue which had been inadequately briefed. *Nordahl v. Oceanic Butler, Inc.*, 20 BRBS 18 (1987), *aff'd*, 842 F.2d 773, 21 BRBS 33(CRT) (5th Cir. 1988).

The Board declined to address issues where the party's brief failed to contain a discussion of the relevant law and evidence supporting its contentions. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

The Board declined to address a challenge to the administrative law judge's imposition of a Section 14(f) penalty where the issue was inadequately briefed. *West v. Washington Metro. Area Transit Auth.*, 21 BRBS 125 (1988).

Pursuant to Section 21(b)(3) and Section 802.211(a), (b), the Board held that where claimant merely filed a copy of a post-hearing brief as a petition for review and brief, without addressing the Decision and Order or identifying errors committed by the administrative law judge, the decision of the administrative law judge below must be affirmed, as claimant failed to raise a substantial issue for the Board to review. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990).

The Board held that a one-sentence "argument" which cited a single authority did not constitute adequate briefing of an issue raised on appeal, as the Board would have to extrapolate the argument and conclusion therefrom. Therefore, the Board held on reconsideration that the panel properly declined to address the issue in its decision. However, for the sake of clarification, the Board, en banc, stated that employer was liable to claimant for all medical expenses related to the injury paid by claimant and was liable for all medical expenses related to the injury paid by claimant's private health insurer, provided the private insurer filed a claim for reimbursement of same. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997).

Claimant appealed the issue of causation, but did not appeal the administrative law judge's finding that claimant was not covered under the Act. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant did not satisfy the Act's coverage provisions. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). As this finding was dispositive, the Board declined to address claimant's contentions regarding causation and affirmed the administrative law judge's denial of benefits. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

The Board declined to address a challenge to the administrative law judge's wage-earning capacity calculation where the issue was inadequately briefed. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Issues Raised in Response Brief

The Board generally will not consider new issues raised by the respondent without the benefit of a cross-appeal, *see* 20 C.F.R. §802.205(b), if the new assertions challenge the ultimate decision of the administrative law judge. *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983). Rather, the Board will entertain new issues so raised only if they offer an alternative in support of the administrative law judge's final judgment and are not advanced to alter, expand or diminish the rights of any party under the decision on review. *Id.*

The Board's decision in *King* resulted from a reassessment of the prior policy that issues not appealed but raised in a response brief would not be considered, *see Boies v. Nat'l Steel & Shipbuilding Co.*, 7 BRBS 81, 85 (1978), as this policy was not consistent with federal practice. The *King* holding is consistent with the Board's regulation at 20 C.F.R. §802.212(b), which states that arguments in response briefs "shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below."

Thus, in *Crum v. Gen. Adjustment Bureau*, 16 BRBS 101 (1983), the Board addressed employer's arguments regarding disability raised in its response brief which, if successful, would support the administrative law judge's award of temporary partial disability benefits. However, the Board declined to address employer's argument that claimant's entitlement should be limited to three days as it did not support the judgment below. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984) (Board declined to consider Sections 12 and 13 raised in response brief as a ruling in employer's favor would not support the decision below, which was an award of benefits).

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The Third Circuit held that where an appellee's contention provides an alternate avenue to a prior favorable judgment, the Board must address that contention even if not raised in a cross-appeal. The court addressed the Board's reasoning that "any new argument, the acceptance of which would dictate remand or any modification of the decision below must be raised in a separate appeal or cross-appeal," and rejected it. Under the "inveterate and certain" rule, arguments in a response brief cannot enlarge one party's rights and/or diminish another party's rights but may assert any argument supporting a ruling even though it may involve an attack on the reasoning of the lower court or an insistence on a matter overlooked or ignored by it. That remand may be required in order to reach a result is not determinative; so long as the contention provides an alternate avenue to a favorable judgment, it is "quite irrelevant that the avenue might wend its way through an inferior tribunal before reaching the desired destination." Accordingly, the case was remanded to the Board. *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133 (3d Cir. 1987) (black lung case).

The Board declined to address a claimant's request for a Section 14(f) penalty, as it was raised only in his response brief and not via a cross-appeal. *Castronova v. Gen. Dynamics Corp.*, 20 BRBS 139 (1987).

The Board declined to address a contention raised in a response brief challenging the administrative law judge's findings regarding Section 33(g), since such a contention should be raised in a cross-appeal. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

The Board reiterated that it will not address issues raised in a response brief which challenge the administrative law judge's findings as such arguments must be raised in a cross-appeal. *Garcia v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

Where claimant appealed that portion of administrative law judge's decision regarding a Section 33(f) credit and employer did not file a cross-appeal of the administrative law judge's Section 33(g) finding, the Board declined to consider employer's arguments on that issue. *Briscoe v. Am. Cyanamid Corp.*, 22 BRBS 389 (1989).

The Board rejected an employer's request, made in a response brief, that claimant's appeal to the Board be dismissed because claimant did not file a timely Petition for Review and brief. In so doing, the Board reasoned that employer's motion had not been presented in a separate document, as is required by 20 C.F.R. §802.219(b), that it was unclear from the case file whether the claimant's Petition for Review and brief had in fact not been filed in a timely fashion, and that the documents had been submitted "within a reasonable period of time." *Fuller v. Matson Terminals*, 24 BRBS 252 (1991).

In a case arising under the Black Lung Act, the Fourth Circuit held that the Board erred in refusing to consider an argument raised by claimant in a response brief. Claimant's award was based on a finding of entitlement under one regulation and due to a change in law, could not be affirmed on that basis. Claimant argued that another regulation supported the award and challenged the administrative law judge's finding that he did not meet its requirements. The court held that the Board failed to properly apply its decision in *King*, 6 BLR 1-187, or its regulation, 20 C.F.R. 802.212(b), which permits arguments in support of the decision below to be raised in a response brief. The court held that an appellee need not cross-appeal in order to make an argument that supports the result reached by the administrative law judge but attacks his reasoning in reaching that result. *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994).

Claimant's failure to respond to one of employer's arguments on appeal does not constitute an admission, as the Board is not bound by technical rules of appellate pleading and procedure. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

Where the district court imposed a Section 14(f) penalty on employer but denied the claimant fees, costs and interest, the Second Circuit declined to consider the claimant's renewed request for fees, costs and interest, as it was made in response to the employer's appeal and not on cross-appeal. *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Board held that it could not consider the merits of the Director's contention regarding the applicability of the Section 8(f)(3) bar as it was raised in a response brief. Specifically, the Board held that inasmuch as the Director, in forwarding his alternate rationale for supporting the administrative law judge's ultimate denial of Section 8(f) relief on the grounds of the prior mental condition, was contesting the administrative law judge's adverse finding regarding the absolute defense at Section 8(f)(3), and since consideration of the Director's contention would require remand, and thus, would not maintain the *status quo* of the administrative law judge's decision, his contention should have been raised in a timely filed cross-appeal. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp., 32* BRBS 118, *vacated on recon.*, 32 BRBS 283 (1998).

The Board granted reconsideration, and held that the Director's contention, raised in his response brief, that the absolute defense of Section 8(f)(3) was applicable, must be addressed as it supported the administrative law judge's ultimate denial of employer's request for Section 8(f) relief. The Board thus vacated its prior decision to the extent that it required the Director to have filed a cross-appeal to preserve this issue. Citing *Dalle Tezze*, 814 F.2d 129, and *Malcomb*, 15 F.3d 364, the Board further noted that it was irrelevant that consideration of the Director's contention would require remand, as acceptance of his position by the administrative law judge would maintain the *status quo* of the administrative law judge's decision. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998).

The Board denied claimant's motion for reconsideration of its decision where claimant raised issues that were not properly before the Board. One issue challenged the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge's decision on remand; the issues could not be raised for the first time in motion for reconsideration. In any event, the issues related to the administrative law judge's initial decision, and the Board's first decision in this case thus constituted the law of the case. *Ravalli v. Pasha Mar. Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The Board may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's decision. In this case, the Board addressed, but rejected, the contention that collateral estoppel effect should be given to the findings of the state workers' compensation board. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

The Board addressed employer's challenge to the administrative law judge's reliance on claimant's treating psychiatrist to find that claimant's psychological condition had reached maximum medical improvement. Although raised in its response brief, employer's contention provides an alternate avenue of affirming the administrative law judge's finding that claimant's disability remained temporary in nature. The Board, however, rejected employer's contention as the administrative law judge's finding was supported by substantial evidence. *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014).

Issues Raised in Reply Brief or Motions

The Board denied claimant's motion for reconsideration of its decision where claimant raised issues that were not properly before the Board. One issue challenged the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge's decision on remand; the issues could not be raised for the first time in motion for reconsideration. In any event, the issues related to the administrative law judge's initial decision, and the Board's first decision in this case thus constituted the law of the case. *Ravalli v. Pasha Mar. Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The Sixth Circuit held employer forfeited its argument that the administrative law judge lacked authority to hear the case under the Appointments Clause as employer first raised the issue in its reply brief. The court explained that Appointments Clause challenges are subject to ordinary principles of waiver and forfeiture, and arguments are deemed forfeited when not raised in an opening brief. The court rejected employer's assertion that the Supreme Court's recent decision in *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 (2018) ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief") established new precedent such that the forfeiture may be excused as *Lucia* itself noted that existing case law "says everything necessary to decide this case." *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 52 BRBS 37(CRT) (6th Cir. 2018).

The Board denied claimant's motion to vacate the administrative law judge's decision and to remand the case to a properly appointed administrative law judge, pursuant to *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044 (2018). Claimant did not raise any issue in her initial brief to the Board concerning the administrative law judge's appointment under the Appointments Clause and thus forfeited this argument. *See* 20 C.F.R. §802.211. *Motton v. Huntington Ingalls Indus., Inc.*, 52 BRBS 69 (2018); *see also Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018) (Appointments Clause issue raised in reply brief will not be addressed).

The Sixth Circuit affirmed the Board's decisions in two black lung cases involving Appointments Clause challenges based on *Lucia v. SEC*, 138 S.Ct. 2044 (2018), which were first raised in motions for reconsiderations before the Board. In both cases, the Board denied reconsideration holding that the moving parties "waived" the *Lucia* issue by failing to raise it sooner, i.e., the issue was raised only after the Board issued decisions on the merits in those cases. The Sixth Circuit reaffirmed the issue-exhaustion requirement in this case, held that the parties did not properly exhaust their claims because they did not follow DOL's claims-processing rules governing how to raise them, and determined that none of the exceptions to exhaustion applied. The court thus held that the parties forfeited their constitutional claims in court by failing to exhaust them with the Board. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 53 BRBS 45(CRT) (6th Cir. 2019); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020).

Appeals of Interlocutory Orders

The Board has adopted the established federal practice of generally not accepting appeals on interlocutory matters. *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). Rulings in interlocutory orders are reviewable after a final decision issues. *See Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). Thus, the Board ordinarily does not accept interlocutory appeals to avoid piecemeal review. *Hudnall*, 17 BRBS 174.

As an administrative agency, the Board is not bound by the legal limitations on the federal courts with regard to review of final decisions. Nonetheless, the Board has adopted the "collateral order doctrine" applicable in those courts, under which interlocutory review of an incomplete decision is permissible "in that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541, 546 (1949).

In addition, the Board has exercised its discretion and allowed interlocutory appeals that did not fall within the collateral order doctrine based on its responsibility to properly direct the course of the adjudicatory process. *Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Murphy v. Honeywell, Inc.*, 8 BRBS 178 (1978). *See Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982) (accepting direct appeal of deputy commissioner's order denying depositions); *Lopes v. George Hyman Constr. Co.*, 13 BRBS 314 (1981) (accepting appeal of administrative law judge's order denying claimant's motion to quash notice of deposition). *See also Silva v. Massman Constr. Co.*, 9 BRBS 932 (1979) (administrative law judge's decision addressing coverage and awarding temporary benefits is not interlocutory and thus ripe for appeal); *Martin v. Kaiser Steel Corp.*, 9 BRBS 903 (1979) (same).

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Although the administrative law judge did not enter a final award after finding that claimant was covered by the D.C. Act, the Board entertained employer's appeal in the interest of judicial economy. *Williams v. Whiting Turner Contracting Co.*, 19 BRBS 33 (1986).

Although interlocutory review is not generally granted in cases involving discovery orders or incomplete decisions, the Board granted review in this case, as extraordinary circumstances were present based on the administrative law judge's failure to permit a medical provider-intervenor the opportunity to respond to employer's Motion to Compel. The hospital's due process rights were collateral to the merits, and redress of their denial would have been impossible on appeal of merits of the case. *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

In a case where the parties tried only the issue of coverage before the administrative law judge and stated that other issues could be resolved by agreement once coverage was decided, the Board granted review despite the lack of a final order. The Board noted that, in order to avoid piecemeal review, the administrative law judge should obtain the facts necessary to resolve all issues prior to

deciding the issue of jurisdiction so that a single compensation order may issue. *Jackson v. Straus Sys., Inc.*, 21 BRBS 266 (1988).

Where the administrative law judge addressed only issues of status and situs, the Board granted review of those issues in fairness to the parties as employer's appeal had been pending since 1986, but noted that the appeal was interlocutory and that the Board ordinarily does not accept interlocutory appeals. *Caldwell v. Universal Mar. Serv. Corp.*, 22 BRBS 398 (1989).

The Board accepted an interlocutory appeal of an administrative law judge's order disqualifying counsel from representing claimant in the instant case, inasmuch as the appeal had been pending since 1986 and Board will accept interlocutory appeals where necessary to direct the proper course of litigation. The Board held the administrative law judge abused his discretion in disqualifying counsel. *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The Board set forth the limited circumstances in which it will accept an interlocutory appeal, namely when it is necessary to properly direct the course of the adjudicative process, or if the collateral order doctrine applies. In the instant case, since the administrative law judge did not purport to resolve the controversy between the parties but rather, after addressing the only issue of coverage under the Act, remanded the case to the deputy commissioner for further proceedings, the administrative law judge's Order was not final. As no exceptions to the rule against taking appeals of interlocutory orders applied, the Board dismissed employer's appeal. *Arjona v. Interport Maint.*, 24 BRBS 222 (1991).

The Board dismissed claimant's appeal of the administrative law judge's order denying recusal, as it was not an appeal of a final order, and did not fall within the exceptions for taking such an appeal: (1) the order must conclusively resolve the disputed question; (2) the order must resolve an important issue completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Hartley v. Jacksonville Shipyards, Inc.*, 28 BRBS 100 (1994).

The Board held that administrative law judge's findings regarding a settlement in a prior interlocutory order were subject to review by the Board as a final decision on the claim had been issued and appealed. The Board thus rejected employer's argument that the claimant should have appealed the earlier decision. *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

The administrative law judge's Order Compelling Discovery did not satisfy the three-pronged test that would bring it under the collateral order exception to the final judgment rule articulated by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988): the order did not resolve an important issue totally separate from the merits of the action because it related to the credibility of evidence relevant to the merits of the case, and the order would not be "effectively unreviewable" on appeal from a final judgment, as employer may appeal the final fee award. Nor did the danger of denying justice in this case outweigh the inconvenience and cost of piecemeal review. Finally, employer's argument that the Board should accept the appeal to properly direct the course of the adjudicatory process was rejected, as discovery need not be uniformly conducted because each administrative law judge has broad discretion in such matters. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

In this case, the administrative law judge did not resolve the controversy between the parties (whether Section 33(g) bars claims for medical benefits), but instead denied employer's motion for summary judgment and remanded the case to the district director for further development of the case; thus, the Board held that the administrative law judge's Decision and Order was not final. No exceptions to the rule against taking appeals of interlocutory orders applied in this case. The Board need not direct the course of the adjudicative process, and the collateral order doctrine does not apply as employer is seeking to foreclose all future entitlement to medical benefits on the merits. Thus, the employer's appeals were dismissed. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

The Board dismissed the Director's appeal of the administrative law judge's order on a motion to compel depositions as interlocutory. The administrative law judge ordered the district director and a claims examiner to be available for depositions concerning procedures involving Section 8(f) applications. The order was not collateral to the merits of the case, the Director did not raise any due process or privileged information defenses, the order was not unreviewable upon final judgment and it was not necessary for the Board to direct the course of litigation inasmuch as the Director's contentions related to the relevancy of the information to be discovered and not to its admissibility. *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995).

The Board dismissed employer's appeal of the administrative law judge's order denying Section 8(f) relief and remanding the case to the district director for entry of a compensation order. The case was remanded to the administrative law judge to either enter an award based on the parties' alleged stipulations or obtain evidence necessary to resolve the issue on which the parties did not agree. The Board also noted that absent findings on an award, the administrative law judge could not properly address Section 8(f). The Board stated that employer could appeal any adverse findings after the administrative law judge issued a final order. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999).

Where the administrative law judge issued an interlocutory order, issues addressed therein were not barred from the Board's consideration by the failure to appeal that order. Rather, the issues may be raised on appeal of the final order, and the Board is not bound by statements made in the interlocutory order. Here, in his non-final order, the administrative law judge identified the disputed issue of responsible carrier, and he declined to dismiss employer from the case, stating that a carrier would be liable for benefits, but he did not resolve any issue of the case. Thus, on appeal from the final order, the Board properly addressed the issue of responsible carrier. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Board rejected the Director's motion to dismiss the appeal because it was taken from a non-final order, since the Board is not bound by technical rules of procedure, 33 U.S.C. §923(a), and the significance of the issue at hand, i.e., whether active duty military personnel working off-duty at an NFIA entity are excluded from coverage, warranted consideration of employer's appeal. *Hardgrove v. Coast Guard Exch. Sys.*, 37 BRBS 21 (2003).

The Board agreed with the Director that the issue raised on appeal was significant to the parties and the industry. The Board therefore accepted the interlocutory appeal of a district director's Order Suspending Compensation pursuant to Section 7(f) for failure to attend a medical

examination in order to properly direct the course of the adjudicatory process. *L.D. [Dale] v. Northrop Grumman Ship Sys., Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008).

The Board dismissed employer's interlocutory appeal, as the order appealed from did not satisfy the requirements of the collateral order doctrine and as employer did not raise any due process considerations. The administrative law judge issued an order granting claimant's motion to compel discovery of the names and addresses of the companies identified by employer's vocational expert as potential suitable alternate employment. A discovery order such as this is reviewable after a final decision is issued, and employer did not contend that the matters to be discovered were privileged materials. Employer's bare contention of "undue hardship" was rejected. *Newton v. P&O Ports Louisiana, Inc.*, 38 BRBS 23 (2004).

In a footnote, the Board stated that appeal of the administrative law judge's interlocutory orders was proper as the administrative law judge had issued a final decision on the merits and that decision had been appealed. Accordingly, employer's appeal of the administrative law judge's orders on motions for summary decision was properly before the Board. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

The Ninth Circuit rejected employer's argument that issues addressed by the Board in its first decision and not in its decision after remand were not properly before the court. The court held that under the APA and Longshore Act, previous non-final orders of the Board are properly appealable only when the final Board decision is appealed. Thus, issues which were addressed in the Board's first non-final decision remanding the case to the administrative law judge were properly before the court when the Board's final decision was appealed. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

The Fifth Circuit dismissed for lack of subject matter jurisdiction claimant's appeal of the Board's dismissal of his appeal. Claimant appealed an unfavorable recommendation of the district director directly to the Board prior to an evidentiary hearing before an administrative law judge. The Board dismissed the appeal as a memorandum of informal conference is not a final appealable action. The court stated that the Board correctly dismissed the appeal because it was not presented with anything within its statutory purview to review, pursuant to Section 21(b) and 20 C.F.R. §802.301. Rather, claimant was required to pursue his claim before an administrative law judge. As the Board did not issue a final order, the court of appeals similarly lacked jurisdiction over the appeal pursuant to Section 21(c). *Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

The Board granted claimant's motion for reconsideration of the dismissal of his interlocutory appeal because the Board's guidance was necessary to direct the course of the adjudicatory process. The administrative law judge had ordered claimant, who lives in Mexico, to bear the costs associated with his travel to and attendance at employer's vocational and medical evaluations in San Diego; the Board reversed. The Board rejected employer's contention that claimant had only 10 days to file a motion for reconsideration because the Board's order was interlocutory. The Board's Order dismissing claimant's appeal was not an interlocutory order, as it was a final

resolution of the appeal. Therefore, claimant's motion for reconsideration, filed within 30 days of the Board's decision, was timely. *Pensado v. L-3 Commc'ns Corp.*, 48 BRBS 37 (2014).

The Board acknowledged that while employer's appeal is of a non-final order, in that the administrative law judge addressed only the coverage issue and neither awarded or denied benefits to claimant, the significance of the issue raised warranted the Board's consideration of employer's appeal. The Board, however, reiterated that piecemeal litigation of this sort is discouraged. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015), *aff'd sub nom. Owensby & Kritikos v. Director, OWCP*, 997 F.3d 587, 55 BRBS 23(CRT) (5th Cir. 2021).

Wardell Orthopaedics provided medical care for claimant's work injury. Wardell submitted an invoice to employer for $8,113. Employer disputed the bill and made a payment of $3,133.60. Wardell filed a notice with the district director, seeking payment in full. Upon investigation, the district director calculated that, under the OWCP Medical Fee Schedule, employer owed an additional $1,374.26. Employer disagreed and requested a hearing on the matter. Thereafter, employer moved to dismiss the claim, asserting, *inter alia*, that the administrative law judge did not have jurisdiction to address the reimbursement claim because employer's defense against the medical charges is based on several private re-pricing contracts. The administrative law judge denied the motion to dismiss. The Board accepted this interlocutory appeal in order to direct the course of the adjudicatory process in light of the issues raised and the number of cases potentially affected. *Watson v. Huntington Ingalls Industries, Inc.*, 51 BRBS 17 (2017) (*See* Section 7(g) and Section 19(a) for a discussion of the merits).

The Board held that claimant's appeal of the administrative law judge's Order Deferring Ruling on Fee Petition is reviewable under the "collateral order doctrine." The Board explained that the order satisfies the three-pronged test articulated by the Supreme Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), as the order conclusively held the fee petition in abeyance, and this issue is collateral to the merits of the case and is effectively unreviewable after a final order issues. *Zaradnik v. The Dutra Group*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518, 54 BRBS 45(CRT) (9th Cir. 2020).

Deference

In general, as the Board is a quasi-judicial agency and not a policy-making body, its interpretation of the statute and regulations are not entitled to special deference. *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991); *Am. Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989).

In accordance with the opinions of the courts of appeals, *see Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT) (5th Cir. 1993); *Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993); *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991); *Force*, 938 F.2d 981, 25 BRBS 13(CRT); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), the Board has granted deference to the reasonable interpretations of the Act and the regulations by the Director, Office of Workers' Compensation Programs. The appellate cases on deference are discussed in Section 21(c), *infra*.

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Section 39 authorizes the Secretary of Labor to promulgate rules and regulations for the purposes of administering the Act. The courts have held that considerable deference is accorded to an agency's interpretation of its authorizing statutes, and thus, an agency need only adopt a permissible interpretation in order to be sustained. Rules or regulations of an agency empowered to adopt the particular rule must be sustained unless unreasonable and plainly inconsistent with the statute. Interpretative regulations should not be overruled except for weighty reasons. The party claiming that a regulation is invalid has the burden of so demonstrating. Where a regulation may be construed together with the statute so as to uphold the validity of the regulation while at the same time preserving the legislative intent and purpose behind the statute, the regulation must be upheld. In this case, the Board upheld the validity of the regulations at 20 C.F.R. §§702.241-702.243 implementing amended Section 8(i). *McPherson v. Nat'l Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). *See also Norton v. Nat'l Steel & Shipbuilding Co.*, 27 BRBS 33 (1993), *aff'g on recon. en banc* 25 BRBS 79 (1991) (Brown, J., dissenting); *Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1989).

The Board held that Guam is covered by the Act, deferring to the Director's interpretation as to the scope of the Act's coverage in view of the ambiguity of the term "Territory" in Section 2(9). The Board held, however, that deference is not due the Director on the issue of whether the University of Guam is a subdivision of the government of Guam, as

resolution of this issue rests on the interpretation of case law and is not a matter of statutory interpretation. *Tyndzik v. Univ. of Guam*, 27 BRBS 57 (1993) (Smith, J., dissenting in part), *rev'd in part sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995).

The Board adopted the Director's position that the language of Section 7(d)(2) and the change in the regulation at 20 C.F.R. §702.422(b) gives the district director sole authority to consider whether to excuse an untimely first report of treatment. The regulation is not plainly erroneous or inconsistent with the statute, and the Director's interpretation must be sustained because it is reasonable and consistent with Section 7 as a whole. The Board, noted, however, that there are problems with the Director's interpretation. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting).

Although the Board interpreted the 10-day period in Section 14(f) as meaning 10 calendar days, the Board stated that it need not defer to the Director's agreement with this interpretation as the statutory language is unambiguous. *Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995).

The Board rejected employer's contention that the definition of "length" under Section 701.301(a)(12)(iii)(F), the implementing regulation to Section 2(3)(F), should be interpreted the same as a Coast Guard regulation which defines the length of a vessel. The Board stated that, despite initial reliance on the Coast Guard regulation, the Director's reasonable interpretation of the regulation is that the Department's exclusion from its regulation of the exceptions listed in the Coast Guard regulation indicates a conscious effort to distinguish the two. The Board thus deferred to the Director's interpretation of the regulation. *Powers v. Sea Ray Boats*, 31 BRBS 206 (1998).

The Board deferred to the Director's regulatory interpretation of the phrase "disabled employee" in Section 8(j). The statute is ambiguous and the regulation interpreting the statute is entitled to deference unless it is arbitrary, capricious or manifestly contrary to the statute. 20 C.F.R. §702.285(a) expresses the legislative intent of the statutory phrase and is consistent with Act as a whole. *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd*, 161 F. App'x 178 (2d Cir. 2006).

The Board declined to defer to the Director's construction of 20 C.F.R. §702.321(a) as requiring compliance with each subsection of 20 C.F.R. §702.441, including (b) referencing presumptive audiograms. The Board noted that his interpretation was not supported by case precedent or the plain language of the regulation, that the Director was taking this position for the first time over 20 years after the regulation was promulgated and was doing so an advocate of the Special Fund rather than as the Act's administrator. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008).

Law of the Case

When a case is before the Board for a second time, and the same issue is raised in the second appeal, the Board generally holds that its prior decision is "the law of the case," and it therefore will not reexamine that issue. *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983); *Whitlock v. Lockheed Shipbuilding & Constr. Co.*, 15 BRBS 332 (1983) (Ramsey, dissenting); *Presley v. Tinsley Maint. Serv.*, 15 BRBS 245 (1983). *See U.S. v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950).

In *Stark v. Bethlehem Steel Corp*., 15 BRBS 288 (1983) (Ramsey, dissenting), the Board held that its prior decisions in that case constituted the law of the case and were controlling despite the fact that they were overruled by *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981). In dissent, Judge Ramsey stated that the doctrine of the law of the case is a matter of judicial practice and follows from the policy that there be an end to litigation; the doctrine need not be applied, however, in exceptional circumstances such as when the prior decision is clearly erroneous in light of the intervening case law. *Id. a*t 292-296. *Accord Whitlock*, 15 BRBS at 335 (Ramsey, dissent).

The Board has since acknowledged that an intervening decision may provide grounds for reconsidering a prior holding. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986). The Board has stated that the law of the case doctrine is discretionary and may not apply where there is a change in the underlying fact situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the Board's initial decision was clearly erroneous and allowing it to stand would result in manifest injustice. *See Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005); *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting).

In the following cases, the Board applied the law of the case doctrine: *Hunter v. Duncanson-Harrelson Co.*, 14 BRBS 424 (1981) (employer's arguments regarding coverage rejected in first decision which was law of the case); *Cooper v. John T. Clark & Son of Maryland, Inc.*, 14 BRBS 154 (1981), *aff'd*, 687 F.2d 39, 15 BRBS 5(CRT) (4th Cir. 1982) (since the Board had already rejected the employer's arguments in the initial appeal, 11 BRBS 453 (1979), the Board affirmed the administrative law judge's decision on the basis that its previous holding was the law of the case); *Meecke v. I.S.O. Personnel Support Dep't*, 14 BRBS 270 (1981) (Board's earlier holding that claimant was permanently totally disabled, not temporarily totally disabled, stands as the law of the case); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981) (decision regarding loss of wage-earning capacity in earlier appeal stands as the law of the case); *Lewis v. Am. Marine Corp.*, 13 BRBS 637 (1981) (since the Board had already issued a decision on the Section 8(f) issue, the Board refused to address the Director's arguments concerning Section 8(f)); *Burbank v. K.G.S., Inc.*, 13 BRBS 467 (1981) (prior holding that claimant was not an

independent contractor is law of the case); *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980) (jurisdiction was settled the first time the case came before the Board; the Board reaffirms that holding).

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In reaching a different result on the issue of the date of majority in D.C. based on an intervening decision by the D.C. Circuit, the Board noted that the law of the case doctrine is merely a matter of judicial economy, and an intervening contrary decision offers a cogent reason for reexamining a previous holding. *Stokes v. George Hyman Constr. Co.*, 19 BRBS 110 (1986).

The Board declined to address issues of situs, *res judicata*, collateral estoppel and election of remedies. These issues were decided in the previous appeal, and the Board's first decision constituted the law of the case. *Dixon v. John J. McMullen & Associates, Inc.*, 19 BRBS 243 (1986).

In a case before the Board for the second time, the Board declined to consider an issue relating to a child's entitlement to benefits which it had fully considered and resolved in the first appeal, holding that its prior decision was the law of the case. *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

The Board's prior holding that the trip-payment exception to the coming and going rule would apply if claimant was returning from work when the accident occurred constituted the law of the case. The Board affirmed a finding that claimant was not injured in the course of his employment based on the finding on remand that he was not returning from work when the accident occurred. *Oliver v. Murry's Steaks*, 21 BRBS 348 (1988).

On appeal after remand for findings regarding Sections 3(b) and 20(d), the majority held that its prior decision in *Williams v. Healy-Ball-Greenfield*, 15 BRBS 489 (1983), that claimants' injuries arose out of their employment was the law of the case and declined to reconsider the issue. In response to the dissent, the Board rejected the argument that this issue should be reopened, holding that while it had the power to reconsider its first decision, none of the generally accepted reasons for doing so was present. The majority found that there was no change in the underlying fact situation, no intervening controlling authority demonstrating that the initial decision was erroneous, and the Board's initial decision was neither clearly erroneous nor resulted in a manifest injustice. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J., dissenting).

In a case before the Board for the second time, the Board held that the issue of D.C. Act jurisdiction had been fully considered in the Board's prior opinion; accordingly that decision constituted the law of the case. The Board, therefore, declined to address

employer's contentions regarding this issue. *Brocklehurst v. Giant Food, Inc.*, 22 BRBS 256 (1989).

The Board vacated the administrative law judge's award of permanent total disability benefits, as the Board's prior decision that the claimant claimed only permanent partial disability was the law of the case. *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989).

In an appeal of an attorney's fee levied against claimant, the Board rejected claimant's argument that it reconsider its prior holding in *Armor*, 19 BRBS 119 (1986) (en banc), regarding the interpretation of Section 28(b) of the Act. The Board's prior holding constituted the law of the case. *Armor v. Maryland Shipbuilding & Dry Dock Co.*, 22 BRBS 316 (1989).

Where the Board fully considered and resolved the situs issue in its prior decision, the Board declined to reconsider that issue, as its prior decision constituted the law of the case. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

The Board declined to reconsider its holding from the first appeal in this case that claimant was entitled to permanent total disability benefits based on the law of the case doctrine. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

As employer's arguments as to representation by counsel at the time of a settlement were previously considered and rejected by the Board in its initial Decision and Order and as employer failed to make any persuasive argument as to why this determination was in error, the Board affirmed its determination in its initial decision that employer's representation by a claims examiner was not representation by counsel. *McPherson v. Nat'l Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

The Board held that the law of the case doctrine did not preclude its consideration of claimant's argument on appeal that the administrative law judge erred in ordering that interest be determined after application of employer's Section 33(f) credit in one lump sum instead of on the dates on which the settlement proceeds were actually received. The question of interest was not at issue at the time of the first appeal before the Board as no additional benefits were found to be due, and it was not until after the administrative law judge's second decision, when the administrative law judge entered an award pursuant to Section 8(c)(23) and awarded employer additional credits, that interest became an issue. At any rate, as interest is mandatory, it may be raised at any time. *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

The "law of the case" doctrine, while departed from only for compelling reasons, is not an absolute bar when the same tribunal is reviewing its own interlocutory order. Thus, the administrative law judge could decide the Section 8(f)(3) issues at the second hearing in

this case, despite his earlier intimation that Section 8(f)(3) would not apply and his remand of the case to the deputy commissioner for the merits of Section 8(f). *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

The Board rejected employer's contention that the Director was barred from raising the issue of Section 8(f) contribution because she did not raise it at any of the earlier proceedings. There is no procedural rule barring consideration of an issue where the law has changed since the prior decisions were issued. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

The Board, without addressing any of the specific arguments, rejected a borrowing employer's contention that it had no jurisdiction over this case because it involved a contract dispute between an employer and an insurer. The Board held that this issue was fully addressed and decided in its previous decision, and that the prior decision was the law of the case. *Schaubert v. Omega Services Indus.*, 32 BRBS 233 (1998).

The issue of whether the administrative law judge erred in allowing claimant to submit evidence post-hearing concerning his unsuccessful job search was fully considered and resolved by the Board in employer's prior appeal of this case; therefore, the Board's decision on this issue constituted the law of the case and the Board declined to consider this issue again. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

The Board declined to address employer's contention that the Ninth Circuit's decision in *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993), was incorrectly decided inasmuch as the Board addressed this contention in its prior decision, which was the law of the case. *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd*, 7 F. App'x 547 (9th Cir. 2001).

In a Section 33(g) case, the Board disagreed with the Director's view that the Board need not consider the merits of the employer's appeal of the administrative law judge's decision based on the law of the case doctrine. In its previous decision, the Board relied on case precedent under Section 33(g) to hold that the administrative law judge erred in granting summary judgment without a determination as to whether the claimants, who alleged occupational injuries, were persons "entitled to compensation." In view of the employer's contention that the subsequent holding by the Supreme Court in *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT), supported its position that claimant was a person entitled to compensation, the Board ruled that it would not apply the discretionary law of the case doctrine and would address employer's argument on appeal. *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

In this "borrowed employee" case, the Board rejected the contention of TESI, the lending employer, that Trinity, the borrowing employer, improperly relied on the indemnity clause contained in the TESI/Trinity contract. As the Board addressed and rejected this contention

in its previous decision, the prior decision constituted the law of the case. *Ricks v. Temp. Emp't Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temp. Emp't Services v. Trinity Marine Grp., Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Board declined to reconsider its previous holding that employer was entitled to a credit for settlement monies paid to claimant by other longshore employers for the same disability based on the law of the case doctrine. *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), *rev'd sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Board reaffirmed its prior decision, applying the law of the case doctrine, that claimant, who was injured in the port of Kingston, Jamaica, was injured on a covered situs. The Board examined the exceptions to the doctrine and found none applicable, including that involving intervening case law; therefore, it held, in light of developing case law, that "navigable waters" includes injuries on the high seas and in foreign territorial waters when all contacts except the site of injury are with the United States. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

The Board denied claimant's motion for reconsideration of its decision. On reconsideration, claimant raised issues that were not properly before the Board. One issue challenged the administrative law judge's decision on remand and was initially raised in claimant's response brief to the Director's appeal, and not in a cross-appeal. The other two issues were not raised in an appeal after the administrative law judge's decision on remand; the issues cannot be raised for the first time in motion for reconsideration. In any event, the issues relate to the administrative law judge's initial decision, and the Board's first decision in this case thus constitutes the law of the case. *Ravalli v. Pasha Mar. Services*, 36 BRBS 91 (2002), *denying recon. in* 36 BRBS 47 (2002).

The Board affirmed the holding from its initial decision that claimant's job was essential to the shipbuilding process based on the law of the case doctrine. *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003).

Where INA settled with claimant after the administrative law judge's decision on remand, the Board held that the post-adjudication settlement did not constitute a change in the underlying circumstances warranting an exception to the law of the case rule. Similarly, the Board held that there was no intervening law affecting its prior decision on OCSLA coverage. Therefore, the Board held that its prior decision affirming the finding that claimant satisfied the OCSLA coverage requirements and its holding that INA was liable for claimant's benefits and must reimburse Houston General constitute the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

The Board declined to address claimant's contention that the administrative law judge erred in denying her motion to withdraw her claim based on the law of the case doctrine. The

Board fully addressed this contention in its first decision and none of the exceptions to this doctrine applies. *Irby v. Blackwater Sec. Consulting*, 44 BRBS 17 (2010).

The Board declined to address claimant's contention that the administrative law judge erred by focusing on intoxication as the sole cause of the fall rather than whether intoxication was the sole cause of claimant's injury. This issue was fully addressed in the Board's prior decision; it is therefore the law of the case, and none of the exceptions to this doctrine is applicable. *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

Reconsideration of Board Decisions

The Act provides that any party aggrieved by a decision of a panel of the Board may seek reconsideration from the full permanent Board sitting en banc. 33 U.S.C. §921(b)(5). The procedures for requesting reconsideration are set forth in Sections 802.407-409 of the regulations. Section 802.407 provides that any party-in-interest may, within 30 days of the filing of a Board decision, request reconsideration from the panel of judges rendering a decision. If the parties wish reconsideration en banc, they must file a request for reconsideration by the panel accompanied by a suggestion that the case is appropriate for reconsideration en banc. The suggestion for en banc review must be clearly marked as such. 20 C.F.R. §802.407(b).

Notwithstanding the above, even where no party has suggested reconsideration en banc, any permanent member may do so. Reconsideration en banc shall be granted on the affirmative vote of the majority of the permanent members, and a panel decision stands unless vacated or modified by the concurring vote of three permanent members. 20 C.F.R. §802.407(c), (d). Reconsideration en banc is not available in cases arising under the 1928 D.C. Workmen's Compensation Act, 36 D.C. Code 501-502 (1973) (amended 1982). 20 C.F.R. §801.301(d).

A request for reconsideration must be in writing, in the form of a motion, stating the reason for the request. The motion must be filed with the Clerk of the Board. 20 C.F.R. §802.408. All requests for reconsideration shall be reviewed and granted or denied in the discretion of the Board. 20 C.F.R. §802.409.

The Sixth Circuit has held that the Board has the discretion to decide untimely motions for reconsideration, because Section 802.407 is not a jurisdictional provision. Pursuant to Sections 802.216 and 802.217, time periods, other than for submitting a notice of appeal, may be enlarged within the Board's judgment. *Dailey v. Director, OWCP*, 936 F.2d 241 (6th Cir. 1991); *see also Director, OWCP v. Hileman*, 897 F.2d 1277 (4th Cir. 1990).

A request for reconsideration of an interlocutory order of the Board must be filed within 10 days of the order's filing pursuant to 20 C.F.R. §802.219(i). *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

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Since the 1984 Amendments to the Act do not apply in cases arising under the District of Columbia Workmen's Compensation Act, reconsideration en banc under Section 21(b)(5) is not available. Since the thirty-day time period for filing a motion for reconsideration is also contained in Section 21(b)(5), and the applicable regulation, 20 C.F.R. §802.407, provided at the time of the decision that such motions must be filed within 10 days of the

Board's decision, the Director's motion was dismissed as untimely filed. (Section 802.407 was subsequently amended to allow 30 days for all motions for reconsideration and Section 801.301(d) notes the unavailability of en banc reconsideration in D.C. Act cases). *Higgins v. Hampshire Gardens Apts.*, 19 BRBS 192 (1987).

The Board granted claimant's motion for reconsideration of the dismissal of his interlocutory appeal because the Board's guidance was necessary to direct the course of the adjudicatory process. The administrative law judge had ordered claimant, who lives in Mexico, to bear the costs associated with his travel to and attendance at employer's vocational and medical evaluations in San Diego; the Board reversed. The Board rejected employer's contention that claimant had only 10 days to file a motion for reconsideration because the Board's order was interlocutory. The Board's Order dismissing claimant's appeal was not an interlocutory order, as it was a final resolution of the appeal. Therefore, claimant's motion for reconsideration, filed within 30 days of the Board's decision, was timely. *Pensado v. L-3 Commc'ns Corp.*, 48 BRBS 37 (2014).

Review by the United States Courts of Appeals

Section 21(c) permits any person adversely affected or aggrieved by a final order of the Board to obtain review in the U. S. Court of Appeals for the circuit in which the injury occurred. An appeal to the circuit court must be filed within 60 days of the issuance of the Board's decision. The statute further provides that the payment of benefits is not stayed pending appeal unless ordered by the court upon a specific finding, based on evidence submitted to the court, that irreparable injury would otherwise ensue to the employer and specifying the nature of the damage.

Jurisdiction; Proper Circuit for Appeal

Section 21(c) provides that an appeal is properly instituted in the circuit where the injury occurred. In cumulative injury or occupational disease cases, appeal lies in any circuit where claimant worked and was exposed to the danger, prior to manifestation of the disease. The Eighth Circuit stated that a flexible rule in selection of the forum is best rather than a legal holding as to when injury occurs, when injury is the result of exposure to harmful stimuli. *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

In general, the court of appeals can transfer a case appealed in the wrong circuit. *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979). *See Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998) (transferring DBA case to proper court); *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998) (same). However, the First Circuit reached a different result, holding that Section 21(c) relates to jurisdiction, not venue, and confers exclusive jurisdiction to hear a petition for review of a final order of the Board in the court of appeals for the circuit in which the injury occurred. *Dantes v. W. Found. Corp.*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980). In *Dantes*, the court held that it lacked subject matter jurisdiction as the injury clearly occurred in a location clearly within the Second Circuit, and it dismissed the appeal. The court rejected the argument that it could transfer the case to the Second Circuit, quoting *Atl. Ship Rigging Co. v. McLellan*, 288 F.2d 589, 591 (3d Cir. 1961) ("Where, as here, the court lacks jurisdiction over subject matter…[a defect] which precludes it from acting at all, *a fortiori* a court lacks power to transfer.").

The D.C. Circuit has held that it has jurisdiction in any case arising under the D.C. extension to the Longshore Act, i.e., the 1928 D.C. Workmen's Compensation Act, regardless of where the injury occurred. *Greenfield v. Volpe Constr. Co., Inc.*, 849 F.2d 635, 21 BRBS 118(CRT) (D.C. Cir. 1988), *rev'g* 20 BRBS 46 (1987); *Director, OWCP v. Nat'l Van Lines*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). *Cf. Exhibit Aids, Inc. v. Kline*, 820 F.2d 650, 20 BRBS 1(CRT) (4th Cir. 1987) (Fourth Circuit held it has jurisdiction over D.C. Act cases where the injury occurred in its geographic area).

Different rules for appeal apply in some circuits in cases arising under the Defense Base Act (DBA) extension of the Longshore Act, 42 U.S.C. §1651 *et seq.*, which provides workers' compensation coverage for workers engaged in employment under contracts with the United States, or an agency thereof outside the U.S. The DBA authorizes the Secretary to assign areas of the world to compensation districts, s*ee* 20 C.F.R. §704.101, and, relevant to appeals, states that judicial proceedings shall be instituted in the U.S. District Court where the office of the deputy commissioner (district director) whose compensation order is involved is located. 42 U.S.C. §1653.

Under this provision, the court for the area in which the office of the district director which filed and served the administrative law judge's decision is located has jurisdiction over the case. *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998). The Courts of Appeals, however, are split on whether Board decisions are appealable to the circuit court or whether they must first be challenged in district court in the appropriate geographic area.

The First, Second, Seventh and Ninth Circuits have concluded that Congress meant to incorporate the Longshore Act as amended in 1972 into the DBA. Accordingly, appellate review in these circuits lies with the Board and then the United States Court of Appeals for the circuit where the office of the deputy commissioner whose compensation order is involved is located. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019); *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85 (CRT) (1st Cir. 2012); *Serv. Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010); *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979); *see also Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980).

The Sixth Circuit, however, concluded that the 1972 Amendments to Section 21, which eliminated review by a district court, was not incorporated into the DBA under 42 U.S.C. §1653(b). It held that review therefore remained in the appropriate district court as it did prior to the Amendments. *Home Indem. Co. v. Stillwell*, 597 F.2d 87 (6th Cir.), *cert. denied*, 444 U.S. 869 (1979). The Fourth, Fifth and Eleventh Circuits have joined in this view. Thus, in those circuits, a Board decision must first be challenged in the appropriate district court, and then may be appealed to the circuit court. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998); *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991). *See Hice v. Director, OWCP*, 48 F. Supp. 2d 501 (D.Md. 1999).

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In General

The Ninth Circuit ruled that the district court lacked subject matter jurisdiction, under the Longshore Act itself or under an implied cause of action under the Act, of a complaint brought by employer to recover an alleged overpayment of compensation benefits paid to claimant. *Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992).

The Longshore Act creates no express or implied remedy, enforceable in the district court, for an employer to recover an overpayment of compensation. Moreover, because Congress provided an exclusive scheme of review under the Longshore Act, there is no jurisdiction under the general federal question statute to consider employer's assertion of a federal common law right to recovery of an overpayment. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992).

The Seventh Circuit affirmed the district court's determination that it lacked jurisdiction over employer's claim for declaratory relief against DOL challenging the district director's "revocation" of the Section 3(d) small vessel exemption during his processing of claimant's claim, as employer failed to exhaust its administrative remedies through the department. *Maxon Marine, Inc. v. Director, OWCP*, 39 F.3d 144, 28 BRBS 113(CRT) (7th Cir. 1994).

The Ninth Circuit held that an appropriations statute, Public Law 104-134, which limited the time an appeal could remain pending before the Board to one year, did not violate the constitutional separation of powers principles. The court stated that the Board is a "constitutionally permissible adjunct tribunal" over which Congress has broad authority. Consequently, the court had jurisdiction to review the two cases before it. Moreover, the court held that Public Law 104-134 does not preclude a motion for reconsideration to the Board of a case which was administratively affirmed because it remained pending for over one year; therefore, a motion for reconsideration tolls the sixty-day period during which a party may appeal a case to the Circuit Court. Consequently, the court held that the appeals in these two cases were timely. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The First Circuit held that a case or controversy exists under Article III of the United States Constitution where claimant had been fully compensated for temporary disability and medical expenses by employer under the state workers' compensation statute and sought a declaratory ruling that his injury was covered by the Longshore Act. The court held that an administrative law judge may grant declaratory relief resolving the issue of disputed coverage if claimant shows a significant possibility of future disability or medical expenses related to the injury. *Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73(CRT) (1st Cir. 1998).

After reviewing the administrative review scheme of longshore cases and legislative history of the Act, the Third Circuit held that if this scheme is inadequate to address a "wholly collateral claim," district court jurisdiction is not precluded over that claim. In this case, Kreschollek challenged the constitutionality of Section 14 of the Act - specifically, whether he was deprived of his due process rights due to lack of a hearing before voluntary benefits were terminated. Acknowledging that the legislative history and administrative scheme preclude district court jurisdiction over ordinary challenges, the court concluded that because Kreschollek had alleged a sufficiently serious irreparable injury --lack of a pretermination hearing-- such is a matter of constitutional right that the administrative process is inadequate to afford him full relief; therefore, district court jurisdiction was not precluded in this instance. Further, the court held that the district court's exercise of jurisdiction over this collateral claim would have no bearing on the merits of Kreschollek's claim of entitlement to benefits. *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 30 BRBS 21(CRT) (3d Cir. 1996). Following remand, the Third Circuit affirmed the district court's holding that the government did not deny claimant's rights to due process when employer unilaterally suspended his longshore benefits as there was no government action involved and claimant did not have a property interest in the continued receipt of these benefits, citing the Supreme Court's holding in a Pennsylvania workers' compensation case, *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), that there is no state action when an employer terminates its voluntary payment of benefits and that an employee has no property interests in unadjudicated benefits under that statute. The Third Circuit rejected claimant's contention that because there is pervasive regulation of workers' compensation by the Longshore Act, there is necessarily state action. *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000).

Defense Base Act

The Fifth Circuit held that Section 21(b) of the Longshore Act as amended in 1972, which provides for review first by the Board and then by the U.S. Court of Appeals for the circuit in which the injury occurred, is not fully applicable to claims arising under the DBA, pursuant to 42 U.S.C. §1653(b). Instead, while the initial appeal of a compensation order on a DBA claim is to the Board, review of a BRB decision is to the district court, rather than a court of appeals. *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991).

The Fourth Circuit, in agreement with the Fifth and Sixth Circuits, and in disagreement with the Ninth Circuit, held that the court of appeals does not have jurisdiction over the initial judicial review of Board decisions in DBA cases. Rather, jurisdiction for judicial review of a Board decision in such cases lies initially in the appropriate district court. *Lee v. Boeing Co., Inc.*, 123 F.3d 801, 31 BRBS 101(CRT) (4th Cir. 1997).

Claimant suffered a heart attack on a military base in Australia, but the claim was transferred to the district director in Baltimore because that office was closest to claimant's residence. The D.C. Circuit ruled that under the DBA, it lacked jurisdiction to hear the case. The court held first that the location of the district director, not the administrative law judge who heard the case, identifies the location of judicial review. Since the district director was in the jurisdiction of the Fourth Circuit, and since the Fourth Circuit has held that the DBA requires appeals from the Board to be heard first by the district courts, not by the courts of appeals, the D.C. Circuit transferred the case to the U.S. District Court for the District of Maryland. *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998).

The Eleventh Circuit held that judicial review of compensation orders under the DBA must be commenced in the district courts pursuant to the unambiguous language of the DBA, which takes precedence over Section 21 of the Longshore Act. The court stated that were it to dismiss the appeal for lack of jurisdiction, any appeal to the appropriate district court would probably be time barred. Accordingly, citing the "interests of justice," the court, under 28 U.S.C. §1631, transferred the case to the United States District Court for the Middle District of Florida, wherein is located the office of the relevant district director. *ITT Base Services v. Hickson*, 155 F.3d 1272, 32 BRBS 160(CRT) (11th Cir. 1998).

The First and Second Circuits, in agreement with the Seventh and Ninth Circuits, and in disagreement with the Fourth, Fifth, Sixth and Eleventh Circuits, held that the court of appeals, rather than the district court, has jurisdiction to hear the initial judicial review of Board decisions in Defense Base Act cases. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Serv. Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010).

In this case, where claimant was injured in Afghanistan and awarded benefits by an administrative law judge based in Louisiana, the Board affirmed the administrative law judge's determination that counsel's entitlement to a fee under Section 28 of the Act is governed by Ninth Circuit law. The Board discussed the circuit court interpretations of Section 3(b) of the Defense Base Act, 42 U.S.C. §1653(b), noting that courts differ in concluding to which court an appeal of a Board decision is to be taken, but not to which jurisdiction. Accordingly, the Board held that the applicable law is determined by the location of the office of the district director who filed and served the administrative law judge's decision. Because the district director who filed the administrative law judge's award in this case has his office in San Francisco, despite employer's attempts to have the case transferred to a district office closer to claimant's residence, the applicable law is that of the Ninth Circuit. *McDonald v. Aecom Tech. Corp.*, 45 BRBS 45 (2011).

The Ninth Circuit held that petitions for review of BRB decisions under the DBA are to be filed directly in the Court of Appeals in the circuit where the relevant district director is located, as opposed to where the OALJ office is. *Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019).

1928 D.C. Act

Appeal from D.C. Act case must be made to circuit in which injury occurred, which in this case would be the Fourth Circuit. However, in view of the holding of the D.C. Circuit in *Nat'l Van Lines* that it has jurisdiction over all D. C. Act cases, the Board followed precedent established by that court. *Norfleet v. Holladay-Tyler Printing Corp.*, 20 BRBS 87 (1987).

The D.C. Circuit held that the 1928 D.C. Workmen's Compensation Act is a matter of local law, and therefore it would defer to the D.C. Court of Appeals' construction of the D.C. Act in its application of the terms of the Longshore Act. The D.C. Circuit therefore affirmed the D.C. Court of Appeals' holding that an employee's tort claim was barred by the exclusivity provisions of the Longshore Act. *Hall v. C & P Tel. Co.*, 809 F.2d 924, 19 BRBS 67(CRT) (D.C. Cir. 1987).

The Fourth Circuit stated that it has jurisdiction over claims arising under the 1928 D.C. Act if the injury occurs within the circuit, consistent with Section 21(c). *Exhibit Aids, Inc. v. Kline*, 820 F.2d 650, 20 BRBS 1(CRT) (4th Cir. 1987).

The D.C. Circuit stated that it was bound by its precedent in *Nat'l Van Lines* that it has jurisdiction over injuries giving rise to claims under the D.C. Act, even if the injury occurred outside the District of Columbia. The court states that this was especially true given the "disappearance of the statutory regime to which the *Nat'l Van Lines* holding applies" referring to the fact that D.C. had adopted its own workers' compensation statute and thus claims under the Longshore extension would eventually end. *Greenfield v. Volpe Constr. Co., Inc.*, 849 F.2d 635, 21 BRBS 118(CRT) (D.C. Cir. 1988), *rev'g* 20 BRBS 46 (1987).

Process of Appeal

Section 21(c) provides that appeals of Board decisions must be filed within 60 days of the issuance of the Board's decision by filing a written petition seeking to have the order modified or set aside. *Nat'l Steel & Shipbuilding Co. v. U. S. Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); 20 C.F.R. §802.406. The Board's decision is "issued" on the date it is "filed" by the Clerk of the Board. *See* 20 C.F.R. §802.403. Consequently, the period to take an appeal to the circuit court commences on that date, and not on the date the Board's decision is received by the petitioner or counsel. *Clay v. Director, OWCP*, 748 F.2d 501, 17 BRBS 16(CRT) (8th Cir. 1984). Since the 60-day period for appeal is jurisdictional, untimely appeals will not be heard. *Id.*; *see also Brown v. Director, OWCP*, 864 F.2d 120 (11th Cir. 1989); *Mussatto v. Director, OWCP*, 855 F.2d 513 (8th Cir. 1988); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

Where a request for reconsideration of the Board's decision is filed, i.e., within 30 days of the Board's decision, the time for appeal commences once the Board's decision on reconsideration is issued. 20 C.F.R. §§802.406, 802.407; *see Dailey v. Director, OWCP*, 936 F.2d 241 (6th Cir. 1991) (Board can extend time for filing motion for reconsideration); *see also Director, OWCP v. Hileman*, 897 F.2d 1277 (4th Cir. 1990).

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The 60-day appeal period provided by Section 21(c) of the Longshore Act was not tolled by the petitioner's submission of an untimely motion for reconsideration to the Board. Thus, where a petition for review was submitted to the Court of Appeals more than 60 days after the Board's decision was issued, the court dismissed the petitioner's appeal as untimely. *Bolling v. Director, OWCP*, 823 F.2d 165 (6th Cir. 1987). In *Director, OWCP v. Hileman*, 897 F.2d 1277 (4th Cir. 1990), the Fourth Circuit noted that it was unclear in *Bolling* whether the Board had rejected the motion for reconsideration because it was untimely filed or on the merits. In *Hileman*, the Fourth Circuit accepted an appeal following the Board's ruling on the merits of the Director's untimely motion for reconsideration.

The Sixth Circuit dismissed an appeal where the appeal was received by the court several months after the issuance of the Board's decision, noting that it cannot accept the date a letter is received by the Board as the date of filing in the court. *Fairchild v. Director, OWCP*, 863 F.2d 16, 22 BRBS 41(CRT) (6th Cir. 1988).

The Third Circuit held that Section 21(c) is jurisdictional, and not merely a statute of limitations, and that the doctrine of equitable tolling therefore cannot be applied to extend the 60-day filing period. The claimant filed a petition for review with the Board within 50

days of the Board's decision, but the court held that there is no statutory authority authorizing this administrative filing to be considered as if it had been timely filed with the appropriate court of appeals (unlike if it had been filed with a district court or another court of appeals). *Shendock v. Director, OWCP*, 893 F.2d 1458 (3d Cir. 1990) (en banc), *cert. denied*, 498 U.S. 826 (1990).

The Fourth Circuit held that an appeal of the Board's decision which was timely filed with the Board within 60 days after its decision was issued, was not timely filed with its Clerk's office, and therefore the court did not have jurisdiction to review the appeal. The court stated that claimant made no showing that the 15 day delay by the Board in advising him of his mistake was an unreasonable delay. The court also refused to apply FRCP 4(a) to an appeal from a Board decision. *Adkins v. Director, OWCP*, 889 F.2d 1360 (4th Cir. 1989) (black lung case).

The Ninth Circuit dismissed claimant's appeal as it was received by the court on the 67th day after the Board's decision was issued. The fact that the appeal was mailed on the 60th day was held insufficient, as the petition must actually be received by the court before the expiration of the 60th day. *Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165(CRT) (9th Cir. 1993).

Employer filed its appeal with the court of appeals more than 60 days after the Board made its determination but less than 60 days after employer learned of the decision. In rejecting employer's argument that *Nealon*, 996 F.2d 966, 27 BRBS 31(CRT) (addressing time for appeal of an administrative law judge's decision to the Board where the parties were not served), was controlling and that the word "issuance" under Section 21(c) and its regulations has the same meaning as "filed" under Section 21(a) and Section 19(e), the Ninth Circuit noted that every circuit faced with the question of the word "issuance" in Section 21(c) determined that it means filing with the Board's clerk and nothing more. The court dismissed employer's appeal as untimely. *Stevedoring Services of Am. v. Director, OWCP*, 29 F.3d 513, 28 BRBS 65(CRT) (9th Cir. 1994).

In Black Lung cases, the Sixth and Seventh Circuits held that second and successive motions for reconsideration, which raised the same grounds previously rejected by the Board, did not further toll the period for filing a petition for review. *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558 (7th Cir.1998); *Peabody Coal Co. v. Abner*, 118 F.3d 1106 (6th Cir.1997).

The Ninth Circuit held that an appropriations statute, Public Law 104-134, which limited the time an appeal could remain pending before the Board to one year, did not violate the constitutional separation of powers principles. The court stated that the Board is a "constitutionally permissible adjunct tribunal" over which Congress has broad authority. Consequently, the court had jurisdiction to review the two cases before it. Moreover, the court held that Public Law 104-134 does not preclude a motion for reconsideration to the

Board of a case which was administratively affirmed because it remained pending for over one year; therefore, a motion for reconsideration tolls the sixty-day period during which a party may appeal a case to the Circuit Court. Consequently, the court held that the appeals in these two cases were timely. *Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The Ninth Circuit held that claimant timely filed his appeal with that court within 60 days of the Board's decision affirming the administrative law judge's denial of benefits. Although at the time he filed this appeal, claimant also had a motion for reconsideration pending before the Board, the court held that as the motion was untimely it did not toll the 60 day period for filing an appeal. The time for appeal began to run on the date of the Board's initial decision and expired sixty days later, notwithstanding that the Board subsequently acted on the untimely motion by denying it instead of dismissing. The court distinguished the Tenth Circuit's holding in *Bridger Coal Co./Pac. Minerals, Inc. v. Director, OWCP*, 927 F.2d 1150, 1152 (10th Cir. 1991), that a motion for reconsideration renders the underlying Board decision nonfinal, precluding judicial review at that juncture, as *Bridger* involved a timely motion for reconsideration. *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Employer filed two motions for reconsideration of the Board's decision; the first was granted by the Board, although each of employer's arguments was rejected, and the second was summarily denied. Employer filed appeals after each of these orders with the Fourth Circuit. With regard to the appeal of the order summarily denying reconsideration, the court held that it did not have jurisdiction as the appeal referenced only this order, and an order which merely denies rehearing is not itself reviewable; thus, the appeal was dismissed as it requested review only of an unreviewable order. The Fourth Circuit noted holdings of the Sixth and Seventh Circuits that appeals must occur within 60 days after the Board's decision on an initial motion for reconsideration, as second or successive motions do not further toll the period for filing a petition for review, but stated that it need not decide whether to follow that precedent here as the jurisdictional defect described above resolved the issue. In the appeal of the initial order, the court stated that employer could have requested review of the underlying decision at that time, citing 20 C.F.R. §802.406, but it specifically requested review only of the order denying reconsideration. Nonetheless, the court held that it had jurisdiction to review this order, as an order which grants reconsideration but denies the relief requested establishes that the Board re-opened the proceedings, reconsidered the issues, and issued a new final order setting forth the resolution--even if the result was a reaffirmation of the previous decision. Thus, an appeal filed within 60 days of such an order is timely and the order is reviewable on the merits. "Appealable reaffirmations" and "unappealable denials" are distinguished by "the agency's formal disposition and not by any amount of discussion which may be noted therein." *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

The Fifth Circuit dismissed claimant's petition for review as untimely filed 70 days after the Board's decision was issued. Although claimant styled his petition as a "cross-application," the issue raised was a challenge to the exclusion of benefits from his average weekly wage. As this was an affirmative challenge, the petition for review had to have been filed within 60 days of the Board's decision pursuant to Section 21(c). *Gulf Best Elec., Inc. v. Methe,* 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

The Fourth Circuit dismissed employer's appeal as untimely filed, as the appeal was not filed within 60 days of the Board's "issuance" of its decision on reconsideration. A decision of the Board is "issued" within the meaning of Section 21(c) of the Act and 20 C.F.R. §802.410(a) when it is filed with the Clerk of the Board. Although the Clerk also must serve the decision on the parties, proper service is not required for the time for appeal to begin running. Moreover, the court held that the due process clause does not guarantee a right to appellate review so there was no constitutional impediment to the court's holding that proper service is not required to start the limitations period. *Mining Energy, Inc. v. Director, OWCP*, 391 F.3d 571 (4th Cir. 2004).

The Ninth Circuit held that it had jurisdiction over claimant's appeal even though claimant-petitioner did not name the Director as a respondent pursuant to FRAP 15(a)(2)(B) because petitioner subsequently notified the Director and the caption was amended to include the Director as respondent. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Standard of Review; Applicable Law; Deference

The standard of review for the court of appeals is the same as that used by the Board. *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976). The courts generally review the Board's decision to determine whether it is in accordance with law and whether the Board adhered to its standard of review. This, in turn, requires the court to review the administrative law judge's findings of fact to determine whether they are supported by substantial evidence. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988).

The court can affirm a decision based on reasoning different than that used by the Board or the administrative law judge. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

In reviewing a Board ruling, the Ninth Circuit initially stated that the court "generally must defer to the Board...in its role as interpreter of the Act." *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). However, the Supreme Court subsequently stated that the Board's interpretation of the Longshore Act is not entitled to deference from the courts. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18, 14 BRBS 363, 367 n.18 (1980). The Third Circuit acknowledged that it owed no deference to the Board's interpretation of the Act, but stated that it would respect its interpretation if it was reasonable. *Curtis v. Schlumberger Offshore Serv. Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988) (interpretation held not reasonable). In general, the courts have concluded that as the Board is not a policy-making agency, its views are not entitled to deference. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991); *Am. Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989).

If Congressional intent in interpreting the Act is not clear, the Fourth Circuit has stated it will defer to a reasonable construction of the Act by the Director because the Director administers and enforces the Act. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991). *Accord Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993). Most courts have held that at least some deference is accorded the reasonable interpretations of the Act and regulations of the Director. *Id. See Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993); *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir.

1992); *Force*, 938 F.2d 981, 25 BRBS 13(CRT); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

The Fifth Circuit stated that deference may be afforded the Director's interpretations of the Act in litigation depending upon the thoroughness evident in consideration, the validity of the reasoning, consistency with earlier and later pronouncements, and all those factors which give the Director power to persuade. Deference is not afforded litigation positions taken by the Director that are wholly unsupported by regulations, rulings or administrative practice. *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007); *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004).

The Eleventh Circuit held that while it would defer to official expressions of policy by the Director, as he administers the Act, circuit law precluded it from affording deference to the agency's litigating position. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991). *See Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001) (Director's interpretation of the Act is entitled to deference if it is contained either in a regulation or in the Director's litigation position within an agency adjudication, so long as the interpretation is reasonable); *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001) (Director's interpretation of the agency's own regulations is controlling unless that interpretation is plainly erroneous or inconsistent with the text of the relevant regulations).

However, in stating that the Board's interpretation of the Act is not entitled to deference as it does not engage in policy making, the Sixth Circuit also stated that the Director's interpretation is entitled to no greater deference than the Board's. *Am. Ship*, 865 F.2d 727, 22 BRBS 15(CRT); *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85(CRT) (6th Cir. 1988). Moreover, when the Director has an adversarial position in the litigation, e.g., where the issue involves Section 8(f), his views may not be entitled to deference, nor is he entitled to deference if his interpretation is not reasonable. *See Port of Portland*, 192 F.3d 933, 33 BRBS 143(CRT); *Total Marine Serv. v. Director, OWCP*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT) (5th Cir. 1996); *Director, OWCP v. Gen. Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992); *Bergeron*, 982 F.2d 790, 26 BRBS 139(CRT). *Cf. Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990) (granting deference on an issue involving interpretation of Section 8(f)).

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In General

In the absence of a decision on an issue by the Eleventh Circuit, decisions issued by the Fifth Circuit prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of*

Pritchard, 661 F.2d 1206 (11th Cir. 1981); *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982).

The Seventh Circuit vacated and remanded the Board's decision, holding that the administrative law judge's mistaken belief that claimant returned to work as soon as he was reinstated by employer was not "harmless" error. The court stated that an administrative law judge's mistake can be deemed harmless only if his ultimate ruling did not depend on his erroneous factual finding. In the instant case, the administrative law judge's conclusion that claimant failed to show that he was unable to perform the duties of his job was based, at least in part, on his erroneous belief that claimant returned to work as soon as employer permitted. *Moore v. Director, OWCP*, 835 F.2d 1219, 20 BRBS 68(CRT) (7th Cir. 1987).

The circuit court can affirm an order of the Board on a different ground or principle than that relied upon by the Board. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

In reviewing the Board's decision on appeal, the court must determine whether the Board adhered to the proper scope of review, whether it committed any error of law, and whether the administrative law judge's findings are supported by substantial evidence. To determine whether the Board exceeded its scope of review, the court conducts an independent review of the record to see if the administrative law judge's findings are supported by substantial evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Whitmore v. AFIA Worldwide Ins.*, 837 F.2d 513, 20 BRBS 84(CRT) (D.C. Cir. 1988).

Unpublished decisions issued before January 1, 1996, by the United States Court of Appeals of the Fifth Circuit are precedential in subsequent cases arising within that circuit. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 36 BRBS 12(CRT) (5th Cir. 2002).

The court is not free to re-weigh the evidence or to make determinations of credibility. The scope of review is limited to whether the Board made any errors of law and whether the administrative law judge's findings of fact are supported by substantial evidence. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

The Ninth Circuit stated it reviews the Board's decisions for errors of law and adherence to the substantial evidence standard, and the court may affirm the decision on any basis contained in the record. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93(CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Fourth Circuit stated that it reviews the Board's decisions for errors of law and to determine whether it properly adhered to the statutorily-mandated "substantial evidence" standard in reviewing the administrative law judge's decision. The findings of the administrative law judge may not be disregarded on the basis that other inferences are more reasonable. *Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). *See also See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

The Fifth Circuit stated it reviews the Board's decisions to ensure only that it "adhered to its proper scope of review, i.e., whether the administrative law judge's findings of fact are supported by substantial evidence and are consistent with law." It is not the role of the court to reevaluate evidence. The court explained, where the reviewing body is confronted with factual disputes surrounding a claim for compensation and the administrative law judge's factual finding is supported by substantial evidence, "neither we nor the BRB may substitute our judgment for that of the ALJ." *Sea-Land Services, Inc., v. Director, OWCP* [*Ceasar*], 949 F.3d 92, 54 BRBS 9(CRT) (5th Cir. 2020).

Deference

The Supreme Court stated that it need not decide what deference is due the Director's "new" interpretation of Section 33(g) which he formed in the course of the litigation, as it held that the plain language of Section 33(g) is clear. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 496, 26 BRBS 49(CRT) (1992).

The First Circuit stated that no deference is due the Director's interpretation of the case law of the circuit. *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992).

The First Circuit declined to decide what deference is due the Director's interpretation of the Act, because the case before it concerned the Director's interpretation of the judicially-created manifest component of Section 8(f), and not his interpretation of the Act or its regulations. Moreover, the Director is a litigant in a Section 8(f) case. *Director, OWCP v. Gen. Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

In appeals to the Second Circuit, the interpretations of the Director of the Act are not entitled to special deference when the Director has an adversarial position in the litigation. *Director, OWCP v. Gen. Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

The Second Circuit held that since Congress delegated to the Secretary of Labor the power to prescribe rules and regulations under the Act, the Director's reasonable interpretations of the Act are to be accorded deference. Thus, the court revised the approach to deference expressed in *Krotsis*, 900 F.2d 506, 23 BRBS 40(CRT), where it declined to give special deference to the Director's interpretation of the Act when he appeared in an adversarial capacity. It noted that the fact that a position is newly announced by the Director in litigation does not mean the position does not warrant deference, but that this fact may be considered in determining the reasonableness of the Director's position. The court also noted that the deference it will accord the Director does not extend beyond his reasonable interpretation of a statute's meaning and does not apply to every instance of a statute's application to particular facts, as this would go too far in usurping the role allocated the Benefits Review Board. *Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992).

The Third Circuit stated that it owes no deference to the Board's interpretation of OCSLA, but will respect its interpretation if it is reasonable. The court held that the Board's interpretation of OCSLA coverage here was erroneous. *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988).

If congressional intent is clear, that ends the inquiry of statutory interpretation, and the court and agency must give effect to the unambiguously expressed congressional intent; if

the court determines that Congress has not addressed the precise question at issue, the court must ask whether the agency's interpretation is based upon a permissible construction of the statute, and, if so, the court may not substitute its own construction for that made by the agency. In this case the court adopted the Director's interpretation of Section 8(f). *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990).

In interpreting the statute, the court must determine whether Congress has addressed the issue. If Congressional intent is clear, the court may not impose its own views upon an unambiguous Congressional mandate. If Congressional intent is not clear, then the court will defer to a reasonable construction of the Act by the Director because the Director administers and enforces the Act. *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991). *Accord Pittman Mech. Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Fourth Circuit stated that the Board's interpretations are not entitled to deference as it is not a policy-making body. In this case, moreover, the court declined to defer to the position of the Director, as it found his position on a Section 2(3) issue both unreasonable and contrary to Congress' clear intent. *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

The Fourth Circuit noted that the Director supported the court's construction of the 10-day period in Section 14(f), but stated it need not defer to her position since the statutory language was unambiguous. *Reid v. Universal Mar. Serv. Corp.*, 41 F.3d 200, 28 BRBS 118(CRT) (4th Cir. 1994).

The Fourth Circuit held that the Secretary's interpretation of which employers were required to pay an assessment to the Special Fund pursuant to Section 44 was entitled to deference as his stance was not merely a litigating position and was a permissible construction of the statute. *Nat'l Metal & Steel Corp. v. Reich*, 55 F.3d 967, 29 BRBS 97(CRT) (4th Cir. 1995).

The Fifth Circuit stated that, generally, the Director's interpretation of the Act is entitled to deference, unless the administrative interpretation of the statute is contrary to the plain meaning of the statute. *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT) (5th Cir. 1993).

The Fourth Circuit declined to defer to the Director's interpretation of "compensation" in Section 22 as including the payment of medical benefits for purposes of tolling the one-year statute of limitations for requesting Section 22 modification. The court reasoned that the Director's argument is a new litigating position as he has never taken a formal position on this issue, and the court did not find his reasoning convincing. *Wheeler v. Newport*

News Shipbuilding & Dry Dock Co., 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir. 2011), *aff'g* 43 BRBS 179 (2010), *cert. denied*, 565 U.S. 1058 (2011).

The Fifth Circuit noted that the Director's "administrative construction" of Section 4(a) was not entitled to judicial deference because the Director failed to show that her construction was anything other than a litigating position unsupported by regulations, rulings or administrative practice. *Total Marine Serv. v. Director, OWCP*, 87 F.3d 774, 776 n.2, 30 BRBS 62, 64 n.2(CRT) (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994).

The Fifth Circuit stated that while neither the administrative law judge's nor the Board's legal interpretation of the regulations is entitled to deference, the Director's interpretation of the agency's own regulations is controlling unless that interpretation is plainly erroneous or inconsistent with the text of the relevant regulations. The court accorded deference to the Director's interpretation that FRCP 6(a) should be used to supplement the time computation provision of 20 C.F.R. §802.221, such that the 10-day time period for filing a motion for reconsideration before the administrative law judge, 20 C.F.R. §802.206(a), excludes intermediate weekends and holidays. *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir. 2001), *aff'g Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *cert. denied*, 534 U.S. 1002 (2001).

The Fifth Circuit stated that the exact amount of deference owed to a particular interpretation of the Act by the Director depends on the "thoroughness of its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements." The court accorded deference to the Director's interpretation that the Section 2(2) "arises naturally out of" language requires only that the conditions of the employment be of a kind that produces the occupational disease, which the court held is consistent with congressional intent, as first interpreted in *Cardillo*. The court also deferred to the Director's position that employer was not entitled to a credit under the extra-statutory *Nash* credit doctrine for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S. 1141 (2004).

Deference may be afforded the Director's interpretations of the Act in litigation depending upon the thoroughness evident in consideration, the validity of the reasoning, consistency with earlier and later pronouncements, and all those factors which give the Director power to persuade. Deference is not afforded litigation positions taken by the Director that are wholly unsupported by regulations, rulings or administrative practice. The Fifth Circuit deferred to the Director's interpretation of "filing" pursuant to Section

21(a) as it is consistent with the text of 20 C.F.R. §702.349 and prior administrative practice. *Grant v. Director, OWCP*, 502 F.3d 361, 41 BRBS 49(CRT) (5th Cir. 2007).

The Sixth Circuit stated that the Board's interpretation of the Act is not entitled to deference as it does not engage in policy making, and that the Director's interpretation is entitled to no greater deference than the Board's. *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 21 BRBS 85(CRT) (6th Cir. 1988); *Am. Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989).

The Seventh Circuit will defer to the Director's construction of the Act and his articulations of administrative policy unless they are unreasonable or contrary to the purposes of the statute or clearly expressed legislative intent. No deference is due the Board's position as it does not administer the Act. *Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992).

The Ninth Circuit stated that since the Board is not a policy-making body, no special deference is owed its interpretations of the Act. The court will accord "considerable weight" to the construction of the Act urged by the Director, and where the statute is "easily susceptible" to the Director's interpretation, the court need not inquire further. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993); *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84(CRT) (9th Cir. 1993).

The Ninth Circuit rejected the Director's argument that it should grant deference to his position that working out of a hall that places maritime workers and a past history of maritime employment make one a maritime employee even on a wholly non-maritime job. The Ninth Circuit declined to defer to the Director's position, concluding that the statute is not ambiguous and easily susceptible to the Director's interpretation. *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g* 29 BRBS 127 (1995).

The Ninth Circuit stated that the Director's interpretation of the Act is limited where that interpretation is only a litigating position, not a regulation. Moreover, the court stated that, in this case, the Director's position that claimant's back condition qualified as an occupational disease, rather than being a matter of statutory construction, was more properly a factual issue to which the court owed no agency deference. Lastly, the court ruled that it could not properly defer because the Director's overbroad definition of occupational disease was not reasonable. *Port of Portland v. Director, OWCP [Ronne]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000).

The Ninth Circuit stated that the Director's interpretation of the Act is entitled to deference if it is contained either in a regulation or in the Director's litigation position within an agency adjudication (as opposed to judicial proceedings), so long as the interpretation is reasonable. The Court clarified some statements about deference it made in *Port of Portland*, 192 F.3d 933, 33 BRBS 143(CRT), and *Hurston*, 181 F.3d 1008, 33 BRBS

81(CRT). *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001), *aff'g* 34 BRBS 21 (2000).

The Ninth Circuit accords considerable deference to the Director's interpretations of the Act, and when the Director's interpretation differs from the Board's, the court favors those of the Director. The court agreed with the Director that the responsible employer issue in a multi-employer, occupational disease case should be analyzed separately and sequentially, beginning with the last employer. However, the court declined to adopt the Director's approach in this case which would have required each employer to rebut the Section 20(a) presumption by a preponderance of the evidence. The court determined that such an approach imposes a greater burden on employers than that created by Section 20(a) and permitted by *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Accordingly, the Ninth Circuit stated that rebuttal of the Section 20(a) presumption requires employers to present "substantial evidence" that they are not liable. *Albina Engine & Mach. v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010).

The Ninth Circuit overruled its precedent extending *Chevron* deference to the Director's litigating positions interpreting the Act. The court held that the Director's interpretation of the Act may merit *Skidmore* respect, depending upon the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Considering the factors outlined in *Skidmore*, the court held that considerations favoring adoption of interest on past due compensation rates set forth in 28 U.S.C. §1961 and 26 U.S.C. §6621 are in equipoise and therefore deferred to the Director's preference for the §1961 rate. The court did not defer to the Director's position on simple versus compound interest. The court did not resolve whether the Board's positions are entitled to *Skidmore* deference. *Price v. Stevedoring Services of Am.*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012) (en banc).

The Eleventh Circuit stated that because the Board is an adjudicative body, and not an administrator, its interpretations are entitled to no special deference. The court stated it owes deference to official expressions of policy by the Director, who does administer the Act, but circuit law precludes it from affording deference to the agency's litigating position. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

Finality of Board Decisions & Interlocutory Appeal

In *Simms v. The Valley Line Co.*, 709 F.2d 409, 15 BRBS 178(CRT) (5th Cir. 1983), the Fifth Circuit addressed a case where the claimant filed an appeal with the Board challenging the administrative law judge's ruling that he was a harbor worker and entitled to benefits under the Act, arguing he did not wish to be prejudiced in a Jones Act claim he was also pursuing. Employer's compensation carrier also appealed the administrative law judge's decision. The Board dismissed claimant's appeal, holding he was not adversely affected by the administrative law judge's decision. Claimant attempted to appeal this dismissal, but the Fifth Circuit dismissed the appeal, holding it was not taken from a "final order" of the Board and was thus premature.

Where the Board remands a case to the administrative law judge, the Board's decision is not a final decision appealable to the circuit court. *Jacksonville Shipyards, Inc. v. Verderane*, 729 F.2d 726, 16 BRBS 72(CRT) (11th Cir. 1984); *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F. 2d 399, 16 BRBS 34(CRT) (5th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 818 (1984) (vacating 698 F.2d 743, 15 BRBS 94(CRT) (5th Cir. 1983), and overruling in part *Ingalls Shipbuilding Div., Litton Sys., Inc. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982)).

The Ninth Circuit has held that where the Board remanded a case and the administrative law judge made findings on remand pursuant to the Board's instructions, employer could file an appeal of this decision directly with the circuit court. The court reasoned that as liability and extent of damage had been determined, a summary affirmance by the Board adhering to a previous ruling would be a purely ministerial act. The court therefore held it had jurisdiction over the appeal. *Nat'l Steel & Shipbuilding Co., Inc. v. Director, OWCP*, 703 F.2d 417, 15 BRBS 146(CRT) (9th Cir. 1983).

No other court has followed this holding by the Ninth Circuit. Thus, where a case is remanded to the administrative law judge and a decision on remand is issued, a new appeal with the Board should be filed. A petitioner who challenges only a conclusion reached by the Board in its prior decision may filed a motion for summary affirmance with the Board; such motions are routinely granted.

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The Fifth Circuit held that it erred in issuing a stay before the Board issued a final decision in the case, as the court does not have jurisdiction until the Board has issued a final order. *Tideland Welding Serv. v. Director, OWCP*, 817 F.2d 1211, 20 BRBS 9(CRT) (5th Cir. 1987).

The D.C. Circuit granted a motion to dismiss a petition for review of a Board decision remanding the case to the administrative law judge for further fact finding, despite the fact

that the decision included a conclusive determination regarding the applicability of Section 33(g), on grounds that this decision did not constitute a "final" order and was therefore not yet subject to review under Section 21(c) of the Act. *Washington Metro. Area Transit Auth. v. Director, OWCP*, 824 F.2d 94, 20 BRBS 13(CRT) (D.C. Cir. 1987).

On appeal of the Board's decision in *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), the Eleventh Circuit granted a motion to dismiss the petition for review, stating that a decision of the Board remanding a case to an administrative law judge for further findings of fact is not a final appealable order. *Cooper Stevedoring Co., Inc. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987).

The Eleventh Circuit held that an administrative law judge's order on remand may not be directly appealed to the Court of Appeals, but must first be appealed to the Board. Under Section 21(c) of the Act, a Court of Appeals may review only a "final order of the Board." *RMK-BRJ v. Brittain*, 832 F.2d 565, 20 BRBS 38(CRT) (11th Cir. 1987).

Where the Board remanded the case to the administrative law judge to compute compensation adjustments, the Board's Order was not final, and precluded the First Circuit Court's review. *Director, OWCP v. Bath Iron Works Corp. [Cain]*, 853 F.2d 11, 21 BRBS 130(CRT) (1st Cir. 1988).

Where the Board affirmed a finding on the merits of Section 8(f) relief but remanded the case for reconsideration of an attorney's fee award, the Eleventh Circuit held that it had jurisdiction to review an appeal of the merits. The court relied on a holding that "[w]hen attorney's fees are similar to costs or collateral to an action, a lack of determination as to the amount does not preclude the issuance of a final, appealable judgment on the merits," quoting *Holmes v. J. Ray McDermott & Co.*, 682 F.2d 1143 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983). As Section 28 provides for a reasonable fee "in addition to the award of compensation," the court held that the fee award in this case was collateral to the main claim, and that appeal was of a final order. *Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988).

The Fifth Circuit held that the Board's order staying payments is a collateral final order and therefore subject to review because it conclusively determined an issue unreviewable on appeal. *Rivere v. Offshore Painting Contractors*, 872 F.2d 1187, 22 BRBS 52(CRT) (5th Cir. 1989).

The Ninth Circuit dismissed for lack of jurisdiction claimant's appeal of the Board's order vacating the administrative law judge's order denying modification and remanding for application of a new legal standard, since the Board's remand order was not final. *Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 22 BRBS 156(CRT) (9th Cir. 1989).

The Ninth Circuit held that a stay of payment order is appealable, even if the merits of the case have not yet been resolved, under the collateral order doctrine because the validity of the stay of payments order is a separate issue from the merits of the action and Congress intended that deserving claimants be paid as soon as possible. The court held that it had authority to hear the appeal even though subject matter jurisdiction over the case as a whole may be lacking. *Edwards v. Director, OWCP*, 932 F.2d 1325, 24 BRBS 146(CRT) (9th Cir. 1991).

The Fifth Circuit held that Section 21(c) authorizes the appellate courts to review only final orders of the Board. Accordingly, an order from the Board remanding a case to the administrative law judge may not immediately be appealed. The APA, however, authorizes the circuit courts to review the decision to remand when the final order of the Board is appealed to the proper circuit. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

The Ninth Circuit rejected employer's argument that the Board's order approving an attorney's fee for work performed before the Board was interlocutory. The court held that the Board's fee order was reviewable since the underlying suit, the claim for benefits, had been settled; the fact that an appeal of the administrative law judge's award of an attorney's fee was pending before the Board had no bearing on the appealability to the court of the Board's attorney fee order. *Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995).

The Eleventh Circuit held that an administrative law judge's decision which was administratively affirmed by the Board without review pursuant to Public Law No. 104-134 under which the Department of Labor was prohibited from using appropriated funds after September 12, 1996, to review cases which had been pending for more than a year as of that date, was final and ripe for review by the appellate court. The court stated that Congress has the power to amend the substantive law governing review of these cases through an appropriations bill. *Donaldson v. Coastal Marine Contracting Corp.*, 116 F.3d 1449, 31 BRBS 70(CRT) (11th Cir. 1997).

The Fifth Circuit noted that the Act affords employer a full pre-deprivation, trial-type hearing before an administrative law judge, as well as a post-deprivation hearing in the Courts of Appeals. Consequently, the Fifth Circuit concluded that employer was not deprived of property without due process because of the administrative affirmance of the administrative law judge's decision, and thus, affirmed the constitutionality of the "one-year legislation." *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *see also Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

The D.C. Circuit held that the Omnibus Consolidated Rescissions and Appropriations Act, P.L. 104-134, is without effect on the District of Columbia Workmen's Compensation Act of 1928 inasmuch as since 1982, the D.C. Act may no longer be amended by cross-reference to the Longshore Act. Consequently, this case, which was remanded by the Board to the administrative law judge more than one year after the appeal was filed, was not ripe for appeal to the Court of Appeals. *Washington Metro. Area Transit Auth. v. Beynum*, 145 F.3d 371, 32 BRBS 104(CRT) (D.C. Cir. 1998).

The Second Circuit declined to address the Board's decision to vacate the award of an attorney's fee under Section 28(a) as the Board's disposition, remanding the case for further consideration of the attorney's fee issue, was not a final disposition on the issue of the attorney's fees as the administrative law judge had not yet issued a revised order. *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008).

The Ninth Circuit rejected employer's argument that issues addressed by the Board in its first decision and not in its decision after remand were not properly before the court. The court held that under the APA and Longshore Act, previous non-final orders of the Board are properly appealable only when the final Board decision is appealed. Thus, issues which were addressed in the Board's first non-final decision remanding the case to the administrative law judge were properly before the court when the Board's final decision was appealed. *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

The Fifth Circuit dismissed for lack of subject matter jurisdiction claimant's appeal of the Board's dismissal of his appeal. Claimant appealed an unfavorable recommendation of the district director directly to the Board prior to an evidentiary hearing before an administrative law judge. The Board dismissed the appeal as a memorandum of informal conference is not a final appealable action. The court stated that the Board correctly dismissed the appeal because it was not presented with anything within its statutory purview to review, pursuant to Section 21(b) and 20 C.F.R. §802.301. Rather, claimant was required to pursue his claim before an administrative law judge. As the Board did not issue a final order, the court of appeals similarly lacked jurisdiction over the appeal pursuant to Section 21(c). *Craven v. Director, OWCP*, 604 F.3d 902, 44 BRBS 31(CRT) (5th Cir. 2010).

Standing

In contrast to Section 21(b)(3) allowing appeals by "any party in interest," Section 21(c) states that "any person adversely aggrieved or affected" may appeal a final order of the Board to the courts of appeals. Thus, while the Director has been held to have standing to appeal before the Board, a different result applies in the Courts of Appeals.

The Director has standing to appeal determinations regarding Section 8(f), as he is the guardian of the Special Fund. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *see Director, OWCP v. Nat'l Van Lines, Inc.*, 613 F.2d 972, 977 n.6, 11 BRBS 298, 301 n.6 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). In an early case holding the Director lacked standing to appeal a coverage determination under Section 2(3) of the Act, the Fifth Circuit stated that the Director is an administrative officer to whom the Secretary of Labor has delegated the responsibilities conferred upon him by the Act, and it described those duties as falling into four categories, including various administrative and supervisory responsibilities allocated to the Secretary by specific sections of the Act, administrative duties under Section 39, the responsibility to oversee the Special Fund, and duties related to the Secretary's authority to promulgate and enforce safety rules and regulations. *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9BRBS 404 (5th Cir. 1978).

However, where neither the liability of the Special Fund nor the Director's specific administrative authority is at issue, the Director does not have standing to appeal under Section 21(c) but is the proper agency respondent in the courts of appeals. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

Initially, in addressing the Director's standing in such cases, a split developed in the circuit courts, which ultimately was resolved by the Supreme Court. *Id.* Some courts held that the Director lacked standing as a proper party before the court. *See Fusco v. Perini N. River Assoc.*, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), *vacated & remanded on other grounds*, 444 U.S. 1028 (1980), *rev'd in part & reaff'd in relevant part*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980) (no standing to appeal in case involving Section 2(3) status); *Donzi Marine*, 586 F.2d 377, 9 BRBS 404 (holding no standing to appeal Section 2(3) determination, the court distinguished cases under the Black Lung Act); *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903, 4 BRBS 343 (4th Cir. 1976) (en banc), *aff'g in pert. part* 529 F.2d 1080, 3 BRBS 88 (1975) (subsequent history relevant to Section 2(3) omitted) (holding Director was not a proper party respondent, court stated that standing requires injury in fact, economic or otherwise). *Cf. Nat'l Van Lines*, 613 F.2d at 977 n.6, 11 BRBS at 301 n.6 (Director has standing as a petitioner both because of his responsibility for administration of the Act and his financial interest as administrator of the Special Fund); *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 14 BRBS 779 (D.C. Cir.

1982) ("This court has previously held that the Director's general supervisory and enforcement interest, apart from any pecuniary interest is sufficient...").

The D.C. Circuit also held that the Director was a proper party respondent in all petitions for review under Section 21(c), regardless of his participation before the Board. The court reached this result based on Section 21(c) rather than Rule 15(a) of the Federal Rules of Appellate Procedure based on a prior holding that the rationale of Rule 15(a) does not apply to this type of proceeding. *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975) (granting the Board's unopposed motion to dismiss itself as a respondent in a section 921(c) review proceeding). As a respondent, the court stated that the Director may elect to support the Board's decision in whole or in part, urge its reversal or remain neutral. *Shahady*, 673 F.2d 479, 14 BRBS 779. *Accord Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Ingalls Shipbuilding Div., Litton Sys., Inc. v. White*, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982). *Cf. Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996) (Director must make an affirmative showing he is "adversely affected or aggrieved" in order to be a respondent, but if not, may seek permission to intervene).

In resolving these issues, the Supreme Court initially held in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), that the Director could properly petition for a writ of certiorari on the issue of claimant's coverage under Section 2(3) as his status as a proper respondent before the Second Circuit was conceded.

In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 29 BRBS 87(CRT) (1995), the Supreme Court resolved the question of the Director's standing to appeal a Board decision, holding that the Director did not have standing under Section 21(c) except in cases involving Section 8(f) and specific instances of administrative responsibility regarding calculation of benefits and processing claims, overseeing medical care and assisting in vocational rehabilitation.

The Supreme Court also resolved the conflict in the circuit courts regarding the Director's standing as a party respondent, holding that the Director is the proper agency respondent under the Federal Rules of Appellate Procedure, Fed. R. App. P. 15(a). *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), *aff'g* 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995).

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The Ninth Circuit, adopting the reasoning of the D.C. Circuit, held that the scheme of the Act and the regulations clearly contemplate that the Director should be named a respondent in all review proceedings brought under Section 921(c), whether or not the Director

supports the Board's order. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

The First Circuit dismissed employer's appeal of the Board's decision affirming a denial of medical benefits on the ground that, although claimant was eligible for such benefits, the reporting requirement was not met. As employer was not "adversely affected or aggrieved" by the Board's decision, it lacked standing to challenge the Board's eligibility finding, which the court stated was *dicta*. *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179, 23 BRBS 21(CRT) (1st Cir. 1989).

The Supreme Court affirmed the Fourth Circuit's decision that the Director did not have standing to challenge the Board's affirmance of the administrative law judge's finding as to the date temporary total disability ended and permanent partial disability began because it did not affect the Director's administration of the Act or the fiscal integrity of the Special Fund. The Director thus was not a person "adversely affected or aggrieved" under Section 21(c) and lacked standing to appeal to the appellate court. The Supreme Court narrowly defined the Director's area of responsibility; (1) supervising, administering, and making rules and regulations for calculating benefits and processing claims; (2) supervising, administering, and making rules and regulations for the provision of medical care to covered workers; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation; and (4) enforcing compensation orders and administering payments to and disbursements from the Special Fund. The Director has no role in assuring the "correct" adjudication of a claim between private parties. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 29 BRBS 87(CRT) (1995), *aff'g* 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993).

The Fourth Circuit dismissed the Director as a respondent, reaffirming its holding in *I.T.O. Corp.*, 542 F.2d 903, 4 BRBS 343, that the Director cannot automatically be named as a respondent in a petition for review under the Act, but must make an affirmative showing that she is "adversely affected or aggrieved by the decision of the Board." The court further reaffirmed its holding in *I.T.O Corp.* that the Director may, if not adversely affected or aggrieved by the Board's decision, request and be granted permission to intervene on the side of the party whose position she supports. The court granted the Director's motion in this case to intervene *nunc pro tunc* on the side of petitioners. *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996).

The Fifth Circuit denied employer's motion to strike the Director's brief on the basis that the Director was not "adversely affected or aggrieved" under Section 921(c), holding that under Fed. R. App. P. 15(a) and the Act and its regulations, the Director is the agency-respondent and therefore entitled to respond. The court also rejected claimant's motion to dismiss employer's appeal for lack of standing. Specifically, employer was "adversely affected or aggrieved" by the district director's orders granting claimants' motions to withdraw after employer had requested that the claims be referred for a formal hearing.

The orders stripped employer of a valuable procedural right, namely the right to have the claims decided by an administrative law judge. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1(CRT), *vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996) (reaching same result under a mandamus order later determined to be inapplicable to the cases on appeal), *rev'g Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (en banc) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (Brown, J., concurring).

The Supreme Court held that the right to appear as a respondent before the courts of appeals is conferred upon the Director, OWCP, by Federal Rule of Appellate Procedure 15(a). In so holding, the Court decline to adopt the narrower reading of Rule 15(a) set forth in *McCord*, 514 F.2d 198, and *Parker*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996). The Supreme Court further decided that the Director, as opposed to some other departmental entity, may be named as a respondent by the courts of appeals. The Director as respondent is free to argue on behalf of any position. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997), *aff'g* 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995).

New Issues Raised Before the Court

In general, issues must be raised before the administrative law judge or Board in order to be preserved for appeal to the circuit courts.

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The Sixth Circuit held that where claimant failed to raise the issue of the administrative law judge's alleged bias by filing an affidavit articulating the facts and reasons justifying the charge until after an adverse decision on the merits, claimant failed to preserve the issue for appeal. *Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1986) (black lung case).

Where employer failed to file a cross-appeal of an issue before the Board, it could not be raised for the first time before the court of appeals. *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986).

The Director's argument that employer waived its right to raise Section 8(f) by not raising it when the initial claim was litigated in 1966 was raised for first time at oral argument before the appellate court. Since it was not raised before the administrative law judge or Board, the issue was not properly before the court. *Director, OWCP v. Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co.*, 16 BRBS 314 (1984).

The D.C. Circuit noted that where a challenge to an administrative law judge's action was not clearly presented to the Board, it was doubtful that the issue was preserved for the Court of Appeals' review. *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987).

Where an issue raised by claimant before the administrative law judge regarding his coverage under the Act was not reached by either the administrative law judge in awarding benefits or by the Board in affirming this decision on appeal, claimant was not precluded from raising the issue before the circuit court as it provided an alternate basis of finding coverage. The court agreed with employer that claimant was not covered under pre-1972 case precedent, but addressed claimant's alternate argument that he was covered under post-amendment law based on application of the law in effect at the time his occupational disease became manifest. The court rejected employer's argument that claimant waived this theory by not raising it before the Board as claimant had been awarded benefits on the other theory, he raised this theory before the administrative law judge, and the Board's position that the law in effect at the time of exposure applied was well known and thus raising the issue would have been futile. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990).

The Fifth Circuit refused to consider employer's argument that its First Report of Injury form was the functional equivalent of a notice of controversion, as employer did not raise this issue in the administrative proceedings below. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991).

Where the district court imposed a Section 14(f) penalty on employer but denied the claimant fees, costs and interest, the Second Circuit declined to consider the claimant's renewed request for fees, costs and interest, as it was made in response to the employer's appeal and not on cross-appeal. *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *cert. denied*, 523 U.S. 1136 (1998).

The First Circuit acknowledged that employer's argument that the carrier failed to raise the issue of responsible carrier in a cross-appeal had merit. Nonetheless, having previously concluded that the administrative law judge had not erred in determining the date of claimant's injury under Section 10(i) and that the carrier was employer's insurer on that date, the court affirmed the administrative law judge's finding that the carrier was responsible for claimant's benefits. *Leathers v. Bath Iron Works & Birmingham Fire Ins.*, 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998).

The Ninth Circuit stated it will not address an issue not raised below unless necessary to prevent manifest injustice or if unusual circumstances warrant such review. In this case, exceptional circumstances were found to warrant review of the Board's decision affirming the denial of post-judgment interest on a fee award, based on the Board's subsequent decision in *Bellmer*, 32 BRBS 245, permitting a supplemental fee award to account for delay in payment of the fee. *Johnson v. Director, OWCP*, 183 F.3d 1169, 33 BRBS 55(CRT) (9th Cir. 1999).

The Fifth Circuit declined to address employer's contention that its notice of final payment form satisfied the prerequisites for a notice of controversion, such that it was not liable for a Section 14(e) penalty. Employer did not raise this issue before the Board, and the court therefore was precluded from addressing the issue. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Ninth Circuit rejected employer's contention that claimant waived his argument that his disability is permanent because he did not raise it until his post-hearing brief before the administrative law judge and then only as an alternative argument. The administrative law judge addressed the issue, and the Board reviewed the issue on appeal. "If the agency 'actually addressed [the] issue, the policies underlying the exhaustion doctrine . . . are satisfied.'" The court noted that employer could hardly argue it was blindsided by the issue. *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016).

The Sixth Circuit held employer forfeited its argument that the administrative law judge lacked authority to hear the case under the Appointments Clause as employer first raised the issue in its reply brief. The court explained that Appointments Clause challenges are subject to ordinary principles of waiver and forfeiture, and arguments are deemed forfeited when not raised in an opening brief. The court rejected employer's assertion that the Supreme Court's recent decision in *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 (2018) ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief") established new precedent such that the forfeiture may be excused as *Lucia* itself noted that existing case law "says everything necessary to decide this case." *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 52 BRBS 37(CRT) (6th Cir. 2018); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020).

The Tenth Circuit declined to address employer's Appointments Clause challenge based on *Lucia v. SEC*, 138 S.Ct. 2044 (2018), because it did not raise the issue before the Board. Thus, the issue was not preserved for appeal. *Energy W. Mining Co. v. Lyle*, 929 F.3d 1202 (10th Cir. 2019).

Effective Date of Court's Decision

In a case where claimant asserted she was entitled to compensation for the time between the issuance of the Fifth Circuit's decision in *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003), which reversed the award and reinstated the original denial of benefits, and the Supreme Court's denial of certiorari, the Board affirmed the administrative law judge's denial of benefits for the period in question based on the language of Section 21(c) which gives the court of appeals the authority to "set aside" a Board decision and which requires employer to make only those payments "required by an award." As the award had been set aside, no payments were required by an award as of the date of the Fifth Circuit's decision. The Board also noted FRAP Rule 41(c), i.e., the mandate rule, which indicates that the judgment of the court of appeals becomes final upon issuance and fixes the parties' obligations as of that date. *Charpentier v. Ortco Contractors, Inc.*, 39 BRBS 55 (2005), *modified in part on recon.*, 39 BRBS 117 (2006), *aff'd in part and rev'd in part*, 480 F.3d 710, 41 BRBS 5(CRT) (5th Cir. 2007).

On reconsideration, the Board modified its decision to reflect that, as argued by claimant, Rule 41 of the Federal Rules of Appellate Procedure, i.e., the mandate rule, does not support its affirmance of the administrative law judge's denial of benefits. Nonetheless, as Section 21(c) of the Act, standing alone, provides a sufficient ground for affirming the denial of benefits, the Board affirmed its prior decision. *Charpentier v. Ortco Contractors, Inc.*, 39 BRBS 117 (2006), *modifying in part on recon.* 39 BRBS 55 (2005), *aff'd in part and rev'd in part*, 480 F.3d 710, 41 BRBS 5(CRT) (5th Cir. 2007).

On appeal, the Fifth Circuit reversed the Board's decision in part, holding that employer was required to continue paying benefits to claimant until the day it issued its mandate in *Ortco*, 332 F.3d 283, 37 BRBS 35(CRT), rather than terminating payment as of the date it first issued its decision in the case. The court, however, affirmed the Board's holding that employer was not required to pay benefits until the Supreme Court denied claimant's petition for certiorari. *Charpentier v. Ortco Contractors*, 480 F.3d 710, 41 BRBS 5(CRT) (5th Cir. 2007).

Section 21(d)—Enforcement

Section 21(d) provides for the enforcement of a compensation order making an award which has become final. It complements Section 18(a), which applies where employer defaults in the payment of compensation due under any award and thus is used to enforce awards which have not become final due, e.g., to pending appeals. *See* Section 18 of the desk book; *Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012).

Section 21(d) states that if an employer fails to comply with a final order awarding compensation, the beneficiary or the deputy commissioner may apply for enforcement of the order to the U.S. district court where the injury occurred. If the court determines that the order was entered and served in accordance with law, and employer has failed to comply with it, the court shall enforce obedience to the order by writ of injunction or by other proper process…."

Attorney's fee awards are enforceable under Section 21(d) only after all appeals are exhausted. *See Christensen v. Stevedoring Services of Am., Inc.*, 430 F.3d 1031, 39 BRBS 79(CRT) (9th Cir. 2005); *Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *Wells v. Int'l Great Lakes Shipping Corp.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982).

Under Section 21(e), proceedings for suspending, setting aside or enforcing compensation orders making an award or rejecting a claim may not be instituted except as provided in this section and Section 18.

Digests

In a case where claimant was awarded benefits but employer did not pay the award, claimant filed an enforcement action with the district court pursuant to Section 21(d). The district court issued an enforcement order, rejecting employer's arguments in defense and request for a stay. The First Circuit determined that, as Section 21(d),(e) does not specify the procedure for notifying an employer of an enforcement action, FRCP 4 applies. Therefore, as service of process in Section 21(d) actions must be in accordance with Rule 4 and the district court here did not obtain *in personam* jurisdiction over employer, the court vacated the enforcement order. The court also held that where employer asserted fraud and a state law counterclaim in response to claimant's enforcement action, Congress intended that such affirmative defenses be adjudicated by DOL in a Section 22 modification hearing, and not by the district court, so as to prevent the needless duplication of judicial/administrative efforts and the possibility of inconsistent outcomes. Further, it concluded that the Act divests the district court of the power to stay Section 21(d) enforcement pending the outcome of the modification hearing unless employer establishes "irreparable injury," which may only be found in extraordinary circumstances and must be

more than a showing of financial difficulty in making payments or that the payments would be unrecoverable. *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

The Fifth Circuit affirmed the district court's dismissal of employer/carrier's claim for reimbursement to recover overpayments from a medical care provider under Section 21(d) for lack of subject matter jurisdiction. The court noted that Section 21(d) expressly provides that a cause of action for reimbursement can be brought only if the beneficiary of a compensation order is seeking to enforce that order against the employer or its agents. Thus, the court rejected employer's attempt to infer an implied, reciprocal right of reimbursement from claimant in Section 21(d). The court found that as Congress had intended that an employer not be allowed to bring a cause of action to recover overpayments from a medical provider, implying such a cause of action would be not only an impermissible and unjustified expansion of federal jurisdiction but would also frustrate rather than advance the efficient use of judicial resources. *Petroleum Helicopters, Inc. v. Nancy Garrett, L.P.T.*, 23 F.3d 107, 28 BRBS 40(CRT) (5th Cir. 1994).

Pursuant to Section 21(d), issues regarding enforcement of an attorney fee award must be addressed to the district court and not to the circuit court. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

As employer did not appeal the Board's decision affirming the administrative law judge's decision, it became final and subject to enforcement under Section 21(d). The court entered a judgment against employer for the awarded amount of past medical benefits due. However, the court gave employer the opportunity to challenge the amount of medical benefits incurred after the administrative law judge awarded future medical benefits. *Cohen v. Pragma Corp.*, 357 F. Supp. 2d 265 (D.D.C. 2005). Subsequently the court agreed with employer that the award of future medical benefits was not enforceable under Section 21(d) because no specific amount was awarded, citing *Lazarus*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992). The court remanded the case to the district director to determine the amount of additional medical benefits, Section 14(f) assessments and interest due. *Cohen v. Pragma Corp.*, 445 F. Supp. 2d 15 (D.D.C. 2006).

The Board rejected claimant's assertion that employer's failure to make voluntary payments in 1995 is subject to consideration under Section 18(a) or Section 21(d). These sections require the issuance of a compensation order entering an award of benefits. Similarly, Sections 18(a) and 21(d) are inapplicable with regard to claimant's assertion that employer did not pay 22 weeks of temporary total disability compensation in 1993, as the administrative law judge did not award compensation for this period. Although it was determined that claimant was disabled during this period, he did not timely request reconsideration of the administrative law judge's decision or appeal the omission of an award covering this period of disability. *Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012).

The court held that Section 18(a) requires a claimant to obtain a supplementary compensation order from the district director before he can seek enforcement in district court. Section 21(d), however, which applies to final compensation orders, does not require that the claimant first obtain a supplementary compensation order from the district director. A claimant can apply directly to the district court for enforcement of a compensation award and a Section 14(f) assessment. *Combs v. Elkay Mining Co.*, 881 F. Supp. 2d 728 (S.D.W.Va. 2012) (Black Lung case additionally holding that regulation at 20 C.F.R. §725.601 is not to the contrary).

The administrative law judge ordered employer to "pay or reimburse the Claimant for all medical expenses arising from the Claimant's work-related injuries," and to "provide treatment going forward, including the diagnostic procedures and therapies his treating physicians judge appropriate." Claimant, alleging that employer refused to pay for required treatment and forced him to rely on Medicare to pay his expenses, sought enforcement of the administrative law judge's order from the district court. The district court granted employer's motion to dismiss, finding it lacked jurisdiction to enforce the administrative law judge's order because it was not "final." The Ninth Circuit, which had not yet addressed the specific issue, held, in conjunction with several of its "sister Circuits," that to be "final" under Section 21(d) of the Act, an order 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." [citing *Severin v. Exxon Corp.*, 910 F.2d 286, 289, 24 BRBS 21, 23(CRT) (5th Cir. 1990)]. The Ninth Circuit held that a district court's limited jurisdiction over a compensation order extends only to orders "whose monetary sweep cannot be disputed." Consequently, because the administrative law judge's order did not list an amount to be paid, a means for calculating what employer owed, or specify any specific medical services for which employer would be liable, it was not final, as required by Section 21(d). The Ninth Circuit thus affirmed the district court's finding that it lacked jurisdiction over claimant's enforcement claim. *Grimm v. Vortex Marine Constr.*, 921 F.3d 845, 53 BRBS 23(CRT) (9th Cir. 2019).