

RONALD E. TOYER)	
)	
Claimant)	
)	
DRS. BRAGER, FELDMAN &)	
ASSOCIATES, P.A.)	
)	
and)	
)	
GREENSPRING PHYSICAL THERAPY,)	
P.A.)	
)	
Petitioners)	
)	
v.)	
)	
BETHLEHEM STEEL CORPORATION)	DATE ISSUED: _____)
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order-Denial of Claim of Bruno DiSimone, District Director, United States Department of Labor.

Bernard J. Sevel (Sevel & Sevel, P.A.), Baltimore, Maryland, for Drs. Brager, Feldman & Associates, P.A., *et al.*

Michael W. Prokopik and Heather P. Vovakes (Semmes, Bowen & Semmes), Baltimore, Maryland, for employer.

Joshua T. Gillelan II (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and

McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

The claimant's treating physicians, Drs. Brager, Feldman & Associates, *et al.* (the medical providers), appeal the Compensation Order-Denial of Claim (4-28115) of District Director Bruno DiSimone¹ denying payment of medical benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The appeal in this case concerns a claim for payment of medical expenses by employer to claimant's treating physicians. In his Order of February 16, 1990, the district director denied the claim, stating only that it was "found not to have been procured in accordance with Section 7 of the Act." The Board initially dismissed the physicians' appeal by Order dated January 27, 1992, holding that treating physicians do not qualify as parties-in-interest under Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3). *Toyer v. Bethlehem Steel Corp.*, BRB No. 90-989 (Jan. 27, 1992). The medical providers thereafter sought reconsideration, alleging that the Board's holding that providers do not have standing to appeal a denial of payment for medical services would have the effect of forcing claimants to pay for the services and then to seek reimbursement from employer. They argued that this would not allow physicians to go directly to employer for payment, in violation of Section 7 of the Act, 33 U.S.C. §907. The Director, Office of Workers' Compensation Programs (the Director), responded, agreeing that the medical providers had standing. The Board granted the Motion for Reconsideration by Order dated July 31, 1992, and remanded the case to the Office of Administrative Law Judges for an evidentiary hearing on the merits under Section 7. *Toyer v. Bethlehem Steel Corp.*, BRB No. 90-989 (July 31, 1992).

The Director then filed a second Motion for Reconsideration in which she asserted that the Board's referral of the case to the Office of Administrative Law Judges could not properly be termed a "remand" as the case had not previously been before an administrative law judge. Moreover, the Director argued that pursuant to Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2)(1988), the district director has the sole discretion to excuse a doctor's failure to file a first report of treatment within ten days. By Order dated January 25, 1993, the Board granted the Director's motion, reinstated the appeal, granted expedited review, and requested that the parties provide briefing on the subject of the administrative law judge's authority to decide questions under 33 U.S.C. §907(d)(2)(1988), and the applicable

regulation, 20 C.F.R. §702.422(b)(1994). *Toyer v. Bethlehem Steel Corp.*, BRB No. 90-989 (Jan. 25,

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute. "District director" shall be used in this decision except when the statute is being quoted.

1993).

In their brief on appeal, the medical providers contend that the district director erred in denying their claim for payment of medical expenses. The medical providers urge the Board to hold that employer is estopped from utilizing a "technicality" of the Act to refuse payment for claimant's necessary medical treatment when employer had timely notice that claimant was undergoing treatment with these providers. Employer responds, contending that pursuant to 20 C.F.R. §702.422(b)(1994), the Office of Administrative Law Judges has no jurisdiction to decide or review a claim involving application of Section 7(d)(2). Employer asserts that the district director has sole discretionary authority to excuse the medical providers' failure to comply with the initial reporting requirements of Section 7, that this finding is directly reviewable by the Board, and that the district director properly exercised his discretion in this case by refusing to excuse the treating physicians' failure to comply with the reporting requirements of Section 7(d)(2).

In addition to the arguments concerning Section 7(d)(2) espoused in her motion for reconsideration, the Director has filed a motion to remand, asserting that the case must be remanded to the district director because of his failure to provide an adequate explanation for the denial of the claim for medical benefits. Employer responds to the motion to remand, contending it should be denied because where, as here, the district director has the discretion to act or refuse to act if he finds it to be in the interest of justice, he need not provide any explanation and that the party seeking to overturn his exercise of discretion has the burden of showing that it was arbitrary.

Initially, we agree with the Director that on the facts presented the case must be remanded. In the instant case, in a two sentence order, the district director found that the claim for payment of medical benefits was not procured in accordance with Section 7 of the Act, and he denied the claim for payment of medical services accordingly. No explanation or rationale was provided for this conclusion. While a claims examiner's memorandum of informal conference suggests that medical benefits were denied pursuant to Section 7(d)(2), the district director did not identify the section of the Act or regulations he was relying upon in denying the claim. The failure to provide any explanation for the denial of medical benefits in this case makes it impossible for the Board to review the findings, thereby rendering the district director's determination arbitrary and capricious. *See Hrycyk v. Bath Iron Works Corp.*, 11 BRBS 238 (1979). Employer's argument that the district director was not required to provide any explanation for his denial of medical benefits is therefore without merit.

In order to determine to whom the case must be remanded, this case requires that we decide whether a determination under Section 7(d)(2) of the Act as amended in 1984 and its implementing regulation, 20 C.F.R. §702.422(b)(1994), as to whether a treating physician's failure to file a first report of treatment within ten days should be excused rests within the authority of the administrative law judge, the district director, or both. Section 7(d)(2) as amended in 1984 provides:

No claim for medical or surgical treatment shall be valid and enforceable against [the] employer unless, within ten days following the first treatment, the physician giving

such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. §907(d)(2)(1988). Prior to the 1984 amendments, Section 7(d) of the Act, 33 U.S.C. §907(d)(1982)(amended 1984), contained similar language, stating that the *Secretary* could excuse the failure to timely file an initial report of treatment when he finds it in the interest of justice to do so. The regulation implementing Section 7(d) explicitly stated that either the deputy commissioner or the administrative law judge could excuse the failure to comply with the reporting requirement. 20 C.F.R. §702.422(b)(1984)(amended 1985). Thus, prior to the 1984 Amendments, administrative law judges routinely considered whether the failure to timely file a first report of treatment should be excused. *See, e.g., Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983); *Reiche v. Tracor Marine*, 16 BRBS 272 (1984).

In 1985, however, the regulations were revised in the wake of the 1984 Amendments. The applicable regulation, Section 702.422(b) states, in pertinent part, that "[f]or good cause shown, the *Director* may excuse the failure to comply with the reporting requirements of the Act...." 20 C.F.R. §702.422(b)(1994) (emphasis added). The Director and the employer argue that this change placed the authority within the exclusive province of the Director, Office of Workers' Compensation Programs, and that such determinations are subject to challenge only upon direct appeal to the Board.

We begin our discussion with an analysis of the duties of the various officials referenced in the Act. Pursuant to the 1972 Amendments to the Act which added Section 19(d),² the Board has held that statutory references to the authority of the deputy commissioners should be considered references to administrative law judges if judicial functions are involved. *See Cooper v. Todd Pacific Shipyards Corp.* 22 BRBS 37, 40-41 (1989). In contrast, statutory references to the Secretary of Labor have been held to refer to the deputy commissioners (district directors) to whom the Secretary's discretionary authority has been delegated. *Id.*; *Ogundele v. American Security & Trust Bank*, 15 BRBS 96 (1980). The district director is defined as a person authorized by the Director, Office of Workers' Compensation Programs, to perform functions with respect to the processing and determination of claims for compensation under the Act. 20 C.F.R. §701.301(a)(7) (1994). The Director, through the district directors, actively supervises the medical care of injured employees. 20 C.F.R. §702.407.

²Section 19(d) states that hearings under the Act must be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §554, and that "[a]ll powers, duties, and responsibilities vested...in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges." 33 U.S.C. §919(d).

In order to implement the 1984 Amendments to the Act, the Director issued proposed regulations on January 3, 1985. 50 Fed. Reg. 384 (1985). As noted, *supra*, the language of the regulation at 20 C.F.R. §702.422(b) was changed in this rulemaking. *Id.* at 403-404. The comments to the final rules which became effective on January 31, 1986, state that:

The Act provides, at section 7(d)(2), that the attending physician must file a medical report within ten days of treatment or the employer is not obligated to pay the bill. The deputy commissioner may excuse the failure to submit a report for good cause. The [Interim Final Rule] did not change the previous §702.422 regarding this point...

51 Fed. Reg. 4270, 4279 (1986). It is the Director's interpretation that Section 702.422(b) refers to the district director when it says "the Director" may excuse the failure to comply with Section 7(d)(2). Since the prior regulation permitted the administrative law judge to consider this issue, and the comments state that no change was implemented, resolution of the issue before us is not entirely uncomplicated.

Section 39(a) of the Act, 33 U.S.C. §939(a), authorizes the Secretary of Labor to promulgate rules and regulations for the purpose of administering the provisions of the Act, and this authority is delegated to the Director. 20 C.F.R. §701.201. As considerable deference is accorded to an agency's interpretation of its authorizing statutes, *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991), an agency's regulations need only adopt a permissible interpretation of the statute in order to be sustained. *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71, 74 (1992)(*en banc*), *aff'g on recon.* 24 BRBS 224 (1991). Regulations of an agency empowered to adopt the particular rule must be sustained unless they are unreasonable and plainly inconsistent with the statute. *See generally Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987).

In the present case, 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) places within the province of the Director, and her delegates, the district directors, the sole authority to consider whether the failure to timely file a first report of treatment should be excused directly parallels the plain language of the statute wherein it states that the Secretary may excuse non-compliance with the reporting requirement. Thus, it cannot be said that the regulation is plainly erroneous or inconsistent with the statute. *See generally Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BRBS 2-89 (1988). Moreover, because the Secretary, through his delegate the Director, OWCP, administers and enforces the Act, and is responsible for the promulgation of regulations, his interpretation must be sustained in this case because it is reasonable. *Pauley v. Bethenergy Mines*, 501 U.S. 680, 15 BLR 2-155 (1991); *see generally Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990). In fact, this interpretation of Section 7(d)(2) is consistent with the rest of Section 7 in which the Secretary, through his delegates, is placed in the position of overseeing the medical care of injured employees. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 33 U.S.C. §907(b); 20 C.F.R. §702.407.

We note that the interpretation that only the district director can make an excuse determination under Section 7(d)(2) gives meaning to another change to Section 7 made by the 1984 Amendments. Prior to 1984, the Act provided that the Secretary could suspend compensation if an employee unreasonably refused to undergo medical treatment. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); 33 U.S.C. §907(d)(1982)(amended 1984). This section was interpreted as prohibiting administrative law judges from making this determination. *Hrycyk*, 11 BRBS at 243-245. In amending Section 7(d) to create Section 7(d)(4),³ Congress specifically gave to administrative law judges the power that formerly belonged exclusively to the Secretary. *See Dodd*, 22 BRBS at 248-249. If Congress had intended for administrative law judges to make determinations with regard to first reports of treatment, it could have explicitly stated so in Section 7(d)(2) as it did in Section 7(d)(4). It is thus reasonable to assume that Congress intended something different for the two subsections based on the fact that different language was used. *See generally Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

In sum, we defer to the Director's interpretation of Section 7(d)(2) and Section 702.422(b) as it is reasonable, and we hold, consistent with her interpretation, that only the Director, through her delegates, the district directors, has the authority to make a determination as to whether a physician has shown good cause for failing to file a first report of treatment in a timely manner. Accordingly, we vacate the district director's finding that medical care and treatment were not provided in accordance with Section 7 of the Act, and we remand the case for the district director to explain this finding consistent with this decision.

We note that the interpretation of the Director which we adopt today is not without potential difficulties. For instance, although the district director may make determinations regarding whether good cause is shown for the failure to timely file a first report of treatment, questions may arise regarding whether the report was, in fact, filed in a timely manner. After noting that the new rule did not change the previous rule on the point of excusing the failure to timely file a report, *supra*, the comments to the final rules state the following:

One comment queried whether the employer must await a finding of fact before being relieved from the liability of medical costs. Such issue must be raised as a defense against the obligation, and a finding of fact would therefore be necessary.

³Section 7(d)(4) states:

If at any time the employee unreasonably refuses to submit to medical or surgical treatment . . . , the *Secretary or administrative law judge* may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4)(1988)(emphasis added).

51 Fed. Reg. 4270, 4279 (1986). Pursuant to Section 19(d) of the Act, fact-finding authority rests with administrative law judges. *See generally Sans*, 19 BRBS at 28. Thus, a case raising the issue of whether the report was in fact timely filed would be referred to the Office of Administrative Law Judges. *See Glenn v. Tampa Ship Repair & Dry Dock*, 18 BRBS 205, 208 (1986) (fee dispute before the district director would be referred to an administrative law judge when a finding of fact regarding the date of employer's controversion is needed). If he found it to be untimely filed, the case would then have to be remanded to the district director for the determination as to whether the untimely filing should be excused for good cause shown. This procedure can produce unnecessary delays in the resolution of the issue of employer's liability for medical benefits.

Furthermore, the effect of our adoption of the Director's position will be to bifurcate the issue of payment for certain medical services from the claim on the merits, and bifurcation is generally to be avoided. *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985). Once the district director makes his determination, his decision will be directly appealable to the Board, contrary to the opinion of our dissenting colleague, and the issue will not go before an administrative law judge. Indeed, the Director recognizes the direct appealability of a district director's determination on this issue, *see Dir.'s Mot. for Recon.* at 5-6, and such procedure is consistent with case law regarding the appealability of discretionary acts of the district director. *See, e.g., Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988); *Cooper*, 22 BRBS at 37; *Glenn*, 18 BRBS at 205; *Hrycyk*, 11 BRBS at 239. The separation of a determination under Section 7(d)(2) from the case on the merits may result in administrative inefficiency and the waste of a party's resources.⁴ For example, in this case, while an appeal is pending of a district director's determination on good cause, an administrative law judge might find, in the case on the merits, that there is no causal relationship between the claimant's injury and his work; thus, the claimant would not be entitled to medical benefits, *see Ozene v. Crescent Wharf and Warehouse Co.*, 19 BRBS 9 (1986), and the medical providers and their counsel would have engaged in a futile effort to obtain payment. These considerations, however, are properly those of the party charged with administration of the Act, the Director. They are insufficient to establish a basis for rejection of the Director's interpretation.

Our dissenting colleague agrees that initial consideration of the issue of whether the failure to comply with the reporting requirements of Section 7(d)(2) should be excused lies with the district director. She, however, would then have the case referred to an administrative law judge in order to ascertain the facts and to establish a record which the Board could review; under this scenario, there would be no direct appeal from the district director to the Board.⁵ Our colleague's opinion is in part

⁴This will be especially true in pending cases where an administrative law judge has made a good cause determination under Section 7(d)(2).

⁵Contrary to the opinion of our dissenting colleague, the Rules of Practice and Procedure before the Board specifically permit an aggrieved party to appeal a decision of a district director to the Board. *See* 20 C.F.R. §802.201(a). The current version of Section 802.201(a) was adopted after the 1984 Amendments to the Act to provide for appeals of decisions of the administrative law judge or district director. *Compare* 20 C.F.R. §802.201(a) (1984) *with* 802.201(a)(1994). The decision in

based on the aforementioned inefficiency and bifurcation that may result as a consequence of our acceptance of the Director's position, and in part on her belief that there is nothing in the statute or the regulations which would preclude an administrative law judge's review of the district director's determination. This view is, of course, contrary to the Director's interpretation and overlooks the specific change in the regulation which explicitly deleted the administrative law judge as a person authorized to consider excuse under this section.

In light of the deference accorded the Director, we conclude that under the Act as amended in 1984, the administrative law judge has no authority to decide issues under Section 7(d)(2) regarding whether to excuse the untimely filing of initial reports of treatment, either upon review or *de novo*, and that the district director's evaluation of this question is a discretionary act which is directly appealable to the Board. *See generally Olsen v. General Engineering and Machine Works*, 25 BRBS 169 (1991).

Accordingly, the Compensation Order-Denial of Claim of the district director is vacated. The Director's motion to remand is granted, and the case is remanded to the district director for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief

Pearce v. Director, OWCP, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981), was issued prior to this regulatory change and involved a statutory provision repealed by Congress in 1984, 33 U.S.C. §914(j)(1982)(repealed 1984).

Moreover, the *Pearce* court did not address the deference due the views of the Director required by more recent court opinions. The remaining cases cited by our dissenting colleague, *Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990) and *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989), were decided under the Black Lung Act, which has its own regulations contained at 20 C.F.R. Part 725. These regulations are not applicable under the Longshore Act. Most significantly, in both cases, the Director vigorously asserted that direct appeal was inappropriate and that the cases should have been referred for hearing. By contrast, the Director is a longstanding proponent of direct appeal in appropriate Longshore Act cases. *See, e.g., Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988). Also, in those cases, as well as in *Pearce*, a hearing was requested. In the present case, no party seeks a hearing. As in *Nordahl*, in this case resolution of the issue presented requires no review of a record or findings of fact. Finally, where an act is truly within the discretion of the district director, there is no role for an administrative law judge. If he holds a *de novo* hearing and resolves the issue, his judgment is substituted for that of the district director, contravening the regulation at issue here.

Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

The basis of the majority's decision is the principle that the agency charged with administering a statute is owed deference in construing it. *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The majority applies that principle twice in the instant case: first, holding that pursuant to 20 C.F.R. §702.422(b) (amended 1985) only the district director has authority to determine whether a failure to file timely a first report of treatment should be excused; and second, holding that the Board has jurisdiction to review the district director's decision issued pursuant to 33 U.S.C. §907(d)(2); 20 C.F.R. §702.422(b). In my view, because the positions of the Director are inconsistent with the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§900-950, the Director is owed no deference and her arguments should be rejected. *See Chevron U.S.A.*, 467 U.S. at 844. I would hold that after the district director has resolved the issue under Section 7(d)(2), upon request of a party the case must be referred to an administrative law judge for a hearing *de novo*. *See* 20 C.F.R. §702.316.

The Director contends that the district director has exclusive authority to excuse the failure to furnish within ten days to employer and the district director a physician's report of first treatment, pursuant to 33 U.S.C. §7(d)(2); 20 C.F.R. §702.422(b). The Secretary decided in 1985 to revise 20 C.F.R. §702.422(b), the regulation promulgated to implement Section 7(d)(2), in order to delete the reference to the administrative law judge and thereby give the district director exclusive authority to determine whether the failure to file timely a physician's report of first treatment will be excused. As the majority observes, the regulation interpreting the statute's reference to the "Secretary" was significantly changed, after the Act was amended in 1984 and Congress had made no comparable change to Section 7(d)(2), authorizing the Secretary to excuse late filing: both the pre-and post-1984 Amendment versions of the section refer only to the Secretary. Given the dramatic change in regulation after Congress had completed its work, the Congress could rightly feel sandbagged. Congress was obviously aware of the Secretary's construction of Section 7(d)(2) at the time of the 1984 Amendments and chose not to alter that construction. In light of the history of the Secretary's construction of Section 7(d)(2), it is difficult to understand the importance the majority attaches to the reference to the Secretary in Section 7(d)(2), as necessarily excluding administrative law judges.

The majority seeks further support for its interpretation by referring to the change to Section 7(d)(4), in contradistinction to the absence of significant change in Section 7(d)(2). This argument

also offers no avail. Congress was constrained to change Section 7(d)(4), because the Secretary's implementing regulation erroneously precluded the administrative law judge from exercising authority essential to the conduct of a fair hearing. Congress was not similarly constrained to change Section 7(d)(2) because the Secretary's implementing regulation at the time of the 1984 Amendments clearly authorized the administrative law judge to consider the untimely filing of the requisite physician's report. Thus, no importance can be attached to the amendment to Section 7(d)(4), unless it is seen as a clear statement of congressional intolerance for the Secretary's erroneous exclusion of the Office of Administrative Law Judges.

The question of whether to excuse the failure to comply with the reporting requirements of Section 7(d)(2) for good cause shown is "part and parcel" of the broader question of whether claimant is entitled to medical benefits. Thus, the decision has potentially enormous consequences to the parties, affecting substantive rights. The determination of whether employer is liable for claimant's medical benefits encompasses such factual determinations as whether the expenses sought are causally related to the work injury and whether the costs involved are reasonable and necessary. Moreover, under Section 7(d)(1), an employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or if employer refuses or neglects to provide treatment. 33 U.S.C. §907(d)(1); 20 C.F.R. §702.421. This subsection clearly necessitates fact-finding by an administrative law judge and the resolution of these issues may be inextricably intertwined with the question of whether an untimely filing of the first report of treatment should be excused.

Furthermore, as the majority concedes, validating the regulation at Section 702.422(b) in the manner they advocate would foster administrative inefficiency as medical benefits claims would be bifurcated and subject to review at two different levels resulting in piecemeal litigation and procedural delays. *See Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985). Although deference is generally afforded to an agency's interpretation of its own regulations, there is simply no reason to defer to the Director's position on the facts presented where doing so will result in a needlessly complex and burdensome administrative scheme. Because the administrative law judge has sole authority under the Act to make factual findings, *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 179, 27 BRBS 116 (4th Cir. 1993), and the questions of fact involved in determining the compensability of a medical benefits claim cannot readily be severed from the question of whether good cause exists for excusing the failure to submit a first report of treatment within ten days of the treatment, I would hold that upon the request of any party, the determination as to whether to excuse the failure to submit a timely first report of treatment in a contested case must be resolved in a *de novo* proceeding before an administrative law judge. Because the majority's application of the Secretary's regulation of 20 C.F.R. §702.422(b) serves to deny the parties a right to a hearing before an administrative law judge on a decision issued pursuant to 33 U.S.C. §907(d)(2), it is inconsistent with the due process guaranteed in the Longshore and Harbor Workers' Compensation Act and should be declared invalid. 33 U.S.C. §§919, 921.

The Director also misleads the majority when she asserts that appeals from Longshore decisions of the district director can come directly to the Board. To date, the Board has thrice has

been chastised for maintaining that the right to a hearing before an administrative law judge is determined by whether a ruling by the district director involves a discretionary act as opposed to an evaluation of a question of law or a mixed question of law and fact. The three United States Courts of Appeals which have spoken have held that pursuant to Sections 19(d) and 21 of the Act, 33 U.S.C. §§919(d), 921, where a decision is made by a district director and a hearing is requested, the hearing shall be conducted by the administrative law judge with a right to appeal to the Board. *See Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); *Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981). *See also Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992) (Brown, J., concurring) (Smith, J., dissenting). The *Lukman* court noted that the Longshore Act provides no authority for an appeal directly from the district director to the Board, and that there are only two exceptions to the so-called "three-tiered" administrative process. *Lukman*, 896 F.2d at 1251, 13 BLR at 2-339. These exceptions are created by regulation and involve direct appeals of attorney's fee awards for work performed before the district director in cases arising under the Black Lung Act, *see* 20 C.F.R. §725.366(e), and direct appeals of grants or denials of commutation from the Director to the Board in black lung cases, 20 C.F.R. §725.521(c). *Id.*, 896 F.2d at 1252-1253, 13 BLR at 2-342. There is no comparable regulation promulgated pursuant to the Longshore Act which authorizes direct appeals from the district director to the Board.

Although the majority cites 20 C.F.R. §802.201(a) as authorizing the Board to review decisions of the district director, they overlook the fact that this provision sets forth the procedure to appeal a decision to the Board, and it does not specify that it has equal application to Black Lung and Longshore cases. The fact remains that the Secretary has demonstrated in two regulations promulgated pursuant to the Black Lung Act that he knows how to write a regulation authorizing direct appeals from decisions of the district director to the Board, yet has failed to provide any regulatory authority for similar direct appeals under the Longshore Act.

I am surprised that in her brief the Director has either ignored or overlooked these circuit court decisions and has chosen instead to cite only old Board decisions. The majority, however, has referenced a circuit court decision in support of its view that discretionary decisions of the district director are reviewable by the Board, *Oceanic Butler Inc. v. Nordahl*, 842 F.2d 773, 782, 21 BRBS 33, 42 (CRT) (5th Cir. 1988). Yet examination of the court's decision reveals that the procedure followed was set forth but not discussed as an issue in the case. Furthermore, the Court's decision in *Nordahl* was issued prior to the emphatic decision of the Tenth Circuit in *Lukman*, *supra*.

I consider the decision of the United States Court of Appeals for the Seventh Circuit in *Pearce* to be particularly instructive because the *Pearce* court was presented with an analogous situation to that in the instant case and rejected the same argument which the Director advances here and which the Board adopts. The Director argued in *Pearce* that the commutation of an award to a lump sum pursuant to 33 U.S.C. §914(j) (1982)(repealed 1984),⁶ is an administrative decision

⁶Prior to its repeal in 1984, Section 14(j) provided, in part, that:

committed to the discretion of the deputy commissioner (now called district director), and appealable directly to the Board.⁷ The court unequivocally rejected this contention, declaring:

If respondents' arguments that the deputy commissioner had the unbridled and absolute discretionary power to finally dispose of the commutation application were followed, his decision should have ended the matter, but, of course, it did not.

Pearce, 647 F.2d at 726, 13 BRBS at 255. The court also considered the Board's limited statutory authority set forth in 33 U.S.C. §921(b)(3): "The findings of fact in the decision under review by the Board shall be conclusive *if supported by substantial evidence in the record considered as a whole.*" *Id.*, 647 F.2d at 726, 13 BRBS 255 (emphasis in original). The court went on to explain that the substantial evidence test is generally applied to review of administrative agency decisions conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §554, which, the court observed, "governs the hearing which should have been held in the instant case." 647 F.2d at 726, 13 BRBS at 255. The fundamental ground of the court's decision is that the Board erred in entertaining review of a deputy commissioner's decision:

because the Board only had authority to review a "hearing record" and there was no such record before it. In short, there was nothing for the Board to review, as it had no authority to consider or review the evidence that had been gathered by the deputy commissioner, or his order, nor to substitute its views for those required to have been, but were not, set forth in an opinion of an administrative law judge.

647 F.2d at 725, 13 BRBS at 254.

The majority suggests that because the parties here do not request a hearing and seek direct review by the Board the administrative law judge can be by-passed. They forget the fundamental rule that the parties cannot confer jurisdiction. There is no legal authority for the review sought here. The Longshore Act clearly authorizes the Board to review decisions made in accordance with

Whenever the deputy commissioner determines that it is in the interest of justice, the liability of employer for compensation ... may be discharged by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at 4 per centum true discount compounded annually....

33 U.S.C. §914(j) (1982)(repealed 1984).

⁷The majority attempts to evade the force of *Pearce* by pointing out that *Pearce* concerned a statutory provisions subsequently repealed. That is totally irrelevant to the Seventh Circuit's analysis in *Pearce* of the structure of the Longshore Act and the court's rejection of the same "deference owed to the Director" argument advanced here, accepted by the Board in *Pearce* and accepted by the majority here.

the Administrative Procedure Act. Of course, the parties can waive their right to a hearing and may request the administrative law judge to make a determination in accordance with the Administrative Procedure Act based on the record of evidence which they submit. Hence, there is no support in the statute, regulations or circuit court cases for the majority's contention that appeals from Longshore decisions of the district director may come directly to the Board. All of the legal authority is, in fact, to the contrary.

In the case at bar, the Department of Labor seeks to circumvent the statutory scheme of the Longshore Act in two ways: first, by promulgating a regulation which purports to authorize the Department to eliminate the authority of the administrative law judge in the significant decisions made pursuant to Section 7(d)(2) of the Act; and second, by denying the administrative law judge his proper role of fact-finder by authorizing the Board to accept appeals from Longshore decisions of district directors without the requisite decisions by administrative law judges made pursuant to the Administrative Procedure Act. 33 U.S.C. §921(b)(3). Both of the majority's holdings will, if not reversed, serve to erode the authority of the administrative law judges and thereby deprive the parties of the important protections afforded by the Administrative Procedure Act, expressly incorporated in the Longshore Act. 33 U.S.C. §919(d). Accordingly, I would hold that a party appealing an adverse decision of a district director made pursuant to 30 U.S.C. §907(d)(2) has a right to a ruling made by an administrative law judge in accordance with the Administrative Procedure Act, and to the extent 20 C.F.R. §702.422(b) is construed to preclude a decision by an administrative law judge, it is invalid. The case should be remanded to the Office of Administrative Law Judges.

REGINA C. McGRANERY
Administrative Appeals Judge