BRB No. 93-0996

| | | |
|---|---|---|
| HAROLD LACHNICHT | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| H.P. HOWLETT, INCORPORATED | ) | DATE ISSUED: |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Order of Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Michael N. Cotignola (Kalmus & Martuscello), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order of Remand (92-LHC-1633) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In his Order of Remand, the administrative law judge granted claimant's motion to remand the instant case to the district director so that claimant may join additional employers as parties in the case. On appeal, employer contends that since claimant failed to establish that it was the last employer to expose claimant to injurious stimuli, the administrative law judge's decision to remand the case to the district director should be reversed and the claim should be denied.

Employer's contention is without merit. Federal courts ordinarily will not grant interlocutory review of an incomplete decision. *See* 28 U.S.C. §1291. Such review is permissible, however, 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 of action itself to require that appellate consideration be deferred until the whole case is adjudicated."

*Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)(the collateral order doctrine);[1] *see also United States v. 101.88 Acres of Land, Etc.*, 616 F.2d 762, 765 (5th Cir. 1980). Similarly, the Board does not ordinarily accept interlocutory appeals so as to avoid piecemeal review. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). The Board will grant interlocutory review nonetheless if necessary to properly direct the course of the adjudicatory process, *see Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989), or if the order does not involve the merits of the case and will be unreviewable on appeal from final judgment. *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986).

[1]Under the collateral order doctrine, review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively reviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

It is well-established that an order remanding a matter to a lower tribunal for further findings and proceedings is not final. *See Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27 (CRT)(11th Cir. 1987); *Cabot Corp. v. United States*, 788 F.2d 1539 (Fed.Cir. 1986); *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). In the instant case, the administrative law judge did not issue a decision on the merits of claimant's claim; rather, the administrative law judge remanded the case to the district director for further proceedings. The administrative law judge's Order of Remand, therefore, is not final. *Washington Metropolitan Area Transit Authority v. Director, OWCP*, 824 F.2d 94, 20 BRBS 13 (CRT)(D.C. Cir. 1987); *Tignor v. Newport News Shipbuilding and Dry Dock Co.*, 29 BRBS 135 (1995); *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). Moreover, no exceptions to the rule against taking appeals of interlocutory orders apply as the Board need not direct the course of the adjudicative process, and the collateral order doctrine does not apply to this case. Once an administrative law judge issues a final decision awarding or denying benefits, employer may raise the issue it seeks to raise now by filing a new appeal within 30 days of the Decision and Order.[2]

Accordingly, as the administrative law judge's Order of Remand is not a final appealable order, employer's appeal is dismissed as interlocutory. 20 C.F.R. §802.401(b).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]In its brief to the Board, employer asserts that claimant failed to show that it was the last responsible employer to expose claimant to injurious stimuli. As set forth *supra*, however, the administrative law judge made no findings regarding the merits of claimant's claim. Moreover, employer's argument which allocates to claimant the burden of proving injurious exposure with a particular employer is misplaced, as it is employer's burden to establish that it is not the responsible employer. In *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed the employer's burden of proof with regard to the issues of causation and the determination of the responsible employer. In *Suseoff*, the Board indicated that once claimant demonstrates *prima facie* entitlement to benefits by showing that "he sustained physical harm and that conditions existed at work which could have caused the harm," there exists a presumption of a compensable claim. *Id.*, 19 BRBS at 151. Employer can rebut this presumption by showing that exposure to injurious stimuli did not cause the harm alleged, *i.e.*, that claimant's hearing loss is not due to noise exposure in any employment, but is due to other causes. Employer may also establish that it is not the responsible employer, by showing that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.; see Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge