BRB No. 07-0920

R.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION EAST	)	DATE ISSUED: 09/17/2007
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	ORDER

Employer/carrier has filed a Notice of Appeal dated August 13, 2007, of the administrative law judge's Ruling on Claimant's Motion for Protective Order and Employer's Request for Issuance of a Subpoena which is dated August 3, 2007. Employer's appeal is assigned the Board's docket number, BRB No. 07-0920. All future correspondence to the Board must bear this number.

Employer's appeal is of a non-final, or interlocutory, order of the administrative law judge. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). The Supreme Court of the United States has articulated a three-pronged test to determine whether an order which does not finally resolve a claim is, nonetheless, appealable. First, the order must conclusively determine the disputed question. Secondly, the order must resolve an important issue which is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988) ("collateral order doctrine"). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on the Federal Rules of Civil Procedure for guidance where the Act and Regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862 n.16, 15 BRBS 11 n.16(CRT) (1st

Cir. 1982). Thus, where the order appealed from does not satisfy the aforementioned three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987).

The administrative law judge's order in this case does not conclusively determine a disputed issue – it merely denies a request for a subpoena to take a deposition in a particular place. *See Butler*, 28 BRBS 114. Nor is the administrative law judge's order unreviewable at a later date, as employer could appeal the final decision and, upon review of the merits of the claim, employer could challenge the admission of any evidence into the record. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Thus, although the order addresses a collateral issue, as the status of claimant's counsel is separate from the merits of the claim, neither of the two remaining prongs is satisfied. Moreover, as administrative law judges are afforded broad discretion in authorizing discovery and in the conduct of pre-hearing procedures, and as the administrative law judge here properly directed the course of the adjudicatory process, *see* discussion below, it is not necessary for the Board to do so. *See Butler*, 28 BRBS 114; *see also* 5 U.S.C. §554 *et seq.*; *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

In this regard, there is no apparent error in the administrative law judge's finding that claimant's counsel may appear as claimant's representative in South Carolina without affiliating himself with local counsel.[1] The administrative law judge relied on Section 18.34 of the Rules of Practice and Procedure for the Office of Administrative Law Judges, which provides that attorneys who are "admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Office of Administrative Law Judges." 29 C.F.R. §18.34(g)(1). Depositions in longshore cases and related subpoenas are within the authority of the Office of Administrative Law Judges, *see* 33 U.S.C. §927(a); *Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982), and are thus part of the practice before that office. The administrative law judge also discussed Rule 5.5(d) of Rule 407 (the South Carolina Rules of Conduct), which provides:

[1]Counsel for claimant, Gregory Camden, of Montagna, Klein & Camden, L.L.P. in Norfolk, Virginia, is licensed to practice in Virginia, as well as before the United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States.

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provided legal services in this jurisdiction that:
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> ***
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment 18 to the rule states:

> Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

Thus, as a federal regulation gives claimant's counsel the right to practice before the Office of Administrative Law Judges, the administrative law judge did not err in finding that claimant's counsel may represent claimant in longshore proceedings in South Carolina. Accordingly, as the administrative law judge has properly directed the course of the adjudicatory process, the Board need not do so. Therefore, we dismiss employer's appeal of the administrative law judge's interlocutory order. *Butler*, 28 BRBS at 118.

We also deny employer's motion to "stay" the administrative law judge's ruling. In order to protect claimant's right to have counsel present during discovery, and as is within his discretion, the administrative law judge denied employer's request for a subpoena to force claimant to be deposed in South Carolina. He stated that the case would move forward with discovery taking place elsewhere or by alternate means. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); 29 C.F.R. §18.13 *et seq.* Employer contends the administrative law judge's order is prejudicial, will cause it irreparable harm, and will prevent it from effectively engaging in discovery. At this point, the administrative law judge has simply denied one subpoena for valid reasons and has advised the parties that he would consider each request for a subpoena for discovery purposes on its own merits. As the administrative law judge specifically listed other methods for employer to obtain the information it seeks, the denial of this subpoena does not prevent employer from engaging in discovery in this case. Particularly given employer's actions in this case thus far, the administrative law judge's disposition of this issue is well-reasoned and rational. The request for a stay is therefore denied.

Accordingly, employer's appeal, BRB No. 07-0920, is dismissed. Employer may seek review of the administrative law judge's interlocutory order after the administrative law judge issues a final decision in this matter. *See Burns*, 41 F.3d 1555, 29 BRBS 28(CRT). Employer's motion to stay the administrative law judge's order is denied.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge