

## TOPIC 19      PROCEDURE

### 19.1            THE CLAIM: GENERALLY

A person seeking compensation under the LHWCA must file a timely claim with the local deputy commissioner (now district director). 33 U.S.C. § 913(a) (one-year limitation period); 33 U.S.C. § 913(b)(2) (for occupational disease claims which do not immediately result in death or disability). The district director notifies the employer of the claim, see 33 U.S.C. § 919(b), at which time the employer might: (i) agree to pay the amount of benefits fixed by the LHWCA, see 20 C.F.R. § 702.231 et seq. (1996) (procedures for payment of non-controverted claims); (ii) enter into a formal settlement with the person seeking compensation for a (presumably) lesser amount, subject to the approval of the district director or an ALJ, see 33 U.S.C. § 908(i); 20 C.F.R. § 702.241 et seq. (1996); or (iii) give notice that it is denying liability for, or controverting, the claim, see 20 C.F.R. § 702.251. If the employer controverts the claim, the district director is empowered to attempt to resolve the parties' disputes informally. 20 C.F.R. § 702.311 et seq. Should informal discussions prove unsuccessful, the district director refers the matter to an ALJ and a formal hearing is held. 33 U.S.C. §§ 919(c)-(d); 20 C.F.R. § 702.316 (1996). "Any party in interest" may appeal the ALJ's decision to the Benefits Review Board. 33 U.S.C. § 921(b)(3). An appeal from the Board's decision to the courts of appeals may be initiated by "any person adversely affected or aggrieved by a final order of the Board." 33 U.S.C. § 921(c); see also 20 C.F.R. § 802.410(a) (1996).

Section 19 vests jurisdiction in an ALJ only over claims for compensation and authorizes an ALJ to hear only questions in respect of such claims. Equitable Equipment Co. v. Director, OWCP, 191 F.3d 630 (5<sup>th</sup> Cir. 1999). In Equitable Equipment, the employer had filed a "claim" seeking attorney fees incurred under the LHWCA from its insurers. As the employer's cause of action in this case was independent of, and wholly unrelated to, an underlying claim for compensation pursuant to Section 19(a), the **Fifth Circuit** held that the ALJ lacked jurisdiction over the dispute.

In Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997), the Board held that the ALJ "has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act." The Board concluded that the ALJ erred in finding two employers liable for the claimant's attorney's fees where "CPS has no longshore workers itself, but merely provides workers to longshore employers, [and Carrier] was on the risk not for CPS itself, but for ... other employers to whom CPS loaned employees." The Board held that "[b]y virtue of the contractual agreements, [Carrier] is solely liable to claimant as the insurance carrier, as its policy insures [the longshore employer] for injuries covered under the Longshore Act and as it waived its right to seek reimbursement from [the longshore employer]." But see, Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5<sup>th</sup> Cir. 2001) (ALJ did not have jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between the borrowing employer and the loaning employer; did ALJ have jurisdiction to address a waiver of subrogation by the loaning employer's carrier.).

A claim for compensation **must be filed with the district director**. Section 19(a) of the LHWCA provides:

**(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.**

33 U.S.C. § 919(a).

However, the ALJ does not have authority to address all tangential issues. For example, whether an award of attorney's fees to an employer based on an alleged breach of an insurer's duty to defend under the terms of its insurance policy with employer, was not a question "in respect of a claim" as is required to fall within the ALJ's jurisdiction under Section 19(a). Jourdan v. Equitable Equipment Co., 32 BRBS 200 (1998), over-ruling Gray & Co., Inc. v. Highland Ins. Co., 9 BRBS 424 (1978). In reference to Gray, the Board stated: "[i]n retrospect, the holding in Gray is an anomaly in that it is the only case in which the Board found that the [ALJ] had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to, any other issue necessary to resolution of the claim. In each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award."

The **right to disability compensation survives the employee's death** and the employee's survivors have standing to file on his behalf. Maddon v. Western Asbestos Co., 23 BRBS 55, 59 (1989); Muscella v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 830, 831-32 (1978). Section 19(f) explicitly provides that an award of compensation for disability may be made after the death of an injured employee. See Andrews v. Alabama Dry Dock & Shipbuilding Co., 17 BRBS 209, 211 (1985); Wilson v. Vecco Concrete Constr. Co., 16 BRBS 22, 25 (1983).

The test for what constitutes a claim is: **Whether the communication reasonably conveys the message that a claim is being filed.** Downey v. General Dynamics Corp., 22 BRBS 203, 205 (1989) (where claim was filed in 1981 based upon 1981 audiogram, but subsequent audiogram was proffered at 1984 formal hearing, Board held that ALJ acted in most judicially efficient manner in finding that 1984 audiogram documented aggravation of original hearing loss through continued exposure to industrial noise and therefore constituted new injury and new claim with appropriate notice); Peterson v. Washington Metro. Area Transit Auth., 17 BRBS 114, 116 (1984); Welding v. Bath Iron Works Corp., 13 BRBS 812, 819 (1981).

The claim must be in **writing** and is normally filed on a form supplied by the district director. Walker v. Rothschild Int'l Stevedoring Co., 526 F.2d 1137 (9th Cir. 1975); See 20 C.F.R. §

702.221(a). However, a memorandum recording by OWCP of a telephone conversation with a claimant has been found by the Board to constitute a claim since it disclosed the claimant's intent to assert a right to compensation. I.T.O. Corp. Of Virginia v. Pettus, 73 F.2d 523, 30 BRBS 6 (CRT)(4th Cir. 1996), cert. denied, 519 U.S. 807 (1996); McKnight v. Carolina Shipping Co., 32 BRBS 165, aff'd on recon en banc, 32 BRBS 165, aff'd on recon en banc, 32 BRBS 251 (1998).

The claim **need not appear** on the form designated by the Department of Labor. A letter from counsel has been deemed sufficient. Employers Liability Assurance Corp. v. Donovan, 279 F.2d 76, 78 (5th Cir.), cert. denied, 364 U.S. 884 (1960); Nix v. O'Keeffe, 255 F. Supp. 752, 754 (N.D. Fla. 1966). An oral interview of the claimant is not sufficient. Slade v. Branham, 48 F. Supp. 769, 770 (D. Md. 1942). Nonetheless, any written filing will toll the prescriptive period. Walker, 526 F.2d 1137. It will be barred if it is filed outside the applicable limitations period set forth in Section 13. See also 20 C.F.R. §§ 702.221, 702.222.

\_\_\_\_\_ Within 10 days after the claim has been filed with the district director, the **district director must give written notice to the employer** by either personal service or certified mail. 20 C.F.R. § 702.224; 33 U.S.C. § 919(b). If the employer declines to pay benefits voluntarily, it must controvert the right to compensation within 14 days from the date it receives notice or knowledge of the injury or death. 20 C.F.R. § 702.251. In the instance the employer wishes to controvert the claim, a notice stating the grounds for controversion must be filed on or before the fourteenth day after he has knowledge of the injury or death. 20 C.F.R. § 702.251; 33 U.S.C. § 914(b). Controversion may be withdrawn in situations where there is no longer any issue to be litigated before the administrative law judge. 20 C.F.R. § 702.351. See Edwards v. Willamette Western Corp., 13 BRBS 800, 802-03 (1981) (attempted withdrawal of controversion by one of two employers was invalid because issue of liability remained pending before ALJ); Lundy v. Atlantic Marine, 9 BRBS 391, 393 (1978).

An **employer who desires to cease payment of compensation** to a claimant (after the administrative law judge has issued a compensation order) should request a **predeprivation hearing** before an ALJ rather than unilaterally stopping compensation. Vincent v. Consolidated Operating Co., 17 F.3d 782 (5th Cir. 1994).

**Claims may be withdrawn**, without prejudice, subject to certain conditions. 20 C.F.R. § 702.225. The immediate predecessor of this regulation was 20 C.F.R. § 702.216. (The predecessor of § 702.216 was found at 20 C.F.R. § 31.7 (1951). See infra for former text.) Section 702.216 was redesignated, in its entirety, as 20 C.F.R. § 702.225 designation on January 3, 1985. 50 FR 397. The wording was not altered at the time of **this** redesignation.

In order to withdraw a claim prior to adjudication (20 C.F.R. § 702.225(a)), the district director or ALJ must approve the withdrawal as being for a proper purpose and in the claimant's best interest. Norton v. National Steel & Shipbuilding Co., 25 BRBS 79, 83 (1991), on recon., 27 BRBS 33 (1993); Madrid v. Coast Marine Constr. Co., 22 BRBS 148, 152 (1989); Rodman v. Bethlehem

Steel Corp., 16 BRBS 123, 127 n.5 (1984); Matthews v. Mid-States Stevedoring Corp., 11 BRBS 139, 142 (1979); Graham v. Director, OWCP, 9 BRBS 155, 159 (1978).

In Smith v. Stevedoring Services of America, 30 BRBS 576 (ALJ) (1996), the judge **denied the employer's request for repayment** of all benefits previously paid to the claimant prior to the Order Granting Withdrawal of Claim. Citing Graham v. Director, OWCP, 9 BRBS 155 (1978), the judge found that 20 C.F.R. § 702.255(b) (which deals with withdrawals "*After adjudication of claim*" and includes a provision for the repayment of the amount of benefits previously paid) is inapplicable to motions to withdraw pending before OALJ before there is an adjudication of a claim. The judge found that motions pending before OALJ must be decided pursuant to § 702.255(a) which does not contain a provision for the repayment of benefits as a prerequisite to the granting of a motion to withdraw. The judge, therefore, found that the employer's sole remedy would be to seek an offset against any benefits awarded by another forum.

The Code of Federal Regulations (20 C.F.R. § 702.225(a)) clearly states that the request for withdrawal [*Before adjudication of claim*] must be filed on or before the date the OWCP makes a determination on the claim. 20 C.F.R. § 702.225(b) notes that "*After adjudication of claim*" a claim may be withdrawn after the date the OWCP makes a determination on the claim provided that "...[t]here is repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of the Office that repayment of any such amount is assumed."

Prior to the 1972 Amendments, deputy commissioners [now district directors] were empowered to act on requests for withdrawal of claims under 20 C.F.R. § 31.7 (1951). Section 31.7 read as follows:

*Withdrawal of claim for compensation.* Any claimant not desiring to proceed with a claim filed in case of injury or death pursuant to said act and the regulations in this subchapter, may apply for withdrawal of the claim to the deputy commissioner with whom filed, stating the reason for such withdrawal. The deputy commissioner whose jurisdiction has been invoked for the filing of such claim shall in consideration of such application determine whether such withdrawal is for a proper purpose and for the claimant's best interest prior to authorizing such withdrawal. Any claim so withdrawn is withdrawn without prejudice to the filing of another claim subject to the provisions relating to the limitation of time in section 13 of said act.

20 C.F.R. § 31.7 (1951).

No limitation was placed on the stage of proceedings at which this power could be exercised. If, in the midst of a formal hearing, a claimant expressed a desire not to proceed with the claim, the

deputy commissioner could consider the request for withdrawal. Graham, 9 BRBS at 158. The withdrawal regulation was subsequently amended and redesignated as 20 C.F.R. § 702.216 on September 26, 1973 and again redesignated as 20 C.F.R. § 702.225 on January 3, 1985.

In Graham, the Board reviewed 20 C.F.R. § 702.216(a) and found that “[b]y its very terms, this section of the Regulations relates only to proceedings before the [district director].” 9 BRBS at 157. However, the Board went on to state that

We conclude that Congress intended administrative law judges to have the same authority at the formal hearing level as was vested in the deputy commissioners prior to the 1972 amendments. As the deputy commissioners were authorized to act on requests for withdrawal of claims even at the formal hearing level, administrative law judges now have that authority.

Graham, 9 BRBS at 158.

The Board, in Graham, further noted:

Subsection (b) of 20 C.F.R. § 702.216 provides for withdrawal “after adjudication of claim.” As subsection (b) refers specifically only to requests for withdrawal “after the date the **OWCP** makes a **determination** on the claim.” (emphasis added), we find that its provisions apply only to claims that have been resolved informally resulting in determinations without the necessity of transference to the Office of Administrative Law Judges.

9 BRBS at 158 n. 2.

***[ED. NOTE:** However, simply substituting OALJ for the district director and assuming the wording of the regulation retains its previous meaning (i.e. that “adjudication” means “formal hearing” or “determination”) is perplexing in light of the Board’s footnote just cited. In that footnote, while referring to subsection (b) of the regulation (“After Adjudication of claim”), the Board stated that it found that this provision applied only to claims that have been resolved **informally** resulting in determinations **without** the necessity of referral to OALJ.*

*This footnote by the Board would make more sense had it referred to subsection (a) of the regulation (“Before adjudication of claim”). If, as the Board states in the body of Graham, the regulation for withdrawal is to also be applied to ALJs at the formal level, and have the same meaning as prior to 1972, then one cannot refer to the footnote and find that subsection (b) of the regulation applies only to cases resolved informally, resulting in determinations without transfer to OALJ.*

*Adding to the confusion is recent **United States Supreme Court** case law which now clearly indicates that OALJ is the beginning of the adjudicatory process. See Ingalls Shipbuilding, Inc. v. Director, OWCP, (Yates), 519 U.S. 248 (1997) and Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995). Moreover, it is noted that the Black Lung Act regulation dealing with withdrawal of claims specifically states that there may be a withdrawal provided “[a]ny benefits previously paid with respect to the claim are reimbursed.” 20 C.F.R. § 725.306(a)(3).*

*If one interprets “adjudication” in the context of 20 C.F.R. § 702.225 to continue to refer to the date the OWCP makes a **determination** on the claim (albeit now only an informal order/memorandum of conference), then one can argue that once the claim is referred to OALJ and then a motion to withdraw is filed, a prerequisite for that withdrawal will be repayment as per § 702.225(b)(2). On the other hand, if “adjudication” is now given a more formal meaning, (i.e., just as adjudication once meant determination by OWCP, it must now mean determination by OALJ) then a withdrawal at the ALJ level will not include a repayment of previously paid benefits unless the ALJ has actually “adjudicated” the claim.*

*From a practical standpoint, a motion for withdrawal, in general, only occurs when a claimant strategically chooses to pursue relief in another forum, i.e., state compensation or Jones Act tort relief. Thus, giving the employer/carrier an offset against an award from another forum will provide equity. However, what happens when relief is not pursued elsewhere? Does this then provide one more reason why employer/carriers will not voluntarily provide compensation?]*

After withdrawal, no provision exists under 20 C.F.R. § 702.225(b) allowing employer to be reimbursed for LHWCA benefits paid to claimant before claimant was allowed to withdraw LHWCA claim; employer’s remedy is to seek offset against any state compensation awarded. Soboczynski v. Pile Foundation Construction, 30 BRBS 580 (ALJ) (1996).

The receipt of money in exchange for withdrawal is not a proper purpose. Norton, 25 BRBS at 83; Rodman, 16 BRBS at 127 n.5; Matthews, 11 BRBS at 142.

In Eneberg v. Todd Pacific Shipyards, 30 BRBS 59 (1996), the Board found that it was **error for the district director to fail to refer a claim on the grounds that the claimant may, at some point in the future, file a motion for withdrawal**. The Board determined that it had subject-matter jurisdiction over the legal issue at bar and noted that “the Board’s exercise of its statutory review in this case is an exercise of mandamus authority.” Id. Section 19(c) of the LHWCA imposes a mandatory duty upon the district director to refer a claim once a hearing is requested by an interested party. See 33 U.S.C. § 919(c).

In order to withdraw a claim after adjudication by the Office of Workers’ Compensation Programs (OWCP), the district director or administrative law judge must approve the withdrawal as being for a proper purpose and in the claimant’s best interest **and** there must be repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it must be

established to the satisfaction of the Office that repayment of any such amount is assured. 20 C.F.R. § 702.225(b).

Where a claim is timely filed under Section 13, but is never adjudicated, it remains open and pending until an order is issued. Intercounty Constr. Corp. v. Walter, 422 U.S. 1, 7-10, 2 BRBS 3, 6-8 (1975); Madrid, 22 BRBS at 152 (where claimant filed no written request to withdraw claim and modification request was never adjudicated, claim remained open and pending); Krotsis v. General Dynamics Corp., 22 BRBS 128, 131 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990) (where no action was taken on claimant's 1979 claim following disapproval of settlement and employer's voluntary payment of compensation, claim remained open at time of hearing on subsequent claim); O'Berry v. Jacksonville Shipyards, 21 BRBS 355, 359-60 (1988), overruled in part, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (1970 claim was still pending in 1982 where there was no valid compensation order or approved settlement).

The judge has the **authority to dismiss** a claim where it has been **abandoned**. 29 C.F.R. § 18.29; Federal Rule of Civil Procedure 41(b). The availability of dismissal as a procedural tool is "restricted to prevent prejudice to parties and to protect their right to a fair hearing." Taylor v. B. Frank Joy Co., 22 BRBS 408, 411 (1989) (dismissal of claim affirmed where claimant's counsel failed to show good cause for his and claimant's failure to appear at the formal hearing and claimant clearly was not pursuing his claim). Consideration is also given, however, to "the countervailing policy of allowing ALJ to exercise those powers necessary to conduct fair and impartial hearings, as well as the policy against encouraging protracted litigation." Id.

The LHWCA does not provide for a "**protective filing**" in occupational disease cases to avoid possible future statute of limitation problems. Black v. Bethlehem Steel Corp., 16 BRBS 138, 142 (1984). A claim for additional benefits can not be deemed an impermissible protective filing against speculative future injuries where the claim arose from a specific injury which was identified on the claim form and since the claimant had not attained maximum medical improvement. Pool Co. v. Cooper, 274 F.3d 173 (5th Cir. 2001). The **Fifth Circuit** distinguished Pool from asbestos cases where the claimants had endured exposure to asbestos but "as yet suffered neither physical nor economic disability." Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994). In Pool, there existed substantial evidence from which the ALJ could infer that at the time the claim was filed, the claimant was undergoing continuing treatment for his original injury in the hope of improving his condition, and he and his physicians reasonably believed that he had not attained maximum medical improvement after all.

**A private insurer's decision to withhold benefits does not amount to governmental action, and the due process clause is, therefore, not applicable.** Kreschollek v. Southern Stevedoring Co., 223 F.3d 202 (3rd Cir. 2000) (A claimant has no protectable property right in the continued receipt of benefits in light of the lack of a prior finding of entitlement.). In Kreschollek, the **Third Circuit** followed American Mfr. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999), which dealt with a similar state worker's compensation claim. In Sullivan, the Court held that "an insurer's

decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State.” Sullivan at 58. The Court further noted that, employees do not have a property interest in workers compensation benefits when they have not demonstrated that they are entitled to them and a state statute requires that they prove “that an employer is liable for a work-related injury, and ... that the particular medical treatment at issue is reasonable and necessary.” Sullivan at 61.

In Admiralty Coatings Corp. v. Emery, 228 F.3d 513 (4<sup>th</sup> Cir. 2000) the employer unsuccessfully challenged the ALJ’s authority to award temporary partial benefits beyond the date of the evidentiary hearing. The employer had argued that the ALJ’s holding violated the APA’s mandate that all findings and conclusions be supported by the evidence of record.

## 19.2 DISTRICT DIRECTOR MUST NOTIFY EMPLOYER

Within 10 days after the filing of a claim with the district director, the district director is required to give written notice to the employer either by personal service or certified mail. 33 U.S.C. § 919(b); 20 C.F.R. § 702.224. Specifically, section 19(b) of the LHWCA provides:

**(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.**

33 U.S.C. § 919(b). See Jones v. Chesapeake & Potomac Tel. Co., 11 BRBS 7, 13 (1979), aff'd, 615 F.2d 1368 (D.C. Cir. 1980).

### 19.3 ADJUDICATORY POWERS

Section 19(c) of the LHWCA deals with adjudication. It provides:

**(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.**

33 U.S.C. § 919(c).

Section 19(c) of the LHWCA imposes a mandatory duty upon the district director to refer a claim once a hearing is requested by an interested party. See Eneberg v. Todd Pacific Shipyards, 30 BRBS 59 (1996) (“[T]he Board’s exercise of its statutory review... is an exercise of mandamus authority.”). See also Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997) (Supreme Court refers to OALJ as the beginning of the adjudicatory process.).

Section 19(a) of the LHWCA provides that the "deputy commissioner shall have full power and authority to hear and determine all questions" pertaining to claims filed under the LHWCA. 33 U.S.C. § 919(a). This provision, along with Sections 19(c), 23(a), and 27(a), reflected the dual roles of adjudication and investigation that were held by the district director prior to the enactment of the 1972 Amendments to the LHWCA.

The 1972 Amendments amended Section 19(d), withdrawing the adjudicatory power to conduct hearings from the district directors and conferring it on hearing examiners, i.e., administrative law judges, who are qualified to conduct adjudications in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 554. Barthelemy v. J. Ray McDermott & Co., 537 F.2d 168, 170, 4 BRBS 325, 326 (5th Cir. 1976); Lauzon v. Strachan Shipping Co., 602 F. Supp. 661, 664 (S.D. Tex.), aff’d, 782 F.2d 1217, 18 BRBS 60 (CRT) (5th Cir. 1985); Blake v. Hurlburt Field Billeting Fund, 17 BRBS 14, 16 (1985); Percoats v. Marine Terminals Corp., 15 BRBS 151, 153 (1982); Clefstad v. Perini N. River Assocs., 9 BRBS 217, 220-21 (1978); Neal v. Strachan Shipping Co., 1 BRBS 279, 281 (1974).

The separation of duties of the deputy commissioner [now district director] from those of the administrative law judge was clearly expressed by Congress in 1972 when it amended Section 19(d) to provide that, “[a]ll powers, duties, and responsibilities [formerly] vested in the deputy commissioners with respect to hearings shall be vested in ...hearing examiners [i.e., administrative law judges].” 33 U.S.C. § 919(d). Shell v. Teledyne Movable Offshore, Inc., 14 BRBS 585 (1981), at 589, aff’d 694 F.2d 720 (5<sup>th</sup> Cir. 1982)(table).

In the Black Lung case of Yates v. Armco Steel Corp., 10 BLR 1-132 (1987) at 1-134, the Board stated that the deputy commissioner is a non-judicial officer. While Yates is a black lung case, the Board took the opportunity to state its opinion as to what the 1972 amendments accomplished. The Board stated that the bifurcation of administrative and adjudicative functions reflected in § 19(d) effects a “neatly legislated procedural separation of informal settlement conferences and formal adjudications,” Yates at 1-135, citing Shell at 589. Also in Yates, the Board observed that the legislation reflected legislative concerns that the administrative and adjudicative functions had been too closely tied together prior to the 1972 amendments. This is bore out by the 1972 House Report which accompanied the 1972 Amendments and stated:

H.R. 12006 amends Section 19(d) of the [Longshore] Act to make clear that all hearings under this Act are to be conducted in conformity with the Administrative Procedure Act (5 USC 554) by hearing examiners [now called administrative law judges] qualified under the Act. It is the committee’s belief that the administration of the Longshoremen’s and Harbor Workers’ Compensation Act has suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings. Moreover, with the new responsibilities that will devolve upon the Secretary with the passage of this bill it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for purposes of the disputes brought under this statute.

House Report No. 82-1441, 1972 U.S. Code Cong. & Adm. News 4708.

**[ED. NOTE: The Black Lung case of Yates v. Armco Steel Corp., 10 BLR 1-132 (1987) has no connection with the Longshore case of Ingalls shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997).]**

More recently, in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 115 S.Ct. 1278 (1995)(eight person majority, one concurrence), the **Court** spoke in terms of the Director as having a “duty of uniform administration and enforcement” as opposed to the adjudicatory process that initially takes place at OALJ. See also, Barthelemy v. J. Ray McDermott, 537 F.2d 168 (5<sup>th</sup> Cir. 1976). Still more recently, in Ingalls Shipbuilding, Inc. v. Director, OWCP, (Yates), 519 U.S. 248, (1997), the **Court** again referred to OALJ as the beginning of the adjudicatory process.

If informal procedures fail to resolve the claim, the district director must transfer the case to the Office of the Chief Administrative Law Judge together with all available evidence which the parties intend to submit at the hearing. See 20 C.F.R. § 702.317.

*[ED. NOTE: Despite the wording of the regulation, however, the district director transfers only a bare bones "file" to OALJ, consisting generally of LS-18 forms filled out by the parties, and a transmittal letter indicating the transfer of the case as well as whether or not Section 8(f) is at issue. (Previously, the district director, on behalf of the Director, may have raised the ultimate § 8(f) defense. However, Abbey v. Navy Exchange, 30 BRBS 139 (1996), has held that it is not sufficient for the District director to raise a defense to § 8(f) relief by way of a transmittal letter. The Director must raise and plead the absolute defense directly to OALJ. 20 C.F.R. 702.321(b)(3).)*

***The entire OWCP file is NOT forwarded to OALJ. The OALJ hearing is de novo. If the parties intend on offering into evidence anything other than the LS-18 forms or transmittal letter it is the responsibility of the party so offering to obtain a copy of the document(s) so offered and submit it to OALJ as per the hearing judge's direction.]***

The regulations pertaining to formal hearings before the administrative law judge are set forth in 20 C.F.R. §§ 702.331 through 702.351. Pursuant to statute and regulation, formal hearings are conducted in accordance with the provisions of the APA. 5 U.S.C. § 554 et seq. See 33 U.S.C. § 919(d); 20 C.F.R. § 702.332.

Notice delivered to the correct address is sufficient to warn a party of the potential waiver of its right to a hearing. Newport News Shipbuilding & Dry Dock Co.v.Gregory, 213 F.3d 632 (Case No. 99-2356)(**4th Cir.** 2000)(Unpublished). In Gregory, employer sought reconsideration of the ALJ's order awarding benefits because it alleged that it was unaware of the fact the case had been assigned to a different ALJ on remand from the circuit court. The employer asserted that it never received notice of the reassignment of the case despite the fact that notice was served at the correct address to the attorney of record as shown in the administrative file at OALJ. After reviewing the record and the ALJ's order denying reconsideration, the circuit court found that it could discern no reversible error on the part of the ALJ. The circuit court stated that employer failed to demonstrate how the ALJ's determination (that notice delivered to the correct address was sufficient to warn employer of the potential waiver of their right to a hearing) rendered her refusal to grant reconsideration contrary to the law.

In Admiralty Coatings Corp. v. Emery, 228 F.3d 513 (**4th Cir.** 2000) the employer unsuccessfully challenged the ALJ's authority to award temporary partial benefits beyond the date of the evidentiary hearing. The employer had argued that the ALJ's holding violated the APA's mandate that all findings and conclusions be supported by the evidence of record.

**Claimant does not have to be an "active" participant in the adjudication proceedings,** so long as the issue to be adjudicated arises under the LHWCA. Schaubert v. Omega Services Industries Inc., 31 BRBS 24 (1997) (ALJ has requisite jurisdiction to decide the responsible

employer issue, including whether the borrowed employee doctrine is applicable, even if claimant is not an “active” participant in the adjudication proceedings).

The **Third Circuit** has held that **due to the inadequacy of the administrative review scheme to address harm, a longshoreman was not required to bring constitutional challenge within the LHWCA’s administrative claim process.** Rather, the district court had jurisdiction to hear the claim in which the longshoreman alleged that the LHWCA’s review procedure unconstitutionally deprived him of a hearing prior to deprivation of benefits. Kreschollek v. Southern Stevedoring Co., 78 F.3d 868 (**3d Cir.** 1996). The court stated:

The inadequacy of the administrative review scheme to address the harm at issue — here, the pretermination hearing — is precisely the sort of situation which we envisioned . . . would permit a district court to exercise jurisdiction over a claim involving the Act. 78 F.3d at 874-875.

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But see Bunol v. George Engine Co., 996 F.2d 67 (**5th Cir.** 1993) (anticipated three-year delay in obtaining review of administrative law judge’s decision awarding benefits under the LHWCA was not so long as to amount to denial of due process); Garvey Grain v. Director, OWCP, 639 F.2d 366 (**7th Cir.** 1981) (“[20 C.F.R. § 702.349] contains no provision which requires vacating an award made more than twenty days after official termination of the hearing before the ALJ, nor do its provisions require a rehearing”).

*[ED. NOTE: The **Third Circuit** conceded that the LHWCA confers only limited jurisdiction in the district courts, and that the 1972 Amendments restricted access to the district courts; however, it did not consider these factors significant enough to stop the claimant’s constitutional claim. The court did not cite any cases dealing with termination of workers’ compensation benefits. The only cases the court cited involved **government** paid benefits or procedures. The court explicated several situations where predeprivation hearings have been held essential to due process, and concluded that the termination of Longshore benefits could require a pretermination hearing. Completely overlooked in the discussion by the court, however, was that the cases in which a pretermination hearing was held necessary all involved benefits provided directly by the **federal government**. A major distinction between those cases and the Longshore benefits was completely overlooked by the court; each of the other examples involves a government service or a government benefit, to which due process strictures clearly apply. See Bunol, 996 F.2d at 69 (“due process generally means that a party must have the opportunity for a hearing before the government interferes with the party’s protected interest” [emphasis excluded]).]*

### 19.3.1 ALJ Cannot Review Discretionary Acts of District Director

The judge's adjudicatory power does not encompass the authority to review discretionary acts by the district director, such as approved or awarded attorney's fees, pursuant to cases agreed upon or settled by the parties. Review of such discretionary acts is properly undertaken by the Board. Mazzella v. United Terminals, 8 BRBS 755, 758, aff'd on recon. 9 BRBS 191 (1978); Dunn v. United Terminals, 8 BRBS 751, 753, aff'd on recon. sub nom. Mazzella v. United Terminals, 9 BRBS 191 (1978); Traina v. Pittston Stevedoring Corp., 8 BRBS 715, 720 aff'd on recon. sub nom. Mazzella v. United Terminals, 9 BRBS 191 (1978).

Section 19(d) "does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues." Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 33 BRBS 209(CRT) (9<sup>th</sup> Cir. 2000)(Party challenging an attorney's fee award made by the district director does not have a right to a formal hearing before OALJ when there are no factual issues in dispute.). Cf. Pearce v. Director, OWCP, 647 F.2d 716 (7<sup>th</sup> Cir. 1981)(LHWCA and its regulations made no distinction between requests for hearings on claims that are "adjudicatory" in nature and those that are "administrative" in nature.). In Pearce, the **Seventh Circuit** held that the district director has a duty to transfer disputes to OALJ because the Board has "no authority to consider or review the evidence that [has] been gathered by the deputy commissioner" because the Board can only review a "hearing record" and such a record can only be developed in an ALJ proceeding.

### 19.3.2 District Director Lacks Jurisdiction Over Claim Once Referred to OALJ

The district director lacks jurisdiction over a claim once the claim is referred to the OALJ. This position is supported by references within the **LHWCA, C.F.R., A.P.A., B.R.B.** caselaw, **Fifth** and **Seventh** Circuit case law and recent U.S. **Supreme Court** caselaw.

The 1972 Amendments to the LHWCA separates the administrative functions from the adjudicatory functions. In pertinent part, Section 19(d) of the LHWCA provides as follows:

Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be **conducted** by the hearing examiner [now administrative law judge] qualified under section 3105 of that title. **All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.**

33 U.S.C. § 919(d) (emphasis added.)

20 C.F.R. § 702.316 states in pertinent part:

...[I]f he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director **shall prepare the case for transfer** to the Office of the Chief Administrative Law Judge. (emphasis added.)

Seemingly, more is implied than a mere transmittal of a file folder. In fact, the regulations, at one point, state that after the last memorandum of conference, "the district director **shall transfer the case** to the Office of the Chief Administrative Law Judges only after having considered such issues or evaluated such evidence..." 20 C.F.R. §702.317(d).

Additionally, the Code of Federal Regulations (20 C.F.R. § 702.241(c)), in part, states that "[w]here a case is pending before the ALJ but **not set for a hearing**, the parties may request the case be remanded to the district director for consideration of the settlement." (emphasis added.) This implies that the ALJ is in full control of the case.

The case law involving the separation of adjudicative and administrative functions is clear. A brief synopsis follows:

The recent **United States Supreme Court** decision in Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) is noteworthy as to the division of jurisdiction between OWCP and OALJ. The Court, in its eight person majority opinion, described the district director as having a "lack of control over the adjudicatory process." 514 U.S. at 133. Specifically, the Court held that the **Director will ordinarily not have standing to appeal a final order of the Board**, since only a person adversely affected can seek appellate review. Id.

Importantly, the **Court** spoke in terms of the Director as having a "duty of uniform administration and enforcement" as opposed to adjudication. 514 U.S. at 133. The **Court** stated:

If the correctness of adjudications were essential to the Director's performance of her assigned duties, Congress would presumably have done what it has done with many other agencies: made adjudication her responsibility. In fact, however, it has taken pains to remove adjudication from her realm. The LHWCA Amendments of 1972, 86 Stat. 1251, assigned administration to the Director, 33 U.S.C. § 939(a); assigned initial adjudication to ALJ's, § 919(d); and created the Board to consider appeals from ALJ's, § 921. The assertion that proper adjudication is essential to proper performance of the Director's functions is quite simply contrary to the whole structure of the Act.

514 U.S. at 133.

In Ingalls Shipbuilding, Inc. v. Director, OWCP, (Yates), 519 U.S. 248 (1997), the **United States Supreme Court** again referred to OALJ as the beginning of the adjudicatory process.

See also Parker v. Director, OWCP, 75 F.3d 929 (**4th Cir.** 1996) (holding that the Director is not a necessary party to appeals before the Circuit Court and that an affirmative showing that he is adversely affected by the decision of the Board is required prior to his participation in an appeal).

In Barthelemy v. J. Ray McDermott, 537 F.2d 168 (**5th Cir.** 1976), the **Fifth Circuit** held that although a district director had held the first part of a two part hearing prior to the effective date of the 1972 amendments (which vested the hearing powers of the district director in OALJ), the district director was divested of authority to continue the hearing. The **Fifth Circuit** concluded:

[T]his case...is one where the very purpose of Congress is to take away jurisdiction. The amendment of section 19(d) of the Act did not itself affect substantive rights. It merely substituted administrative law judges for deputy commissioners as those empowered to conduct hearings, thus evincing a change of congressional policy, based on the conclusion that **administrative and adjudicatory functions under the Act should be separated to better effectuate its purposes and policies.**

Barthelemy, 537 F.2d at 173; see also Du Puy v. Director, OWCP, 519 F.2d 536, 540 (**7th Cir.** 1975), cert. denied, 424 U.S. 965 (1976).

In Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994), the **Fifth Circuit** again stated its position:

The Director retains authority for the overall administration of the statute. Substantive legal or factual disputes arising under the LHWCA, however, are to be decided by the OALJ with review to the Board.

17 F.3d at 133. The **Fifth Circuit** went on to cite 20 C.F.R. § 702.316.

The Director has a "clear, non-discretionary duty " to transfer the case to OALJ under the above noted circumstances. Ingalls Shipbuilding, Inc., 17 F.3d at 133; see also Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, 802 (**5th Cir.** 1960). The Atlantic & Gulf court found that every agency has a duty to conclude any matter before it with reasonable dispatch and that the courts are essentially empowered to review the inaction of an agency and to "compel agency action unlawfully withheld or unreasonably delayed." Atlantic & Gulf, 274 F.2d at 802 (quoting 5 U.S.C.

§ 706(1)); see also 5 U.S.C. § 555(b) (“With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.”)

If the Director has a clear, mandatory duty to transfer a case to the OALJ, then the Director is indeed relinquishing jurisdiction over the case. This is indeed in line with the Board’s pronouncement in Boone v. Ingalls Shipbuilding, Inc., 27 BRBS 250 (1993), aff’d en banc, 28 BRBS 119, 122 (1994) wherein the Board stated:

**Initially, we note that the Act does not remove jurisdiction from the district director’s office until the case has been referred to the OALJ by the district director.**

(Boone, for other reasons, was appealed to the **Fifth Circuit**. See Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone], 102 F.3d 1385 (**5th Cir.** 1996) vacating and remanding 28 BRBS 119 (1994) (Decision and Order on Recon.) (*en banc*) (Brown, J., concurring).)

In order to compel the district director to transfer claims to the Office of Administrative Law Judges, *mandamus* is the proper remedy. Ingalls Shipbuilding v. Asbestos Health Claimants, 17 F.3d 130 (**5th Cir.** 1994) (the Director lacks discretion to delay the ordering of a hearing) (citing Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, 802 (**5th Cir.** 1960), reh’g denied, 279 F.2d 75 (district director is bound by LHWCA and APA to refer a claim for hearing upon the request of either party)).

The prior jurisprudence by the Board seems to support the position that only OALJ has jurisdiction of a case once it is transferred to the Office of the Chief Judge for adjudication. See Neal v. Strachan, 1 BRBS 279, at 281 (1975); Clefstad v. Perini North River Assocs., 9 BRBS 217, at 221 (1978); Percoats v. Marine Terminals Corporation, 15 BRBS 150, at 155 (1982), overruled in part on other grounds at Maine v. Brady-Hamilton Stevedore Company, 18 BRBS 129 (*en banc*) (1986); Maine v. Brady-Hamilton Stevedore Company, 18 BRBS 129 (*en banc*) (1986); Carter v. Merritt Ship Repair, 19 BRBS 94 (1986); O’Berry v. Jacksonville Shipyards, Inc., 22 BRBS 430 (1989); Falcone v. General Dynamics Corp., 21 BRBS 145 at 147 (1988); and Sans v. Todd Shipyards Corp., 19 BRBS 24, 28 (1986).

In Blake v. Hurlburt Field Billeting Fund, 17 BRBS 14, 16 (1985) (Board reaffirms prior holdings that both district directors and ALJs may approve settlements.), the Board noted that “the interest in judicial efficiency was best served by allowing administrative law judges to approve settlements where the case had been referred to that office for hearing prior to the settlement being reached.” The Board explained that it determined on a case-by-case basis which powers are adjudicatory and thus transferred to the ALJs. Blake, 17 BRBS at 16-17. If a settlement is reached after a case is referred to OALJ, the ALJ may rule on the settlement proposal, unless the case has not yet been set for a hearing and the parties request that the matter be remanded. (See paragraph below.).

When Section 19(d) of the LHWCA was amended in 1972, it created the OALJ by giving it adjudicatory powers which the district director had previously held. Consequently, the jurisprudence and regulations support the position that the district director lacks jurisdiction over a claim once it is referred to the OALJ. However, the parties may request that a case pending before an ALJ, but not set for a hearing, be remanded to the district director for consideration of the settlement. 20 C.F.R. § 702.241(c).

### 19.3.3 Dismissal of Claim

Neither the LHWCA nor the implementing regulations (20 C.F.R. § 702 *et seq.*) addresses the propriety of dismissal of a claim by a judge. In a 1981 case, the Board vacated a judge's order dismissing a claim since "neither the Act nor the regulations establish a procedure whereby an administrative law judge may dismiss a claim (with or without prejudice). Rather, the Act requires that an administrative law judge either award or deny benefits after a hearing." Brown v. Reynolds Shipyard, 14 BRBS 460, 461 (1981).

In Graham v. Director, OWCP, 9 BRBS 155 (1978), the Board held that a motion for dismissal should have been treated as a request for withdrawal. The Board found that the dismissal of a claim upon the claimant's motion for dismissal without a finding as to whether withdrawal was for a proper purpose or in the claimant's interest was improper.

The regulations governing the Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges at 29 C.F.R. § 18.39(b) provide, however, that "[a] request for hearing may be dismissed upon its **abandonment** or **settlement** by the party or parties who filed it."

The **claim is considered abandoned** if neither the party nor his representative appears at the hearing and good cause is not shown for the failure to appear. Taylor v. B. Frank Joy Co., 22 BRBS 408, 411 (1989); *see also* 20 C.F.R. § 18.29(a) (affording ALJ all powers necessary to conduct fair and impartial hearings and take appropriate actions authorized by Rules of Civil Procedure for U.S. District Courts); F.R.C.P. 41(b) (allowing involuntary dismissal for, *inter alia*, failure to prosecute claims); F.R.C.P. 37(b)(2)(c) (permits dismissal of an action for failure to comply with a discovery order).

Repeated and numerous **abuses of the administrative process** by a party may constitute grounds for dismissal with prejudice. In Harrison v. Barrett Smith, Inc., 24 BRBS 257 (1991), the Board affirmed the dismissal of a claim where the claimant filed over 100 motions *pro se* and hearings were repeatedly continued due to the claimant's failure to cooperate. The Board has stated that a clear record of intentional conduct must be shown and the factfinder must consider whether lesser sanctions would serve the interests of justice or whether other sanctions have proven unavailing. Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118 (1989).

Also, a **default decision**, see 29 C.F.R. § 18.5(b), may be entered against any party who fails to appear without good cause.

Note, however, it is error for the judge to dismiss a claim where the claimant expresses a desire not to pursue the claim; rather, the proper procedure is to grant a withdrawal without prejudice. Lundy v. Atlantic Marine, 9 BRBS 391, 394 (1978); Graham, 9 BRBS 155.

#### **19.3.4 Hearing Order Within 20 Days**

In the event the case goes to a formal hearing, Section 19(c) requires that the judge issue an order within twenty days accepting or rejecting the claim. The "twenty day rule" set forth in the LHWCA and at 20 C.F.R. § 702.349 is **not mandatory**, however. Rather, failure to issue a decision within 20 days only requires remand where the aggrieved party shows that it was prejudiced by the delay. Leone v. Sealand Terminal Corp., 19 BRBS 100, 102 (1986); Dean v. Marine Terminals Corp., 15 BRBS 394, 399 (1983); Welding v. Bath Iron Works Corp., 13 BRBS 812, 816-17 (1981) (overruling prior decisions, including Rosensweig v. Namar Foods, 7 BRBS 898 (1978), to the extent that they did not require prejudice). Accord Garvey Grain Co. v. Director, OWCP, 639 F.2d 366, 372, 12 BRBS 821, 828 (7th Cir. 1981), aff'g 11 BRBS 441 (1979).

Prejudice may be established where a party demonstrates errors in the ALJ's consideration of the evidence. See Champion v. S & M Traylor Bros., 14 BRBS 251, 257 (1981), rev'd on other grounds, 690 F.2d 285, 15 BRBS 33 (CRT) (D.C. Cir. 1982) (contention that claimant prejudiced by being forced to continue receiving welfare held insufficient); Valencia v. Marine Terminals Corp., 9 BRBS 788, 790 (1978). Cf. Jeyakaran v. Daniel, Mann, Johnson & Mendenhall, 8 BRBS 505, 507 (1978), overruled by Welding v. Bath Iron Works Corp., 13 BRBS 812 (1981); Rosenzweig, 7 BRBS at 905 (noting numerous errors regarding facts and unsupported statements by ALJ, although Board concluded it could not say for certain there was prejudice due to delay).

#### **19.3.5 ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon**

Section 552(a)(2)(B) of the APA requires that a final order be in writing. Additionally, the ALJ must adequately detail the rationale behind his decision and specify the evidence upon which he relied. See Teutonico v. Staten Island Operating Co., (BRB No. 96-0206)(October 17, 1996)(Unpublished); see Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988). Hearings of claims arising under the LHWCA are subject to the APA, see 33 U.S.C. § 919(d), which requires that every adjudicatory decision be accompanied by a statement of

findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record ...

5 U.S.C. § 557(c). See Randall v. Comfort Control, Inc., 725 F.2d 791, 797-98, 16 BRBS 56, 64-65 (CRT) (D.C. Cir. 1984); Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, 661 (1979)

(APA requires that ALJ make "explicit findings on all relevant aspects of the determination"). It is a "fundamental rule of administrative law ... that the agency must set forth clearly the grounds on which it acted." Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973).

Furthermore, "[i]t has been a longstanding requirement that decisions and orders under the [LHWCA] be specific and complete." Whittington v. National Bank of Washington, 8 BRBS 235, 237 (1978). The rationale behind this requirement is that it is impossible for the Board, or any other reviewing body, to apply its standard of review without a sufficient explanation of the grounds upon which the fact-finder acted. Id. at 237-38.

The regulations further require the judge to "inquire fully into the matters at issue and ... receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters." 20 C.F.R. § 702.338. See Ramirez v. Southern Stevedores, 25 BRBS 260, 264 (1992) (ALJ's refusal to allow post-hearing deposition by employer's vocational expert, although holding record open for post-hearing deposition of claimant's treating physician, violated Section 702.338, as he did not receive into the record evidence on one of issues of case, extent of claimant's permanent partial disability); see also Kyle v. Pool Company-Gulf Ensearch, (BRB No. 92-0740)(May 29, 1996)(Unpublished) (case remanded due to failure of ALJ to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion).

The omission of a portion of the ALJ's order may toll the 30 day period. Grimmett v. Director, OWCP, 826 F.2d 1015, 1017-18 (11<sup>th</sup> Cir. 1987)(Held: omission of portion of ALJ's order which explained why medical evidence rebutted interim presumption of total disability was not mere clerical error so that 30 day limitations period for filing appeal did not begin to run until original order was amended). Compare this with the black lung decision in Graham-Stevenson v. Frigitemp Marine Div., 13 BRBS 558, 559 (1981)(Held: that ALJ's failure to multiply dollar amount of miner's weekly compensation rate by appropriate percentage constituted "oversight" or "omission" within Fed.R.Civ.P. 60(a) and thus did not suspend the appeals period until the ALJ issued *sua sponte* correction).

The ALJ is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. Huff v. Strachen Shipping Co., (BRB No. 93-756)(August 28, 1996) (Unpublished); Bolden v. G.A.T.X. Terminals Corp., 30 BRBS 71, 73 (1996); see also Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5<sup>th</sup> Cir. 1962), cert. denied, 372 U.S. 954 (1963); Todd Shipyards Corp. V. Donovan, 300 F.2d 741 (5<sup>th</sup> Cir. 1962).

The ALJ's reliance of an affidavit does not constitute an abuse of discretion. Greenhouse v. Ingalls Shipbuilding, Inc., (BRB No. 91-2087)(Dec. 10, 1993)(Unpublished).

### 19.3.6 Formal Hearing

If there are contested issues of fact or law that cannot be resolved by informal procedures, the district director has the authority to bring the conference to a close and to prepare a written memorandum with recommendations for resolving the issues. 20 C.F.R. § 702.316. If after receipt of this memorandum, **any party requests a hearing or the district director believes further conferences would not be productive, the district director may transfer the case to the Office of Administrative Law Judges.** *Id.* The case cannot be stayed at the district director level until a disability arises at some future date. Black v. Bethlehem Steel Corp., 16 BRBS 138, 143 (1984).

In order to compel the district director to transfer claims to the Office of Administrative Law Judges, *mandamus* is the proper remedy. Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994) (the Director lacks discretion to delay the ordering of a hearing) (citing Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794, 802 (5th Cir. 1960), *reh'g denied*, 279 F.2d 75 (district director is bound by LHWCA and APA to refer a claim for hearing upon the request of either party)).

A formal hearing is initiated after the district director transmits to the OALJ the prehearing statement (form LS-18), forms prepared by the parties, the available evidence the parties intend to submit at the formal hearing, and a letter of transmittal (this does not include the written memorandum prepared by the district director). In pertinent part, section 19(c) of the Act provides as follows:

The Deputy Commissioner [now District Director] shall make or cause to be made such investigations as he considers necessary with respect to the claim, and **upon application of any interested party shall order a hearing thereon.** (emphasis added)

20 C.F.R. § 702.331 of the Regulations governing the administration of the LHWCA states in pertinent part:

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the Pre-Hearing Statement forms, the available evidence which the parties intend to submit at the formal hearing and the letter of transmittal from the Deputy Commissioner [now District Director] as provided in Section 702.316 and Section 702.317.

20 C.F.R. § 702.316 of the Regulations states in pertinent part:

...If [the Director] is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the [Director]

shall prepare the case for transfer to the Office of the Chief Administrative Law Judge. (emphasis added)

Formal hearings are conducted in accordance with the provisions of the APA at 5 U.S.C. § 554 et seq. Section 5(b) of the APA, which controls proceedings under the LHWCA, provides that:

With due regard for the convenience and necessity of the parties ... and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

**All adjudicatory functions reside only in the administrative law judge.** Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986) (en banc) (**Only the ALJ can issue subpoenas, even when the matter is still before OWCP.**). When an issue is in dispute, only the judge can hold a formal hearing and make findings to resolve the dispute. Carter v. Merritt Ship Repair, 19 BRBS 94, 96 (1986); Sans v. Todd Shipyards Corp., 19 BRBS 24, 28 (1986). See Falcone v. General Dynamics Corp., 21 BRBS 145, 147 (1988) (where parties were not in agreement, ALJ properly retained jurisdiction and made findings on disputed issues). The formal hearing procedures are found at 20 C.F.R. §§ 702.331-702.351.

Pursuant to Sections 702.331 and 702.332 of the regulations, formal hearings must be conducted by a judge assigned to the case by the Office of the Chief Administrative Law Judge. 20 C.F.R. §§ 702.331, 702.332. “ALJs and judges serving on the BRB are entitled to absolute immunity for performing judicial acts.” Olsen v. Ms. Alexis Herman, et al, (No. 00-3165 MMC) (N. Dist. of CA)(Oct. 31, 2001) (Unpublished) (Held: Federal district court lacked jurisdiction over plaintiff’s claims against the federal defendants, including ALJs, for injunctive relief and dismissed claims.). In Olsen, the employer filed a Section 22 Modification Request challenging the claimant’s entitlement to permanent and total disability compensation benefits. The claimant resisted the employer’s move to affect his benefits. During the course of considering the modification request, the claimant sued members of the Department of Labor, OWCP, OALJ, and members of the Board. The Federal District Court ruled that a disgruntled claimant cannot sue the above noted persons for rulings they made in the course of considering the challenge to the claimant’s benefits:

As the Court previously ruled in its Order filed December 21, 2000, the LHWCA provides the exclusive procedures for the determination of benefits available under the LHWCA. Courts have repeatedly held that the comprehensive nature of the LHWCA’s administrative review scheme, its limited provision for district court jurisdiction, and its legislative history, purpose, and design preclude subject matter jurisdiction in district courts over claims for injunctive relief arising out of compensation proceedings under the LHWCA.

Besides noting the federal defendants’ immunity, the court specifically rejected the plaintiff’s claims for 42 USC §§ 1981, 1983, 1985, 1986 and 1988, finding that these claims fall for a variety of reasons.

In the related case of Olsen v. Triple A Machine Shop, Inc., (No. C01-3354 BZ (ADR)) (N. Dist. of CA.) (Dec. 14, 2001)(Unpublished) (Order Granting Defendant Triple A Machine Shop's Motion To Dismiss),(Final Judgment entered December 17, 2001), the Northern District of California ruled that it does not have jurisdiction over the LHWCA Modification Request. The district court, citing Thompson v. Potashnick Construction Co., 812 F.2d 574 (9<sup>th</sup> Cir. 1987), noted that it only has jurisdiction to enforce orders in relation to LHWCA matters.

The regulations require that the parties be notified of the place and time of the formal hearing not less than 30 days in advance thereof. 20 C.F.R. § 702.335. See Abbott v. Universal Iron Works, 23 BRBS 196, 199 (1990) (Board affirmed ALJ's finding of adequate notice as rational and supported by substantial evidence where ALJ concluded that record indicated that notice of hearing was issued, by mail, to carrier almost two months prior to hearing, although carrier denied receiving it).

***[ED. NOTE: In a Social Security Disability Income claim, the Ninth Circuit has ruled that a claimant is not entitled to have an ALJ residing in the same state as the claimant, hear the case. Subia v. Commissioner of Social Security, 264 F.3d 899 (9<sup>th</sup> Cir. 2001). The court stated that the claimant failed to advance a "rational argument" explaining why an ALJ residing elsewhere would be any less qualified to hear the case. "Although [the claimant] asserts that an-out-of-state ALJ may not be familiar with local doctors and vocational experts, [the claimant] fails to explain why such familiarity is essential to ensure a fair hearing. [The claimant] overlooks the fact that judges routinely entertain testimony from experts with whom they are wholly unfamiliar."]***

As far as the conduct of the actual hearing, the judge has great discretion, especially with regard to the admission of evidence. Wayland v. Moore Dry Dock, 21 BRBS 177, 180 (1988); Durham v. Embassy Dairy, 19 BRBS 105, 107-08 (1986). Pursuant to Section 702.338, the judge may reopen the hearing for the receipt of evidence at any time prior to the filing of a compensation order. 20 C.F.R. § 702.338. See Wayland, 21 BRBS at 180-81 (Board held that although ALJ could have concluded his consideration of claimant's compensation claim at end of hearing, he did not err in instead choosing to continue proceedings before him by requesting submission of new evidence).

This Section also allows the judge to receive into evidence the testimony of witnesses and any documents which are "relevant and material." 20 C.F.R. § 702.338. See Durham, 19 BRBS at 107-08 (ALJ may, within his discretion, exclude even relevant and material testimony for failure to comply with terms of pre-hearing order). See also, Smith v. Loffland Bros., 19 BRBS 228 (1987)(Held: party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing.) See "Pre-Hearing Order," infra, this same subsection.

However, in Burley v. Tidewater Temps, Inc., \_\_\_ BRBS \_\_\_ (BRB No. 01-0405) (Jan. 17, 2002) (Held: ALJ's exclusion from evidence of a labor market survey was an abuse of discretion and a violation of 20 C.F.R. § 702.338), the Board distinguished both Durham and Smith. The Board noted that Durham did not involve the last minute addition of a new issue, i.e., the availability of suitable alternate employment, but rather employer's failure to list a witness, whose testimony would

have been with regard to the sole issue in that case, in compliance with the ALJ's pre-hearing order. Similarly, the Board distinguished Smith as a case where the party did not exercise due diligence in seeking to admit evidence.

In addressing the ALJ's ruling that excluded evidence in Burley, the Board stated:

Moreover, given the importance of the excluded evidence in this case and the administrative law judge's use of permissive rather than mandatory language in his pre-hearing order, employer's pre-hearing submission of its labor market survey to claimant ... does not warrant the extreme sanction of exclusion.

*[ED. NOTE: While the Board specifically noted in Burley that 20 C.F.R. § 702.338, in part states that, "The ALJ shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters," the Board acknowledged the ALJ's discretion as to what is allowed into evidence. It did not overrule Durham and Smith.]*

Section 702.339 expands this discretion even further:

**In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.**

20 C.F.R. § 702.339. See Evidence, Topic 23, infra.

### **Jurisdiction to Address Issues**

However, the ALJ does not have authority to address all tangential issues. For example, whether an award of attorney's fees to an employer bases on an alleged breach of an insurer's duty to defend under the terms of its insurance policy with employer, was not a question "in respect of a claim" as is required to fall within the ALJ's jurisdiction under Section 19(a). Jourdan v. Equitable Equipment Co. 32 BRBS 200 (1998), over-ruling Gray & Co., Inc. v. Highland Ins. Co., 9 BRBS 424 (1978). In reference to Gray, the Board stated: "[i]n retrospect, the holding in Gray is an anomaly in that it is the only case in which the Board found that the [ALJ] had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to, any other issue necessary to resolution of the claim. In each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award."

## Pre-Hearing Orders

In Williams v. Marine Terminals Corporation, 14 BRBS 728 (1981) the Board acknowledged that the regulations do not specifically provide an ALJ with the authority to issue pre-hearing orders and indicated that the issue had never expressly been addressed by any prior decision. Williams at 732-33. However, the Board went on to hold that evidence offered in violation of a pre-hearing order may be excluded in the judge's discretion pursuant to 20 C.F.R. § 702.338. Thus, one may argue, the Board implicitly held that 20 C.F.R. § 702.338 authorizes the issuance of such orders. Section 702.338, in relevant part, states:

The order in which evidence and allegations shall be presented and the procedures at the hearings generally, except as these regulations otherwise expressly provide, shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

Based on this language, the Board has stated that a decision to exclude evidence that does not comply with the pre-hearing order may only be overturned if it was arbitrary, capricious or an abuse of discretion. Williams, 14 BRBS at 733. Several cases are enlightening as to the limits of the administrative law judge's discretion. First, it is clear that an ALJ is not bound by the common law and formal rules of evidence, or by technical or formal rules of procedure, as long as the parties are provided adequate protection of their due process rights. 33 U.S.C. §923(a). See also Southern Stevedoring Co. v. Voris, 190 F.2d 275, 277 (5<sup>th</sup> Cir. 1951); Avondale Shipyards v. Vinson, 623 F.2d 1117, 1121 (5<sup>th</sup> Cir. 1980).

In an unpublished opinion, the **Second Circuit** has held that, under 20 C.F.R. § 702.338, “the ALJ must retain significant freedom to administer its considerable docket. Howell v. Universal Maritime Service Corp., (ALJ Case No. 93-411)(2<sup>nd</sup> Cir. November 18, 1996)(Unpublished)(Held, it was not an abuse of discretion to not adjourn the hearing to discover relevant evidence where claimant's counsel sought the adjournment after the commencement of the hearing, “and described the then-potentially available evidence only in the vaguest of terms.”). Supreme Court Justice Brennan noted, in a dissenting LHWCA opinion, the discretion provided to judges and the “sensible informality” of the hearings that such discretion allows. U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 622 (1982)(J. Brennan, dissenting). Justice Brennan further noted that this informality allows claims and issues to be narrowed “through a mixture of formal and informal pre-hearing procedures.” Id.

Board decisions have also demonstrated the ALJ's breath of discretion. In Smith v. Ceres Terminal, 9 BRBS 121 (1978), the Board held that an ALJ has broad discretion regarding evidentiary matters based on Section 23 of the LHWCA. [*Although this section of the LHWCA, references “deputy commissioners,” it is applicable to ALJs through Section 19(d).*] Specifically, in Smith, the Board held that an ALJ may, in his discretion, prohibit post-hearing depositions. In Durham v. Embassy Dairy, 19 BRBS 106 (1986), the Board expressly held that it is within an ALJ's discretion to exclude the relevant and material testimony of the employer's lone witness where that

witness was not identified to the claimant as required by the pre-hearing order, even though the employer's counsel admitted on the record that he had misplaced the order. Durham, at 108. See Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985)(ALJ has great discretion in the admission of evidence pursuant to § 23(a) and 20 C.F.R. § 702.338).

In Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997), the Board noted that the just-noted pertinent regulations and LHWCA sections afford an ALJ "considerable discretion in rendering determinations pertaining to the admissibility of evidence." [However, in Hansen, the ALJ had abused his discretion when he granted the claimant's motion to suppress the employer's evidence for failing to answer interrogatories, where the claimant had failed to request an order compelling response, and the evidence had been identified within the time limits set out in the pre-hearing order. Exclusion was thus too harsh a sanction.]

*[ED NOTE: For more information on the discretion of the ALJ in pre-hearing matters, see 5 U.S.C. § 556(c), (d); and the introductory chapter of the "Manual for Administrative Law Judges," 2<sup>nd</sup> ed. (1992) by Morrell E. Mullins. Professor Mullins specifically mentions "structured case management devices" which include "court or agency rules which systematically regulate the parties' pre-trial preparation."]*

Subsequent to the formal hearing, the **ALJ must prepare a final decision and order** in the case. 20 C.F.R. § 720.350.

### **19.3.6.1 Issues at Hearing**

\_\_\_\_\_The formal hearing will address issues noted by the parties in pre-hearing statements (LS-18) prior to transfer pursuant to 20 C.F.R. § 702.317. Lewis v. Norfolk Shipbuilding & Dry Dock Corp., 20 BRBS 126, 129 (1987), overruled in part by Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992). But see Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1, 3 (1990) (Board rejected claimant's contention that ALJ erred in allowing coverage issue to be raised on basis of amended LS-18 after case was referred to OALJ where employer raised issue over three months prior to scheduled hearing and claimant was provided with ample time to prepare).

The judge is mandated to adjudicate all of the issues before him in one proceeding in order to avoid piecemeal litigation and needless procedural delay. Hudnall v. Jacksonville Shipyards, 17 BRBS 174 (1985); 20 C.F.R. § 702.338.

*[ED. NOTE: However, there are rare occasions when judicial, as well as economic, efficiency are better served by way of a bifurcated hearing. For example, where jurisdiction (coverage) is a major and complicated issue, and the case will also have several other medical/economic issues, it seems reasonable (with the agreement of the parties) to bifurcate the claim and first decide the coverage issue. This may in effect cause the remaining issues to settle.]*

The hearing may be expanded to allow consideration of new issues if the evidence presented warrants their consideration. 20 C.F.R. § 702.336(a). See Emery v. Bath Iron Works Corp., 24 BRBS 238, 242-43 (1991) (ALJ did not abuse his discretion in refusing to allow employer to raise Section 8(f) issue, where ALJ found that employer had evidence of claimant's pre-existing hearing loss within its possession sufficient to alert it to possible Section 8(f) claim at district director level, and employer did not raise issue until after formal hearing). See also 20 C.F.R. § 702.338. However, distinguish the above situation from that where an **employer seeks to add a late-asserted ground for Section 8(f) relief**. In Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Dillard), 230 F.3d 126, (4<sup>th</sup> Cir. 2000), the employer asserted, and the Director did not dispute, that the employer was unaware of the critical information concerning the late-asserted ground for Section 8(f) relief. The ALJ therefore allowed the late assertion. The Board found that the ALJ, in effect, must have found that the employer could not have reasonably anticipated the late-asserted grounds. In remanding the matter back to the ALJ, the **Fourth Circuit** found that the ALJ had not determined whether or not the employer reasonably anticipated the ground. Interestingly, the court stated:

Whatever its powers on review, the Board cannot supply in lieu of what the ALJ did not find, what he intended to find, or what he "in effect" found, rather it must deal with stated findings or the absence thereof....Only an ALJ has the power to make the factual findings, assess the credibility of the relevant witnesses, and resolve any inconsistencies in the evidence necessary to determine if [Employer] demonstrated that it could not have reasonably anticipated the late-asserted ground for §8(f) relief at the time the company initially filed its application with the district director.

Under Section 702.336(b) of the regulations, at any time prior to the filing of a compensation order, an ALJ may in his discretion, upon the application of a party or upon his own motion, consider a new issue raised by one of the parties. 20 C.F.R. § 702.336(b). Similarly, the regulations require that parties be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing. 20 C.F.R. § 702.336(b); see also Cornell Univ. v. Velez, 856 F.2d 402, 405, 21 BRBS 155, 162-63 (CRT) (1<sup>st</sup> Cir. 1988) (ALJ's lack of notice of his decision to raise Section 8(f) issue *sua sponte* deprived Director of opportunity to prepare to address issue); Currie v. Cooper Stevedoring Co., 23 BRBS 420, 424 (1990); Estate of Cowart v. Nicklos Drilling Co., 23 BRBS 42, 47-48 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT) (5<sup>th</sup> Cir. 1990), aff'd en banc, 927 F.2d 828, 24 BRBS 93 (CRT) (5<sup>th</sup> Cir. 1991), aff'd, 505 U.S. 469 (1992) (ALJ did not abuse discretion in issuing order stating that although no discussion regarding issue of future medical benefits was held at hearing and not raised in pleadings, he would consider the issue--employer's due process rights were not violated as it had an opportunity to address issues, did so and submitted brief); Klubnikin v. Crescent Wharf & Warehouse Co., 16 BRBS 182, 184 (1984); Taylor v. Plant Shipyards Corp., 30 BRBS 90 (1996) (ALJ's failure to consider the Section 33(g) issue post-hearing constituted an abuse of discretion under Section 702.336(b)); Lewis v. Todd Pacific Shipyards Corp., 30 BRBS 154 (1996) (citing Taylor, 30 BRBS 90 (1996)).

**[ED. NOTE:** *The record may also be reopened and a new issue raised pursuant to Section 22 [33 U.S.C. § 922], via a modification proceeding where reopening is premised on a mistaken determination of fact or change in conditions. Modification is not available where the basis for reopening is premised on a subsequent change in law. See Pittson Coal Group v. Sebben, 488 U.S. 105 (1988); Ryan v. Lane & Co., 28 BRBS 132 (1994); see also *infra* Topic 22.]*

Where such notice is not provided, and a decision and order is issued, the decision must be vacated and the case remanded. See *id.*; Spearman v. Foxhall E. Condominiums, 13 BRBS 722, 724 (1981) (where employer confronted with new legal theory for which it had not prepared and ALJ nevertheless proceeded with hearing, Board held it was error not to continue case without providing employer time to meet new issue); Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167, 173 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983).

The Board has vacated an ALJ's refusal to consider a new issue that could not have been anticipated by its proponent prior to the hearing. Bolden v. U.S. Stevedores Corp., 18 BRBS 172, 174 (1985) (ALJ abused her discretion by declining to address employer's claim for relief under Section 26, inasmuch as basis for claim lay in claimant's testimony at hearing).

The Board holds that a judge may not **raise a new issue** *sua sponte* in his decision and order. Bukovac v. Vince Steel Erection Co., 17 BRBS 122, 123 (1985). *Contra* Cornell Univ., 856 F.2d at 405, 21 BRBS at 161 (CRT) (ALJ's decision to raise Section 8(f) issue *sua sponte* was within his discretion where: (1) evidence at least arguably sufficient to come within intent of statute, (2) case not too far along, and (3) petitioners' failure to plead the defense was subject to some mitigating circumstances).

When a judge finds that a case presents an issue which has not been raised by a party, he must give the parties notice that he is raising a new issue and hold the record open in order to provide them an opportunity to respond before he issues his decision. Cowart, 23 BRBS at 47-48; Bukovac, 17 BRBS at 123. A judge may not order a new hearing based on a new issue in a decision and order awarding benefits. Once a compensation order is issued, the record is closed and the judge's authority to raise a new issue expires. Bukovac, 17 BRBS at 123. See 20 C.F.R. § 702.336(b).

Although the judge is not obligated to accept all **stipulations** entered into by the parties, his rejection or modification of a stipulation must be adequately explained. Grimes v. Exxon Co., U.S.A., 14 BRBS 573, 576 (1981). Ceres Marine Terminals v. Hinton, 243 F.3d 222 (5th Cir. 2001) (A judge is not bound by nebulous stipulations pertaining to alternate employment where the employer had not established the existence of jobs that he could secure.). The judge may not reject stipulations without giving the parties prior notice that he will not automatically accept the stipulations and an opportunity to present evidence in support of the stipulations. Beltran v. California Shipbuilding & Dry Dock, 17 BRBS 225, 228 (1985); Misho v. Dillingham Marine & Mfg., 17 BRBS 188, 191 (1985); Phelps v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS

325, 327 (1984); Erickson v. Crowley Maritime Corp., 14 BRBS 218, 219-20 (1981). A stipulation cannot be accepted where it evinces an incorrect application of the law. Puccetti v. Ceres Gulf, 24 BRBS 25, 29 (1990); McDevitt v. George Hyman Constr. Co., 14 BRBS 677, 680 (1982).

The Board will not review an issue raised on appeal where the facts were stipulated before the judge; the general rule that stipulations are binding on the parties applies. Alexander v. Ryan-Walsh Stevedoring, 23 BRBS 185, 187 (1990).

The Board has held that the parties may not stipulate jurisdiction under the LHWCA. Littrell v. Oregon Shipbuilding Co., 17 BRBS 84, 88 (1985); Brown v. Reynolds Shipyard, 14 BRBS 460, 461 (1981); Erickson v. Crowley Maritime Corp., 14 BRBS 218, 220 (1981); Mire v. Mayronne Co., 13 BRBS 990, 991 (1982). A stipulation as to average weekly wage, which is based on a reasonable method of calculation under the LHWCA, is not prohibited by Section 15(b) of the LHWCA. Fox v. Melville Shoe Corp., 17 BRBS 71, 73-74 (1985).

**Claimant does not have to be an “active” participant in the adjudication proceedings,** so long as the issue to be adjudicated arises under the LHWCA. Schaubert v. Omega Services Industries Inc., 31 BRBS 24 (1997) (ALJ has requisite jurisdiction to decide the responsible employer issue, including whether the borrowed employee doctrine is applicable, even if claimant is not an “active” participant in the adjudication proceedings).

Whether an ALJ has jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between an employer and borrowing employer turns on the interpretation of the portion of Section 19(a) stating that an ALJ has authority “to hear and determine all questions in respect of such claims.” Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5<sup>th</sup> Cir. 2001). Here the **Fifth Circuit** found that the contract dispute was not integral to the longshore compensation claim and that the Board and the ALJ did not have statutory authority to determine this issue.

### 19.3.6.2 Discovery

The ALJ has broad power to direct and authorize discovery in support of the adjudication process. 33 U.S.C. § 927(a); 5 U.S.C. § 556(c); see generally 20 C.F.R. §§ 702.338 - 702.341; 29 C.F.R. § 18.14 et seq.; Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 325 (1983); Lopes v. George Hyman Constr. Co., 13 BRBS 314, 321 (1981) (ALJ "empowered to allow the use of discovery depositions when the ends of justice would be served").

A discovery ruling will constitute **reversible error only** if it is "so prejudicial as to result in a denial of due process." Olsen v. Triple A Mach. Shops, 25 BRBS 40, 45 (1991); Martiniano v. Golten Marine Co., 23 BRBS 363, 366 (1990). See Niaz v. Capital Hilton Hotel, 19 BRBS 266, 268-69 (1987) (where discovery orders effectively denied intervenor-petitioner an opportunity to respond to employer's motions to compel, that denial was violation of due process of law).

Pursuant to this broad power, the ALJ may **compel depositions**. Percoats v. Marine Terminals Corp., 15 BRBS 151, 154 (1982); Lopes, 13 BRBS at 321. He may also compel the production of documents. Sledge v. Sealand Terminal, 14 BRBS 334, 338 (1981). The judge may even compel a claimant to undergo a vocational rehabilitation evaluation. Villasenor v. Marine Maintenance Indus., 17 BRBS 99, 102 n.5 (1985); Bonner, 15 BRBS at 325. The judge may also limit post-hearing discovery to evidence relevant to a certain issue. Olsen, 25 BRBS at 44. It is also within the administrative law judge's discretion to deny a discovery motion. Stark v. Washington Star Co., 833 F.2d 1025, 1030, 20 BRBS 40, 48 (CRT) (**D.C. Cir.** 1987); Duran v. Interport Maintenance Corp., 27 BRBS 8, 13 (1993).

An ALJ may not dismiss a claimant's claim for benefits pursuant to 29 C.F.R. § 18.6(d)(2)(v) when the claimant fails to comply with a discovery order. DeMarco v. Global Terminal & Container Services, Inc., (BRB No. 96-1619)(Aug. 22, 1997) (Unpublished). In DeMarco, the Board held that the Act contains a specific procedure to be followed if any person resists any lawful order (including discovery). See 33 U.S.C. § 27(b).

### **19.3.6.3 Federal Rules of Civil Procedure**

The regulations provide the administrative law judge with all powers necessary to conduct fair and impartial hearings. 29 C.F.R. § 18.29(a). Included among these powers is the right to

(8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts...

29 C.F.R. § 18.29(a)(8). The Board has concluded that the Federal Rules of Civil Procedure "may be applied in those instances where the Act and the regulations are silent." Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118, 120 (1989) (where ALJ chose FRCP 41(b) as means to dismiss claim of *pro se* claimant, Board held that case must be remanded for ALJ to consider whether less drastic sanctions exist to resolve case).

But see Taylor v. B. Frank Joy Co., 22 BRBS 408, 411-12 (1989) (where claimant's counsel failed to show good cause for his and claimant's failure to appear at formal hearing, Board found that ALJ had authority, pursuant to 29 C.F.R. § 18.29 and FRCP 41(b), to dismiss request for hearing and refuse to remand case to district director, which was equivalent of entering "default decision" against claimant).

Before a particular rule of Civil Procedure may be applied in a case, the issue that must be resolved is whether that rule is consistent with the LHWCA and its intent. Jourdan v. Equitable Equip. Co., 889 F.2d 637, 639, 23 BRBS 9, 10-11 (CRT) (**5th Cir.** 1989) (FRCP 4 inapplicable to procedures to be used in obtaining and enforcing a supplementary order of default under Section 18(a) of LHWCA, as engrafting FRCP 4 onto Section 18(a) procedures would frustrate Congress' intent to get compensation into injured workers' hands as quickly as possible); Bogdis v. Marine Terminals Corp., 23 BRBS 136, 139 (1989) (use of FRCP 59(e) to provide additional requirement

for filing document is not consistent with Section 23, particularly where claimant is unrepresented by counsel).

See Ceres Gulf v. Cooper, 957 F.2d 1199, 1204, 25 BRBS 125, 129 (CRT) (5th Cir. 1992) (district court erred in denying Director's intervention pursuant to FRCP 24(a)(2)--interest that justifies intervention is protection of administrative jurisdiction over LHWCA claims); Quave v. Progress Marine, 912 F.2d 798, 800, 24 BRBS 43, 45 (CRT), on reh'g, 918 F.2d 33 (5th Cir. 1990), cert. denied, 500 U.S. 916 (1991) (district court's determination that FRCP 6(a) governs timeliness of employer's payment to claimant was proper); Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1, 4 (1990) (FRCP 56 and 29 C.F.R. § 18.40(a) analogous--promptly dispose of actions in which there is no genuine issue of material fact).

### 19.3.7 ALJ Disqualifying Attorney

*[ED. NOTE: These provisions apply to disqualification from "a particular proceeding" as distinguished from the authority of the Secretary under Section 31(b) of the LHWCA to list attorneys who are barred from representing claimants for not less than three years.]*

Section 19(c) of the LHWCA and the regulations applicable to LHWCA adjudications empower the judge to "conduct such hearing in such a manner as to best ascertain the rights of the parties," 33 U.S.C. § 923(a); 20 C.F.R. § 702.339, and the general powers of judges include "all powers necessary to the conduct of fair and impartial hearings," 20 C.F.R. § 18.29(a). These provisions therefore afford direct and indirect alternatives for attorney disqualification.

The **direct alternative**, set forth in section 18.34(g)(3) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, provides that the "privilege of appearing" as counsel may be denied if it is found that counsel "does not possess the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude."

Also, Section 18.36(b) provides that counsel may be excluded, suspended or barred from participation in a particular proceeding for "refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards or orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications." 29 C.F.R. §§ 18.34(g)(3), 18.36(b).

Implicit in these provisions is the premise that unethical or improper professional conduct by one party's counsel deprives the other party of "rights essential to a fair hearing." 29 C.F.R. § 18.34(c). See Smiley v. Director, OWCP, 973 F.2d 1463, 26 BRBS 37 (CRT) (9th Cir. 1992), substituted opinion, 984 F.2d 278 (9th Cir. 1993) (ALJ has authority and duty to make complete inquiries if the question arises, to disqualify counsel for conflicts of interest prohibited by applicable rules of professional conduct); Baroumes v. Eagle Marine Servs., 23 BRBS 80 (1989) (ALJ has

authority to immediately disqualify attorney for "appearance of impropriety" applying State rules against conflict of interest and reasonable standards of ethical conduct).

Procedurally, the direct denial of authority to appear may be imposed only "after notice of an opportunity for hearing," the judge must "state in the record the cause for suspending or barring an attorney" from participation, and any attorney so suspended or barred "**may appeal to the Chief Judge** but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or representative." 29 C.F.R. §§ 18.34(g), 18.36(b).

As an **indirect alternative**, pursuant to the administrative law judge's general powers, certain types of misbehavior (e.g., disobeying or resisting any lawful order; obstructing the hearing) may be certified to a Federal District Court "to request appropriate remedies." 29 C.F.R. §§ 18.29(b).

## 19.4 FORMAL HEARINGS COMPLY WITH APA

Section 19(d) of the LHWCA provides:

**(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.**

33 U.S.C. § 919(d).

Section 19(d) “does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues.” Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 33 BRBS 209(CRT) (9<sup>th</sup> Cir. 2000), cert. denied, 121 S.Ct. 378 (2000)(Party challenging an attorney’s fee award made by the district director does not have a right to a formal hearing before OALJ when there are no factual issues in dispute.). Cf. Pearce v. Director, OWCP, 647 F.2d 716 (7<sup>th</sup> Cir. 1981)(LHWCA and its regulations made no distinction between requests for hearings on claims that are “adjudicatory” in nature and those that are “administrative” in nature.). In Pearce, the **Seventh Circuit** held that the district director has a duty to transfer disputes to OALJ because the Board has “no authority to consider or review the evidence that [has] been gathered by the deputy commissioner” because the Board can only review a “hearing record” and such a record can only be developed in an ALJ proceeding.

Section 554(b) of the APA, 5 U.S.C. § 554(b), requires that persons entitled to **notice** of an administrative hearing shall be informed of issues of fact and law to be resolved therein. The fundamental problem of the notice requirement is one of due process, rather than "correct procedure." Although administrative hearings are not bound by the same details of procedure as the common law courts, they are governed by basic requirements of fairness and notice. Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin., 495 F.2d 975, 984 (D.C. Cir. 1974).

In Ion v. Duluth, Missabe and Iron Range Railway Co., 32 BRBS 268 (1998), the Board found that the ALJ had violated the employer’s right to due process by failing to provide the employer with an opportunity to cross-examine the claimant or respond to his post-hearing affidavit regarding his job search. On remand the employer was given an opportunity and alleged that the passage of 20 months had destroyed his due process rights because many potential employers had destroyed their employment applications and/or did not remember the claimant as an applicant. In his Decision and Order on Remand, the ALJ found that the passage of time had not automatically

destroyed the employer's due process rights, but rather, employer had not availed itself of all of the opportunities to submit meaningful rebuttal evidence in that it had not deposed the claimant nor any of the employers he had contacted, but only made "cursory" contacts with seven of the 12 employers mentioned in claimant's affidavits.

Section 554(d) of the APA, 5 U.S.C. § 554(d), provides that the **post-hearing decision** shall be made by the judge who received the evidence and presided at the hearing, unless that officer is unavailable. If the credibility of the witnesses is at issue, and the presiding judge is unavailable to issue a decision, the **parties have the right to a *de novo* proceeding before a new judge**. This right may be waived. See Van Teslaar v. Bender, 365 F. Supp. 1007 (**D.C. Md.** 1973); see also Pigrenet v. Boland Marine & Mfg. Co., 656 F.2d 1091, 1095, 13 BRBS 843, 846 (**5th Cir.** 1981) (en banc), vac'g 631 F.2d 1190, 12 BRBS 710 (**5th Cir.** 1980) (claimant waived right to new hearing by not objecting to resubmission of case on extant record or seeking to present further evidence and also did not raise resolution of credibility issues based on transcript as error before ALJ in reconsideration or before the Board); Creasy v. J.W. Bateson Co., 14 BRBS 434, 435-36 (1981) (parties' failure to opt for supplemental hearing offered by new ALJ constituted waiver of *de novo* hearing). An ALJ's determination that notice delivered to the correct address was sufficient to warn an employer of the potential waiver of its right to a hearing, is not contrary to law. Newport News Shipbuilding & Dry Dock Co. v. Gregory, (ALJ Case No. 99-2356)(**4th Cir.** April 24, 2000)(Unpublished)(Employer's allegation that it was unaware of the fact that a case had been assigned to a different ALJ on remand was of no consequence since notice had been served at the correct address to the attorney of record as shown in the administrative file at OALJ.).

Section 556 of the APA, 5 U.S.C. § 556, applies to hearings held under 5 U.S.C. § 554, and pertains to formal hearings, trial officers and their power, evidentiary development and the formal record. Under this section, a judge may disqualify himself. In cases where this results from **allegations of bias**, the allegations must be supported by the record in order to show prejudice against the party seeking disqualification. Swain v. Bath Iron Works Corp., 17 BRBS 145, 147 (1985).

Adverse rulings, alone, are insufficient to show bias. Olsen v. Triple A Mach. Shops, 25 BRBS 40, 45-46 (1991); Raimer v. Willamette Iron & Steel Co., 21 BRBS 98, 100 (1988). Written remarks regarding the judge's conduct are insufficient to establish bias by the judge towards the author of the remarks. Olsen, 25 BRBS at 46.

Each **allegation of bias** must be specific for the complaint to be heard, Pfister v. Director, OWCP, 675 F.2d 1314, 1318, 15 BRBS 139, 142 (CRT) (**D.C. Cir.** 1982), and must be made "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." Id.; Marcus v. Director, OWCP, 548 F.2d 1044, 1050-51, 5 BRBS 307, 315 (**D.C. Cir.** 1976). See also Walker v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 101 (1979), aff'd, 618 F.2d 107 (**4th Cir.**), cert. denied, 446 U.S. 943 (1980).

To establish bias resulting from an *ex parte* communication, a party must show that such communication formed the basis of the judge's decision. Nasem v. Singer Business Machs., 13 BRBS 429, 432 (1981), aff'd mem., 691 F.2d 495 (4th Cir. 1982). The Board will not consider an allegation of bias if not timely raised at the hearing level. Jones v. J.F. Shea Co., Inc., 14 BRBS 207, 209 (1981).

Under Section 556(d) of the APA, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence. See 5 U.S.C. § 556(d). Because of this allocation of the burden of proof, the **United States Supreme Court** had concluded that an injured worker claiming compensation must prove the elements of his claim by a "preponderance of the evidence." The "**true doubt**" rule under which the claimant wins if the evidence is evenly balanced, is inconsistent with the APA, 5 U.S.C. § 556(d). Director, OWCP v. Greenwich Collieries, (Maher Terminals), 512 U.S. 267 (1994) (See Topic 20.3, *infra*.)

The **United States Supreme Court** has held that this rule is contrary to the provisions of the APA because it allows the claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. *Id.* Contra Freeman United Coal Mining Co. v. OWCP, 988 F.2d 706, 17 BLR 2-195 (7th Cir. 1993); Avondale Shipyards v. Kennel, 914 F.2d 88, 90-91, 24 BRBS 46, 47-48 (CRT) (1st Cir. 1990); Parsons Corp. of California v. Director, OWCP, 619 F.2d 38, 41, 12 BRBS 234, 235 (9th Cir. 1980); Bath Iron Works Corp. v. White, 584 F.2d 569, 574, 8 BRBS 818, 821 (1st Cir. 1978); Fidelity & Casualty Co. v. Burris, 59 F.2d 1042, 1044 (D.C. Cir. 1932).

Section 556(e) of the APA, 5 U.S.C. § 556(e), states that the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitute the **exclusive record for decision**. Pursuant to the Code of Federal Regulations, evidence must be formally admitted into the record; a decision issued based on evidence not formally admitted violates the APA. 20 C.F.R. § 702.338. See Williams v. Hunt Shipyards, Geosource, 17 BRBS 32, 35 (1985) (ALJ erroneously decided Motion for Modification on basis of evidence which was never formally admitted); Ross v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 224, 225 (1984) (because ALJ did not rule on objections to admission, documents never became part of record).

See also Lindsay v. Bethlehem Steel Corp., 18 BRBS 20, 22 (1986) (Board cannot consider evidence submitted at oral argument indicating that claimant is barred from compensation due to third party settlement; case remanded to ALJ to admit and consider evidence); Woods v. Bethlehem Steel Corp., 17 BRBS 243, 245 (1985) (motion to dismiss appeal due to unapproved third-party settlement denied as facts are not in record; employee may seek Section 22 modification).

The Code of Federal Regulations detail how formal hearings will be conducted. Section 702.337 pertains to the **location and time of the formal hearing**. Although **continuances** will not be granted except in cases of extreme hardship, the judge's decision to continue a hearing will be overturned only for a clear abuse of discretion. Colbert v. National Steel & Shipbuilding Co., 14 BRBS 465, 467 (1981).

Section 702.338 requires parties or their representatives to attend the hearings, dictates that the judge shall inquire into all matters at issue and receive evidence pertaining thereto, and allows the hearing officer to reopen the hearing for the receipt of new evidence deemed necessary. See Bingham v. General Dynamics Corp., 14 BRBS 614, 616 (1982); Sprague v. Bath Iron Works Corp., 11 BRBS 134, 138 (1979), decision following remand, 13 BRBS 1083 (1981), aff'd sub nom. Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11 (CRT) (1st Cir. 1982) (ALJ may inquire into matters not in record to determine whether they are relevant or subject to discovery).

The judge has the power, using 28 U.S.C. § 1961 (district courts have power to award interest), as guidance to award interest. Brown v. Alabama Dry Dock and Shipbuilding Corp., 28 BRBS 160 (1994); (post-judgment interest, assessed on awarded but unpaid pre-judgment interest, serves the purpose of the LHWCA by making claimants whole); see Santos v. General Dynamics Corp., 22 BRBS 226 (1989). See generally Topic 65, infra.

Under Section 702.351, the judge shall halt the proceedings upon receipt of a signed statement from the party **withdrawing controversy**. 20 C.F.R. § 702.351. The judge is to notify the district director, who shall then proceed to dispose of the case as provided for in Section 702.315. 20 C.F.R. § 702.315. The regulation assumes that the parties have decided to voluntarily dispose of the claim in a manner consistent with informal proceedings, thus obviating the need for a formal hearing on any issues. Lundy v. Atlantic Marine, 9 BRBS 391, 393 (1978).

Section 557 of the APA, 5 U.S.C. § 557, applies when hearings are conducted in accordance with 5 U.S.C. § 556. Section 557(c)(3)(A), 5 U.S.C. § 557(c)(3)(A), requires **decisions rendered under the APA to include** a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." The rule is designed to allow reviewing bodies to carry out their function of determining whether decisions have been made according to the applicable statutes. See generally See v. Washington Metropolitan Area Transit Authority, 36 F.3d 375, 28 BRBS 96 (CRT) (4th Cir. 1994); Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973).

The judge must **adequately detail the rationale** behind his decision, and **specify which medical evidence was relied upon and why**. Cotton v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 380, 382 (1990); McCurley v. Kiewest Co., 22 BRBS 115, 119 (1989); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187 (1988); Williams v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 61, 62-63 (1985); Whittington v. National Bank of Wash., 12 BRBS 439, 442 (1980); Corcoran v. Preferred Stone Setting, 12 BRBS 201, 203 (1980).

The ALJ must also **independently analyze and discuss the evidence**; the failure to do so will violate the APA's requirement for a reasoned analysis. Williams, 17 BRBS at 63; Frazier v. Nashville Bridge Co., 13 BRBS 436, 437 (1981). But see Hayes v. P & M Crane Co., 23 BRBS 389, 394 (1990), vac'd, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991) (ALJ did not err in failing to discuss physician's testimony, as it supported his denial of Section 8(f) relief).

The ALJ's **incorporation of factual and legal assertions from a party's brief** is impermissible to the extent it prevents this independent review of the evidence by the adjudicator. Williams, 17 BRBS at 63. See also Jaros v. National Steel & Shipbuilding Co., 21 BRBS 26, 29-30 (1988) (ALJ's adoption of findings of grievance arbitrator and his failure to make independent findings of fact required remand).

The Board has **remanded cases where the judge made conclusory findings of fact without comment on conflicting evidence or without explicit acceptance or rejection of parts thereof**. Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245, 248 (1989) (ALJ's cursory finding that there existed "substantial evidence" to rebut Section 20(a) presumption failed to satisfy APA); Frye v. Potomac Elec. Power Co., 21 BRBS 194, 196-97 (1988) (ALJ erred in failing to analyze conflicting medical opinions in concluding that claimant's back condition and chronic pain syndrome were not work-related); Williams, 17 BRBS at 63; Williams v. Nicole Enters., 15 BRBS 453, 454 (1983); Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 324 (1983); Frazier, 13 BRBS at 437; Willis v. Washington Metro. Area Transit Auth., 12 BRBS 18, 22-23 (1980).

The Board has also **remanded cases where the judge neglected to make specific findings of fact in applying the LHWCA, or made ambiguous findings**. Jones v. Midwest Mach. Movers, 15 BRBS 70, 73 (1982), *aff'd*, 840 F.2d 20 (7th Cir. 1988); McDevitt v. George Hyman Constr. Co., 14 BRBS 677 (1982); Grimes v. Exxon Co., U.S.A., 14 BRBS 573, 577 (1981); Bentley v. Sealand Terminals, 14 BRBS 469, 470 (1981); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 147 (1980); Moore v. Paycor, Inc., 11 BRBS 483, 489-90 (1979).

The Board has **remanded where the judge failed to address issues raised by the parties during the hearing**. Wade v. Gulf Stevedore Corp., 8 BRBS 335, 341-42, *on recon.*, 8 BRBS 627 (1978).

There is no provision of the LHWCA under which the ALJ may condition a claimant's entitlement to benefits upon his relinquishing his firearms. Such conditioning exceeds the scope of the ALJ's authority. Kish v. GATX Corp., (Unreported)(BRB Nos. 97-461, 00-445 and 00-445A)(Jan. 18, 2001). In the original ALJ Decision and Order in Kish, the administrative law judge had found that the claimant suffered from physical and psychological disabilities which rendered him unable to return to his former employment, thus awarding the claimant continuing temporary total disability benefits.

In the Decision and Order Denying Petition for Modification, the judge conditioned the claimant's continued receipt of benefits upon submission of a sworn statement that he has renounced all threatening behavior, has removed all firearms and ammunition from his home, and has no access to the weapons of his family and friends. In addition, the judge required the claimant to cooperate with the employer by arranging a 30-day stay in an East Coast facility to address issues regarding substance dependence, pain medication, and psychiatric problems, and to furnish documentation requested by physicians. The Board vacated the 30-day treatment provision of the Order and ordered

the judge to resolve conflicts in the record. As to the firearms portion of the Order, the Board noted found that the judge exceeded his authority.

Compensation benefits under the LHWCA may be suspended only if an employee unreasonably refuses to submit to a medical examination or treatment. 33 U.S.C. § 907(d)(4), (f). Specifically, the Board noted that “Although Section 27(a) grants the [ALJ] the authority to issue subpoenas, administer oaths, compel attendance and testimony of witnesses, production of documents, and ‘all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office,’ the behavior the [ALJ] is attempting to curtail in the instant case does not involve conduct in the hearing held before him.” Kish at 7.

Similarly, an ALJ was found to have exceeded his authority in mandating how a claimant must file a second longshore claim as this procedure is covered by the LHWCA. See generally Stevens v. Matson Terminals, Inc., 32 BRBS 197 (1998).

#### **19.4.1 District Director Cannot Hold Hearings After 11/26/72**

The 1972 Amendments amended Section 19(d), withdrawing the adjudicatory power to conduct hearings from the district directors and conferring it on administrative law judges. See Topic 19.3, supra. See also O’Berry v. Jacksonville Shipyards, 22 BRBS 430, 432-33 (1989) (where district director did not have authority to issue a compensation order in 1973 because 1972 Amendments had already taken effect, order was void from its inception and therefore without legal effect).

Pursuant to the amended Section 19, the district director performs only administrative and pre-hearing investigative functions, and facilitates settlement; all adjudicatory functions reside in the administrative law judge. Carter v. Merritt Ship Repair, 19 BRBS 94, 95 (1986) (district director exceeded his authority by vacating ALJ’s decision). When an issue is in dispute, only the judge can hold a formal hearing and make findings to resolve the dispute. Id. at 96; Sans v. Todd Shipyards Corp., 19 BRBS 24, 28 (1986) (remand to district director is justified only when it is clear that all interested parties are in agreement and further formal proceedings are unnecessary).

The Board has therefore held that district directors no longer possess the authority to perform certain adjudicatory duties which are referred to in Sections 19, 23, and 27. The district director may no longer issue subpoenas *duces tecum*. Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 132 (1986) (en banc), overruling Rabb v. Marine Terminals Corp., 11 BRBS 498 (1978), and contrary language in Percoats v. Marine Terminals Corp., 15 BRBS 151 (1982).

**[ED. NOTE: For a discussion of the procedure involved in requesting/issuing subpoenas, see [www.oalj.dol.gov](http://www.oalj.dol.gov).]**

The district director may not compel testimony at depositions. Percoats, 15 BRBS at 155. See also Grandy v. Vinnell Corp., 14 BRBS 504, 511 (1981) (district director may not entertain motion for exhumation and autopsy).

Absent an agreement by the parties or a request for an order under Section 702.315, the district director is not empowered to issue a compensation order. Roulst v. Marco Constr. Co., 15 BRBS 443, 446 (1983). Upon request of any interested party, a hearing on the claim **shall** be ordered. Black v. Bethlehem Steel Corp., 16 BRBS 138, 142 (1984). Section 19(c) then confers jurisdiction on the administrative law judge. Id.

An order issued upon consent of the parties pursuant to Section 702.315 is subject to Section 22 modification. Stock v. Management Support Assocs., 18 BRBS 50, 52 (1986).

Although Section 22 explicitly refers to **initiation of modification proceedings** before the district director, the Board has held that modification is properly sought before the administrative law judge who heard the case **where an appeal is pending** before the Board. Craig v. United Church of Christ, Comm'n for Racial Justice, 13 BRBS 567, 571 (1981).

**In other cases**, modification may be initiated before the district director. His function, however, is to gather evidence and conduct informal investigations, he may not modify the decision of an ALJ in a contested case. Carter, 19 BRBS at 96; Sans, 19 BRBS at 29.

The Board has held that the district director **may not delegate** to the claims examiner **discretionary duties** such as the authority to determine attorney's fees. Mazzella v. United Terminals, 8 BRBS 755, 759, aff'd on recon., 9 BRBS 191 (1978). Cf. Bradley v. Director, OWCP, 8 BLR 1-418 (1985) (district director may delegate **ministerial** duties such as setting deadline for submitting fee petition). Contra Barulec v. Skou, R.A., 471 F. Supp. 358, 361 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2d Cir. 1980), aff'd sub nom. Rodriguez v. Compass Shipping Co., 451 U.S. 596, reh'g denied, 453 U.S. 923 (1981) (district director's authority to enter award based on settlement can be delegated to claims examiner; delegation not in issue on appeal).

An **assistant district director**, however, who is duly authorized to perform the duties of a district director, may approve a Section 8(i) settlement. House v. Southern Stevedoring Co., 14 BRBS 979, 981 (1982), aff'd, 703 F.2d 87, 15 BRBS 114 (CRT) (4th Cir. 1983).

The **district director continues to possess the authority to** approve settlements under Section 8(i) of the LHWCA. Blake v. Hurlburt Field Billeting Fund, 17 BRBS 14, 15 (1985); Clestad v. Perini N. River Assocs., 9 BRBS 217, 221 (1978). But see 20 C.F.R. § 702.241(c) The district director also has the authority to approve attorney's fees for work performed before him. Mazzella v. United Terminals, 8 BRBS 755, 759, aff'd on recon., 9 BRBS 191 (1978). The district director can back up his investigatory authority by referring a case to the Office of Administrative Law Judges for the issuance of a subpoena. Maine, 18 BRBS at 133.

The **district director's role**, as it emerges in the scheme of the post-1972 LHWCA, is that of a claims administrator who functions both to process claims and to facilitate their informal resolution in a timely and fair manner. Maine, 18 BRBS at 132. See generally 20 C.F.R. Subparts A, B, and C, §§ 702.301 to 702.321. For example, claims are initially filed with the district director, who must notify the responsible employer thereof. 20 C.F.R. §§ 702.221, 702.224. The district director is also responsible for supervising an injured employee's medical care and medical examinations. 20 C.F.R. §§ 702.401 et seq.

Where a claim is disputed, the district director will attempt an informal resolution of the claim and hold informal conferences, if necessary, to achieve that end. 20 C.F.R. §§ 702.311, 702.312. No witnesses are called at the informal conference, and no stenographic report is taken. 20 C.F.R. § 702.314(a). **If the parties reach agreement**, the district director shall embody the agreement in a memorandum or issue a formal compensation order. 20 C.F.R. § 702.315.

**If the parties disagree**, the district director shall close the conference, prepare a closing memorandum of conference and submit it to the parties, who have 14 days to submit final comments on their respective positions. 20 C.F.R. § 702.316. If the dispute persists, the district director shall transfer the case to the Office of the Chief Administrative Law Judge for formal adjudication. 20 C.F.R. §§ 702.316, 702.317, 702.331.

**Informal conferences** are not mandatory. The Board has therefore held that the district director acted within his discretion in referring a case to the Office of Administrative Law Judges without an informal conference where there were numerous complex issues, the employer had ample opportunity to develop evidence and present issues to the administrative law judge, and the employer was not prejudiced. Matthews v. Jeffboat, Inc., 18 BRBS 185, 187 (1986).

*[ED.NOTE: However, the awarding of Section 28(b) fees is not appropriate if there has not been an informal conference with the Department of Labor. FMC Corporation v. Perez, 128 F.3d 908 (5th Cir. 1997); Accord Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607 (9th Cir. 1991); Stafftex Staffing v. Director, OWCP, 217 F.3d 365 (5th Cir. July 18, 2000); re-issued at 237 F.3d 409 (5th Cir. July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.); but see, Mary J. Hawkins (Widow of Gilbert W. Hawkins) v. Harbert International, Inc. and Insurance Company of North America, 33 BRBS 198 (1999) (Although technically no informal conference had been held, the review of the claim by two claims examiners satisfied the informal process requirements of the LHWCA.); Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (5th Cir. 2000). See discussion of Stafftex Staffing v. Director, OWCP, 237 F.3d409 (5th Cir. 2000) (5th Cir. Case No. 99-60587) at Topic 28.2.1 Attorney Fees–Controversion.]*

## 19.4.2 SUMMARY DECISION

*[ED. NOTE: For purposes of proceedings under the LHWCA, a motion for “summary decision” is akin to a motion for “summary judgment.” Administrative Law Judges issue “decisions” as opposed to “judgments.” In general, no distinction between the two terms is to be made.]*

A motion for **summary decision** in a LHWCA case is governed by 29 C.F.R. §§ 18.40 and 18.41. The purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact. Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995); Harris v. Todd Pacific Shipyards Corp., 28 BRBS 254 (1994); Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990).

Any party may, at least 20 days prior to trial, move for a summary decision. Affidavits submitted with the motion shall set forth facts admissible in a proceeding subject to Title 5 U.S.C. §§ 556-557.

An ALJ may grant a summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56.

An issue is material if the alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Furthermore, the fact must necessarily affect application of appropriate principles of law to the rights and obligations of the parties. Id. If the court (ALJ) finds a fact or facts to be material, then it must determine whether there is a “genuine issue” concerning any of them. 10 A. Wright and Miller, Federal Practice and Procedure, § 2725, at 95 (1983). If no issues are present, the moving party is entitled to a judgment as a matter of law. If the slightest doubt remains as to the facts, the motion must be denied.

The burden of proof in a motion for summary decision is borne by the party bringing the motion. See id. at § 2727, at 121. Because the burden is on the movant, the **evidence presented is construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it.** Id. at 124-25. Therefore, facts asserted by the party opposing the motion that are supported by affidavits or other evidentiary material are regarded as true. Id. at 128. Nevertheless, when the moving party has carried its burden under Section 56(c) of the Federal Rules of Civil Procedure, its opponent must do more than simply show there is some metaphysical doubt as to the material facts. Matsushita Elec., 475 U.S. at 574. Thus, under the summary decision rule, **a non-moving party “may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.**

Anderson v. Liberty Lobby, 477 U.S. 242, 256-57 (1986); Matsushita Elec., 475 U.S. at 587; see Dunn v. Lockheed Martin Corp., 33 BRBS 204 (1999).

There must be no controversy regarding the evidentiary facts or the inferences to be drawn therefrom. Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54 (2d Cir. 1987). The ALJ must review the evidence and inferences in the light most favorable to the party opposing the motion. Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); see Brockington v. Certified Electric, Inc., 903 F.2d 1523 (11<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1026 (1991); Dunn v. Lockheed Martin Corp., 33 BRBS 204, at 207 (1999). Relying on those cases, the Board affirmed a summary decision in Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990). The motion may be denied if the moving party refuses discovery to a party opposing the request.

**The ALJ cannot summarily try the facts.** Rather, the ALJ must apply the law to the facts that have been established by the parties. See 10 A. Wright and Miller, Federal Practice and Procedure, § 2725, at 104 (1983). **A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial.** Id. at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. Id. at § 2728, at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." Id. § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end and summary decision must be denied. Id. at 187.

The **United States Supreme Court** has cautioned that "summary procedures should be used sparingly ... where motive and intent play lead roles..." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962).

Any decision issued as a summary judgment must conform to the requirements for all final decisions and include:

- (1) Findings of fact and conclusions of law on all issues.
- (2) The terms and conditions of the order.

## 19.5 MOTION FOR RECONSIDERATION

Once the judge issues a decision, he may reconsider that decision and it is within his discretion to grant or deny a motion to reconsider. Winburn v. Jeffboat, Inc., 9 BRBS 363, 365 (1978) (ALJ's denial of employer's petition for reconsideration and motion to submit evidence of awarded claimant's incarceration was not abuse of discretion, since ALJ has discretion to grant or deny motion for reconsideration).

Section 802.206(f) of the Board's regulations state that "any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, **shall** be dismissed without prejudice as premature." 20 C.F.R. § 802.206(f) (emphasis added). In Jourdan v. Equitable Equipment Co., 29 BRBS 49 (1995), the Board held that the regulatory language of Section 802.206(f) is mandatory and requires dismissal of an appeal when a motion for reconsideration is filed with an ALJ, regardless of whether such motion requests reconsideration of the merits. In other words, **whenever** a motion for reconsideration is filed with the OALJ, dismissal of the appeal is required by Section 802.206(f). Jourdan, 29 BRBS at 50.

**A motion for reconsideration will toll the running of time for filing a notice of appeal.** 20 C.F.R. § 802.206(a); McCrary v. Stevedoring Servs. of America, 23 BRBS 106, 110 (1989) (although motion for reconsideration tolls running of time for filing notice of appeal, it does not toll the 10-day period for paying benefits contained in Section 14(f)); McCabe v. Sun Shipbuilding & Dry Dock Co., 7 BRBS 923, 926 (1978), *rev'd*, 593 F.2d 234 (3d Cir. 1979).

If a timely motion for reconsideration of a decision or order is filed, any appeal to the Board whether filed prior to or subsequent to the filing of the motion for reconsideration, shall be dismissed without prejudice as premature. 20 C.F.R. § 802.206(f).

**A motion for reconsideration is timely when it is filed not later than 10 days from the date the decision or order was filed in the Office of the District Director.** 20 C.F.R. § 802.206(b)(1); see Bogdis v. Marine Terminals Corp., 23 BRBS 136, 138 (1989). Where the **date of mailing** of the motion for reconsideration is timely, it is the date of mailing, not the date of filing, that determines the timeliness of the motion. 20 C.F.R. § 802.206(c); Leete v. Petroleum Helicopters, 15 BRBS 51, 52 (1982).

***[ED. NOTE: Query: What if the motion was sent overnight and not by U.S. Postal Service Over Night? Does this "date of mailing suffice to determine timeliness?]***

The ten day filing period for a motion for reconsideration of an ALJ's decision, as governed by Section 802.206(b)(1), "commences on the date that the district director certifies that he filed the Decision and Order." Hamilton v. Ingalls Shipbuilding, Inc., 30 BRBS 84, 87 (1996).

The ALJ Rule of Practice and Procedure at 29 C.F.R. § 18.4 does not govern motions for reconsideration; rather, the Federal Rules of Civil Procedure (FRCP) apply. Galle v. Ingalls

Shipbuilding, Inc., 33 BRBS 141(1999). In Galle, the Board first noted that the general rules for proceedings before an ALJ at 29 C.F.R. Part 18 do not provide for motions for reconsideration, nor do the longshore regulations at 20 C.F.R. Part 702. Only the Board's regulation addresses this issue in the context of what constitutes a timely appeal to the Board. Thus, the Board found that the federal civil procedural rules govern the filing of these motions. The Board, in Galle, found it necessary to note the historical development of its own regulation at 20 C.F.R. § 802.206.

The authority for the 10-day filing requirement was based on Rule 59(e) of the FRCP. Rule 59(e) states: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." The rule did not discuss the applicability of Rule 6(a) which excludes intermediate Saturdays, Sundays and holidays. Rule 6(a) provides that if the final day of a period provided in a statute falls on a Saturday, Sunday or holiday, the period runs until the end of the next day that is not a Saturday, Sunday or holiday. Rule 6(a) also states that the day of the act is excluded such that counting begins the day following the action.

The Board held that, as Rule 6(a) applies to Rule 59(e), which is the basis for the 10-day filing time limit for motions for reconsideration contained in the Board's regulation at 20 C.F.R. § 802.206, Rule 6(a) applies to the filing of motions for reconsideration before the ALJ for purposes of determining whether the tolling provision of Section 802.206(a) applies. Of significance is the fact that the Board stated that the ALJ Rules of Practice and Procedure do contain a "general provision on computation of time." The Board noted that, at the time the provisions at 29 C.F.R. § 18.4 were promulgated, FRCP 6(a) also provided for the exclusion of intermediate Saturdays, Sundays, and holidays when the applicable time period was seven days or less. Thus, the two rules were consistent until the FRCP were amended in 1985, and Rule 6(a) changed to expand the time frame from seven days or less to less than 11 days.

In Galle, the Board went on to state that "[i]n any event, Section 18.4 specifically states '[i]n computing any period of time *under these rules*...'" 29 C.F.R. § 18.4 (emphasis added). As there is no rule regarding motions for reconsideration under the Part 18 Regulations, Section 18.4 is not applicable on its face. Accordingly, as motions for reconsideration are governed by Federal Rules through Section 18.1, the computation of time is similarly governed by those rules."

If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed pursuant to Section 802.205. 20 C.F.R. § 802.206(d). If the motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed pursuant to Section 802.205. 20 C.F.R. § 802.206(e).

## 19.6 FORMAL ORDER FILED WITH DISTRICT DIRECTOR

Section 19(e) of the LHWCA provides:

**(e) The order rejecting the claim or making the award (referred to in this Act as a compensation 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 claimant and to the employer at the last known address of each.**

33 U.S.C. § 919(e). The **Ninth Circuit** has interpreted the word "filed" as used in this Section to include the effecting of service on the parties. Nealon v. California Stevedore & Ballast Co., 996 F.2d 966, 969-73, 27 BRBS 31, 34-39 (CRT) (**9th Cir.** 1993).

The **Ninth Circuit** also reasoned that the purpose of the LHWCA is to deliver benefits to injured workers and that all doubtful questions of fact be resolved in favor of the injured employee. Force v. Director, OWCP, 938 F.2d 981, 985 (**9th Cir.** 1991). Therefore, it would frustrate the legislative intent of Congress to hold claimants to timetables for filing when the claimant does not know that the time for filing has begun.

*[ED. NOTE: The Ninth Circuit's position is somewhat in conflict with the recent Supreme Court decision which disregards the "true doubt" rule. See Director, OWCP v. Greenwich Collieries, (Maher Terminals), 512 U.S. 267 (1994).]*

The **Seventh Circuit**, however, has held that the district director's failure to mail a copy of the administrative law judge's order to the employer's counsel did not prevent the order from being "filed" and becoming effective. Jeffboat, Inc. v. Mann, 875 F.2d 660, 664, 22 BRBS 79, 81-82 (CRT) (**7th Cir.** 1989) (language of 20 C.F.R. § 702.349 does not make proper mailing part of filing).

Enforcement of a final compensation order may be had in a United States District Court, which is accorded federal question jurisdiction. Stevedoring Servs. of America v. Eggert, 23 BRBS 25, 27-28 (CRT) (**W.D. Wash.** 1989) (unpub.), vac'd and remanded, 953 F.2d 552, 25 BRBS 92 (CRT) (**9th Cir.**), cert. denied, 505 U.S. 1230 (1992); Travelers Ins. Co. v. Thompson, 20 BRBS 79 (CRT) (**8th Cir.** 1987).

### "Final Order"

However, "finality" has become an issue in the **Fifth Circuit**. Keen v. Exxon Corp., 35 F.3d 226 (**5th Cir.** 1994) (Held, ALJ's compensation order did not become final until such time as the district director furnished computations dictated by the ALJ order.); Ledet v. Phillips Petroleum Co., 163 F.3d 1999 (**5th Cir.** 1998), Although the ALJ provided a means of calculating the amount of benefits due, he impermissibly delegated his fact-finding duty to the Director who would have to

resort to extra-record facts; such is impermissible.); Lazarus v. Chevron USA, Inc., 958 F.2d 1297, 1304, 25 BRBS 145, 150-51 (CRT) (5<sup>th</sup> Cir. 1992) (affirmed district court's dismissal of claimant's petition for enforcement because ALJ's award was not a final order enforceable under Section 18(a), as it did not adequately state amount of compensation owed to claimant); Severin v. Exxon Corp., 910 F.2d 286 (5<sup>th</sup> Cir. 1990) ("To constitute a final decision and order of the ALJ, the 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 dispute between the parties.").

**[ED. NOTE:** *It is only within the **Fifth Circuit** that "finality" of orders has become an issue. A careful reading of the above noted cases will disclose that this "issue" has been self-inflicted by the court itself, and by its lack of understanding as to the realities of administrative/regulatory law in this area. For example, in Keen, the **Fifth Circuit** stated:*

*It appears that ALJs, perhaps not routinely but at least regularly, include in compensation orders the very language that has given rise to the present controversy. The problem that we have confronted here can readily be avoided by the elimination of such language [ordering the district director to perform the calculations] from future orders, or alternatively, if such language is used, by the setting of a a specific time period for the director's performance of the award computation as a means of achieving finality.*

*35 F.3d 229, n. 6].*

## 19.7 AWARD AFTER DEATH OF EMPLOYEE

Section 19(f) of the LHWCA provides:

**(f) An award of compensation for disability may be made after the death of an injured employee.**

33 U.S.C. § 919(f). See Andrews v. Alabama Dry Dock & Shipbuilding Co., 17 BRBS 209, 211 (1985); Wilson v. Vecco Concrete Constr. Co., 16 BRBS 22, 25 (1983). The right to disability compensation survives the employee's death and his survivors have standing to file a claim for benefits on his behalf. Maddon v. Western Asbestos Co., 23 BRBS 55, 59 (1989); Muscella v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 830, 831-32 (1978).

**19.8 DISTRICT DIRECTOR MAY TRANSFER CLAIM TO OTHER DISTRICT DIRECTOR**

Section 19(g) of the LHWCA provides:

**(g) At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.**

33 U.S.C. § 919(g).

## 19.9 MEDICAL EXAMINATIONS

Section 19(h) of the LHWCA provides:

**(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.**

## 19.10 BANKRUPTCY

*[ED. NOTE: If both the employer and carrier are bankrupt, the liberal construction of the LHWCA logically makes the Section 44 Trust Fund available to the claimant. (Assuming there is no state guaranty association involved.) Ordinarily, when an employer is discharged from liability, under the bankruptcy laws, the employer's insurer remains fully responsible for the claim pursuant to the provisions of Sections 35 and 36(a) of the LHWCA. When there is no insurer (e.g., the employer is self-insured) recovery must come from the indemnity bond or securities deposited by the employer pursuant to Section 32(a)(2). As noted above, there may also be a state guaranty association that may be liable for payment. If none of the preceding resources are available, some benefits may come from the Special Fund pursuant to the provisions of Section 18(b).]*

When a matter is set for hearing before OALJ and either the employer or the insurance company files for bankruptcy, an ALJ has two options in relation to proceeding with the hearing and/or the decision and order (if the bankruptcy filing took place after the hearing, but before the issuance of the decision and order). As noted above, the process should contemplate the possibility that there is a state guaranty association and provide for its active participation.

### Option I

Under Option I, the ALJ holds the hearing/decision in abeyance, waiting for the Bankruptcy Court to lift the automatic stay. Normally at least one of the parties, finding it in its best interest, will move for the stay to be lifted. The prevailing theory here is that Section 36 of the LHWCA does not state that the underlying proceeding may continue despite the automatic stay created by the bankruptcy. In other words, when the bankruptcy is eventually concluded, the longshore litigation will also conclude and at that time the insurer of the employer herein will be obligated to pay any judgment rendered against the employer should the ALJ so rule at that time. Section 36(a), in pertinent part reads: "Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract."

### Option II

Under Option II, the ALJ proceeds under the theory that the **employer or carrier is now simply a "nominal" party** in a proceeding where a successful claimant can then seek relief from the Section 44 Trust Fund, provided there is no state guaranty association to stand in the shoes of the insolvent party.

## Avoiding the Stay

Section 362 of Title 11 of the United States Code sets forth the automatic stay provisions of the Bankruptcy Code and reads in pertinent part, as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of—

(1) The commencement or continuation, including the issuance or employment process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of a case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate of a judgment obtained before commencement of this case under this title...

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

11 U.S.C.. § 362(1991).

The legislative history to subsection (b)(4) states that it is “to be given narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.” H.Rep. No. 95-595, 95<sup>th</sup> Cong., 2d Sess., 1978 U.S. Code and Cong. and Admin. News at 5787.

Moreover, with respect to subsection (b)(5), the House Report provides, in pertinent part as follows:

[T]he exception extends to permit an injunction and enforcement of an injunction, and to permit entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control

of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a government unit of a money judgment would give it preferential treatment to the detriment of all other creditors. (H. Rep. No. 95-595, 95<sup>th</sup> Cong., 2d Sess., 1978 U.S. code and Cong. and Admin. News at 5787.)

The **Sixth Circuit** applied the exemptions found at subsections (b)(4) and (b)(5) to state workers' compensation cases in In Re Mansfield Tire and Rubber Co., 660 F.2d 1108, 1114 (6<sup>th</sup> Cir. 1981) on grounds that "the administration of workers' compensation claims by the State of Ohio and the agencies created for that purpose is a valid exercise of the police and regulatory power of a governmental unit." The court concluded that it could "find no basis of any distinction between the enactment of workers' compensation laws as a valid exercise of a state's police or regulatory power on the one hand, and the administration of claims arising under such laws as not being an exercise or extension of that power on the other." *Id.* at 1113. The court then determined that workers' compensation cases involve health and safety issues and that the automatic stay does not apply to such proceedings because it "prevents the exercise by the (state agency) of its lawful powers and operates to hinder, delay and deprive Mansfield's injured workers of the benefits to which they are lawfully entitled and it affects their safety." *Id.* at 1113.

Whether or not a general proposition may be asserted that the automatic stay is inapplicable to all workers compensation proceedings, one can argue that there are additional factors which render the automatic stay inapplicable in respect to a Department of Labor proceeding the purpose which is to determine the disability of a claimant under the LHWCA. See generally, In Re Howell, Bankruptcy. Tenn. 4BR 102 (1980), involving the Federal Employees' Compensation Act. Although a covered employer is generally responsible for on-the-job injuries suffered by its workforce, Section 18(b) of the LHWCA provides additional potential relief to claimants in employer-default situations. The employer may have obtained a bond or other security guaranteeing its obligations or in the absence of adequate bonding, the Secretary of Labor may be called upon to initiate payment from the Special Fund. In cases where judgment on an award cannot be satisfied by reason of insolvency, the Secretary of Labor "may, in his discretion, and to the extent he shall deem it advisable after consideration of current commitments payable from the special fund established in Section 44 of the LHWCA make payment from such fund upon any award made under this Act, and in addition, provide a necessary medical, surgical, or other treatment required by Section 7 of the Act." Sections 17(a) and 18(b) of the LHWCA.

Under circumstances in which the employer may ultimately be relieved by bankruptcy of its responsibility for the payment of all or part of an award, a claimant's disability must yet be determined, and an award entered in contested cases, before a bonding company may be held responsible or petition for payment by the fund may be considered. Thus the application of Section 362 of the Bankruptcy Act to stay LHWCA proceedings would deprive a claimant of the opportunity to pursue the alternative avenue of relief Congress has established in these types of cases.

Upon consideration of the procedures set forth in Section 18 of the LHWCA, one can argue that it is clear that the LHWCA contemplates the entry of an award in cases involving insolvent

employers and disabled workers. It is actually the award following the LHWCA proceeding which triggers potential access to the Fund. Given the framework of pertinent statutory provisions, **an award against the employer is entered pro forma**, even if technically unenforceable as such. See generally, In Re Western States Drywall, Inc., 150 BR 774 (1993). In essence, the award following a determination of entitlement is a procedural mechanism which begins the process by which the injured worker may pursue his case against the bonding company or petition the Secretary of Labor for relief from the Special Fund. As such, Section 362 of the Bankruptcy Act does not appear to be applicable to proceedings to determine the nature and extent of disability under the LHWCA.

*[ED. NOTE: Option II has been successfully used since 1981, when it was first utilized in reference to the Seatrain Shipbuilding Corporation. See 80 LHC 819, et seq. More recently, in 1997, it was used with Jacksonville Shipyards, Incorporated. See for example, Howell v. Jacksonville Shipyards, Inc., (96-LHC-2217)(J. Levin)(Oct. 6, 1997)(Unpublished). In fact, the editor is not aware of any cases in which the Bankruptcy Court resisted Option II's use when an ALJ explained its application. Four key points should be made when Option II is utilized: (1) It has been successfully used previously; (2) Due process consideration for notice must be included. (For example, an order notifying the parties as to how and why the ALJ intends to proceed with the hearing/decision, and allowing time to file comments should be issued.); (3) The acknowledgment that any award against the employer is entered pro forma; and (4) The explanation that the very language of the LHWCA seems to support its application, i.e., Congress contemplated the orderly and timely medical treatment and compensation needs of workers covered under the LHWCA due outside the context of the bankruptcy proceeding from a Special Fund administered by the Department of Labor, and created by Congress itself precisely for the purpose of protecting injured workers of financially troubled employers.]*