

TOPIC 21 REVIEW OF COMPENSATION ORDER

21.1 COMPOSITION AND AUTHORITY OF BENEFITS REVIEW BOARD

21.1.1 Establishment and Composition

Section 21(b)(1) of the LHWCA provides:

(b)(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

33 U.S.C. § 21(b)(1). See 20 C.F.R. §§ 801.101 — 801.203. Decisions issued by district directors, prior to the 1972 Amendments, were appealed to the district court; post-amendment decisions, issued by administrative law judges, are appealed to the Benefits Review Board. Presley v. Tinsley Maintenance Serv., 529 F.2d 433, 435-36, 3 BRBS 398, 399-400 (5th Cir. 1976).

Upon the filing of the final decision of the ALJ with the district director, the **parties have 30 days to file a notice of appeal with the Board.** 33 U.S.C. § 921(a); 20 C.F.R. § 702.350. However, 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 (11th 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: 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.

[ED. NOTE: Regardless of whether an appeal is filed, compensation payments must begin after the final decision of the ALJ unless a stay is ordered by the Board.]

A compensation order becomes effective on the date it was **filed** in the OWCP and properly **served** upon the parties by certified mail. Unless a timely appeal is filed with the Board, the decision becomes final within 30 days of being filed with the district director. Thus, **the time for filing a notice of appeal runs from the date the decision is filed, not from the date of service.** See Beach v. Noble Drilling Corp., 29 BRBS 22 (1995).

The 1984 Amendments increased the number of permanent members from three to five. Permanent members are appointed by, and serve at, the discretion of the Secretary of Labor. See Kalaris v. Donovan, 697 F.2d 376, 380-81 (D.C. Cir. 1983), cert. denied, 462 U.S. 1119 (1983); 20 C.F.R. § 801.201(d). Although the Board is authorized to sit in panels of three members, 33 U.S.C. § 921(b)(1) and (5), it normally sits in panels of three, with authority for en banc review. The 1984 Amendments also gave the Chairman, who is designated by the Secretary, the authority to “exercise all administrative functions necessary to operate the Board.” 33 U.S.C.A. § 921(b)(1).

The 1984 Amendments also allow the appointment of up to four Department of Labor administrative law judges to serve as temporary Board members, for periods not to exceed one year. The Board is to sit in three-judge panels; each panel shall have no more than one temporary member and two members shall constitute a quorum. Any aggrieved party can petition the entire permanent Board for review of a panel’s decision within 30 days after entry of the decision. 33 U.S.C.A. § 921(b)(5).

The 1984 Amendments changed a quorum of the permanent Board from two to three. A quorum is necessary for any official action. 33 U.S.C.A. § 921(b)(2).

21.1.2 Grant of Authority

The Benefits Review Board may hear and determine appeals raising a substantial question of law or fact. The Board’s review is based upon the hearing record, and the findings of the ALJ are conclusive if supported by substantial evidence. 33 U.S.C. § 921(b)(3). **The findings of the ALJ must be accepted unless they are not supported by substantial evidence in the record considered as a whole or unless they are irrational.** See id.; 33 U.S.C. § 921(b)(3); see also 20 C.F.R. § 802.301(a).

The **Fifth Circuit** has stated that the Board does not have the authority to engage in a *de novo* review of the evidence or to substitute its views for those of the ALJ. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 944 (5th Cir. 1991); see also Porter v. Kwajalein Services, Inc., 32 BRBS 56 (1998) (“Our scope of review is not *de novo* but is limited to review of the evidence in the formal record before the [ALJ].”).

The **Ninth Circuit** has also expressed that the Board, in reviewing claims pursuant to the LHWCA, may not substitute its view views for that of an ALJ, but instead must accept the ALJ’s finding unless they are contrary to the law, irrational, or unsupported by substantial evidence. Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419 (9th Cir. 1995).

See also Burns v. Director, OWCP, 29 BRBS 28 (CRT) (D.C. Cir. 1994) (BRB must accept finding of ALJ even if it is not the more reasonable of two inferences, if supported by substantial evidence); Director, OWCP v. Jaffee New York Decorating, 25 F.3d 1080, 1084 (D.C. Cir. 1994) (holding that the Board has “no authority to second-guess the findings of the ALJ if those findings are supported by substantial evidence”).

The Board's scope of review under the LHWCA thus differs markedly from that of other agencies that are permitted to independently determine the facts and need not defer to the ALJ. See Presley v. Tinsley Maintenance Service, 529 F.2d 433, 436 (5th Cir. 1976).

Section 21(b)(3) of the LHWCA provides the specific statutory grant of authority to the Board:

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

33 U.S.C. § 921(b)(3).

Under this Section, Congress authorized the Board to decide questions of law, which include determinations of the consistency of a regulation with the underlying statute. The Board was created to perform the functions formerly performed by the United States District Courts. See Nacirema Operating Co. v. Benefits Review Bd., 538 F.2d 73, 75, 4 BRBS 190, 193 (3d Cir. 1976).

The **Board is not a court**. Kalaris v. Donovan, 697 F. 2d 376, 381 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); see also Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993). The "subject matter jurisdiction of ...the Benefits Review Board is confined to a right created by Congress" and the Board does not "possess all ordinary powers of the district court." Schmit v. ITT Federal Electric Int'l, 986 F.2d 1103, 1109, 26 BRBS 166, 173 (CRT) (7th Cir. 1993); see generally Washington Legal Foundation v. U.S. Sentencing Commission, 17 F.3d 1446, 1448-1449 (D.C. Cir. 1994); Rochester v. George Washington University, 30 BRBS 233 (1997) (Board does not have the "equitable" power to overturn settlement agreement of parties or the compensation order approving same, as Board's authority is statutory.).

The district courts had authority to decide the legal question of the validity of a regulation and that authority was transferred to the Board. Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1118 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); Carozza v. United States Steel Corp., 727 F.2d 74, 76-77 (3d Cir. 1984). See also Rivere v. Raymond Fabricator, Inc., 18 BRBS 6, 8 (1985).

The Board also has the authority to decide the constitutional validity of statutes and regulations within its jurisdiction. Gibas, 748 F.2d at 1117-18; Herrington v. Savannah Mach. & Shipyard Co., 17 BRBS 194, 196 (1985).

The Board can issue summary *per curiam* opinions. Kicklighter v. Ceres Terminal, 12 BRBS 323 (1980), on recon., 13 BRBS 109, aff'd mem., 665 F.2d 1040 (4th Cir. 1981).

While the Board generally does not entertain appeals from interlocutory orders, see Hudnall v. Jacksonville Shipyards, 17 BRBS 174 (1985) (Bifurcated proceedings should be avoided.), it does have discretion to do so. Fitzgerald v. Stevedoring Services of America, 34 BRBS 202(2001). In making this pronouncement the Board cited Section 21(b)(2) of the LHWCA, which provides that the Board is authorized to hear appeals “raising a substantial question of law or fact taken by any party in interest...” See also, Johnson v. United States Coast Guard Exchange, ___ BRBS ___, (BRB No. 99-1197)(Aug. 17, 2000)(“Nonetheless, as this appeal has been pending for a lengthy period and is fully briefed, review at this time serves the interests of administrative efficiency.”).

The Director of the Office of Workers’ Compensation Programs (OWCP) has no review authority over Board decisions and does not speak for the Board; the Board is not bound by the Director’s interpretation of regulations. Moore v. Dixie Pine Coal Co., 8 BLR 1-334, 1-338 (1985); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995). The LHWCA gives the Board final review authority within the Department of Labor, and a United States Court of Appeals is the only judicial body to have direct review authority of Board decisions. 33 U.S.C. § 921(b)(3), (c). See Boating Indus. Ass’ns v. Marshall, 601 F.2d 1376, 1382 n.6 (9th Cir. 1979) (neither the Secretary nor the Director can dictate to the Board the manner in which the LHWCA should be interpreted).

[ED. NOTE: Ordinarily the Director of the OWCP will not have standing to appeal a final order of the Board. See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) [discussed infra at Topic 21.3.6]. Compare Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997) (distinguishing Newport News by maintaining that the Director may appear before court of appeals, not as a petitioner seeking review, but as a respondent).]

Once a party appeals an administrative law judge’s order to the Board, jurisdiction of the case is transferred to the Board, and the administrative law judge is without power to conduct a hearing since he no longer has jurisdiction over the case. Colbert v. National Steel & Shipbuilding Co., 14 BRBS 465, 468 (1981).

The tribunal vested with the authority to determine compensation liability also has the authority to adjudicate insurance contract disputes arising out of claims filed under the LHWCA. Rodman v. Bethlehem Steel Corp., 16 BRBS 123, 126 (1984) (ALJ has such authority); Brady v. Hall Bros. Marine Corp., 13 BRBS 854, 857-58 (1981) (ALJ had authority where contract dispute presented question in respect of compensation claim). But see Busby v. Atlantic Dry Dock Corp., 13 BRBS 222, 225-26 (1981) (Board could not consider appeal by two insurance companies

disputing right to reimbursement where claim underlying dispute was no longer in issue--not a pending issue in appeal raising substantial question of law from decision with respect to claim of employee).

The Board does not have authority to provide a claimant with **legal assistance** nor to appoint a guardian for a claimant. Porter v. Kwajalein Services, Inc., 32 BRBS 56 (1998).

21.2 BOARD APPELLATE PROCEDURE

21.2.1 Advisory Opinions Not Permissible

The Board's performance of its review function, to hear and determine appeals raising a substantial question of law or fact, is "necessarily limited to the resolution of cases and controversies." Andrews v. Petroleum Helicopters, 15 BRBS 160, 161 (1982) (employer's request for Board to resolve question of whether Jones Act or OCSLA applied to case was request for advisory opinion since employer was no longer contesting ALJ's finding of coverage). Where there is no case or controversy for the Board to decide, the proper course of action is to dismiss the appeal and thereby avoid issuing an advisory opinion on an abstract proposition of law. Id.

In determining whether a case or controversy exists, "the basic inquiry is whether the 'conflicting contentions of the parties ... present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297 (1979).

21.2.2 New Issue Raised on Appeal

In order to be considered on appeal, an issue must first be raised below. Jones v. Navy Exch., 966 F.2d 1442, 26 BRBS 10, 11-12 (CRT) (4th Cir. 1992) (unpub.) (where petitioner failed to challenge, at hearing before Board, ALJ's finding that he was aware of relationship between injury and employment at time of accident, he was precluded from raising issue on appeal); King v. Director, OWCP, 904 F.2d 17, 19, 23 BRBS 85, 88 (CRT) (9th Cir. 1990) (court did not need to consider Section 8(c)(17) issue where it was not raised before ALJ nor addressed by Board); Jourdan v. Equitable Equip. Co., 889 F.2d 637, 640, 23 BRBS 9, 11 (CRT) (5th Cir. 1989) (where employer did not raise responsible carrier issue in proceedings before ALJ and Board, it could not be raised before court); Goldsmith v. Director, OWCP, 838 F.2d 1079, 1081, 21 BRBS 30, 32 (CRT) (9th Cir. 1988) (where petitioner improperly raised issue of doctrine of laches for first time on appeal, court held that Board properly refused to consider it).

See also Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP, 804 F.2d 1558, 1561-62, 19 BRBS 61, 64 (CRT) (11th Cir. 1986) (where employer did not contest death benefits award before Board, it was not properly before court); Bullock v. Ingalls Shipbuilding, Inc., 27 BRBS 90, 94 (1993) (fee objections not raised below may not be addressed on appeal); Lobus v. I.T.O. Corp. of Baltimore, 24 BRBS 137, 140-41 (1990) (claimant's counsel's assertion at hearing that he was only seeking temporary partial disability precluded his raising claim for temporary total disability on appeal); Shaw v. Todd Pac. Shipyards Corp., 23 BRBS 96, 100 (1989) (where issue of commencement date of Section 8(f) liability was not raised before ALJ, Board refused to consider issue); Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262, 269 (1989) (en banc), rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990) (Board declined to address employer's specific contentions regarding substance of attorney's fee awards where objections not raised before ALJ); Fairley v. Ingalls Shipbuilding, Inc., 22 BRBS 184,

194 (1989), rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990) (where employer failed to make timely objection to attorney's fee petition before ALJ, attorney's fee award was affirmed).

See also Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 90 (1989) (where coverage issue not raised before ALJ, Board will not address it for first time on appeal); Pinnell v. Patterson Serv., 22 BRBS 61, 66 (1989), overruled in part by Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) (where employer requested assessment of costs under Section 26, Board dismissed request to extent it referred to proceedings before ALJ); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 346 (1988) (where employer did not raise issue of subsequent injury before ALJ, it was precluded from raising issue for first time on appeal); Clophus v. Amoco Prod. Co., 21 BRBS 261, 265-66 (1988) (Board refused to address employer's objections to claimant's attorney's hourly rate since issue not raised before ALJ); Raimer v. Willamette Iron & Steel Co., 21 BRBS 98, 100 (1988) (issue of ALJ's bias not preserved for appeal where claimant failed to raise issue until after adverse decision); Maria v. Del Monte/Southern Stevedore, 21 BRBS 16, 19 (1988), vac'd on recon., 22 BRBS 132 (1989) (issue of Special Fund's credit should have been raised before ALJ--Director not entitled to unilaterally raise issue and unilaterally resolve it subsequent to ALJ's award, which it did not appeal).

The Board will not award benefits on appeal based on a theory that was neither presented nor argued before the judge. Jackson v. Giant Food, Inc., 11 BRBS 186, 189-90 (1979). See U.S. Indus./Fed. Sheet Metal v. Director, OWCP, 455 U.S. 608, 612-15, 14 BRBS 631, 632-33 (1982) (case must be decided on claim for injury alleged by claimant).

There are instances in which an issue may be raised for the first time on appeal. The Board has held that an issue may be considered for the first time on appeal in cases in which a pertinent statute or regulation has been overlooked or when there is a change in the law while the case is pending on appeal and the new law might materially alter the result. Bukovi v. Albina Engine/Dillingham, 22 BRBS 97, 98 (1988). It has also held that an issue may be raised for the first time on appeal where there is a pure question of law involved and a refusal to consider it would result in a miscarriage of justice. Aurelio v. Louisiana Stevedores, 22 BRBS 418, 422 (1989), aff'd mem., 924 F.2d 1055 (5th Cir. 1991) (citing Martinez v. Matthews, 544 F.2d 1233, 1237 (5th Cir. 1976)).

The **Ninth Circuit** has also recognized exceptions to the requirement that all issues be raised below. It has held that "where a claim is fully presented before the administrative process ends, the doctrines of exhaustion and waiver are not applicable." Abel v. Director, OWCP, 932 F.2d 819, 821, 24 BRBS 130, 133 (CRT) (9th Cir. 1991) (jurisdiction existed to hear appeal where petitioner failed to raise his arguments below, since the Board, after hearing before ALJ, entertained and decided petitioner's claim on the merits).

The court recognized another exception in Smiley v. Director, OWCP, 973 F.2d 1463, 1466, 26 BRBS 37, 41 (CRT) (9th Cir. 1992), substituted opinion, 984 F.2d 278 (9th Cir. 1993), where

an issue of law existed, of which both the administrative law judge and the Board were aware, and which the Board specifically promised to consider. The court concluded that it was able to consider the issue despite its being raised for the first time on appeal.

In two decisions reversed by the **Ninth Circuit**, the Board raised the issue of LHWCA jurisdiction *sua sponte*. The Board reasoned that, even though not raised below, subject matter jurisdiction of the judge and the Board cannot be waived. Perkins v. Marine Terminals Corp., 12 BRBS 219, 221 (1980), *rev'd*, 673 F.2d 1097, 14 BRBS 771 (**9th Cir.** 1982); Ramos v. Universal Dredging Corp., 10 BRBS 368, 373 (1979), *rev'd*, 653 F.2d 1353, 13 BRBS 689 (**9th Cir.** 1981). In rejecting the Board's reasoning, the court held that subject matter jurisdiction was not lacking under the facts of those cases. Perkins v. Marine Terminals Corp., 673 F.2d at 1100-02, 14 BRBS at 773-74; Ramos v. Universal Dredging Corp., 653 F.2d at 1355, 13 BRBS at 690.

The Director may appeal to the Board when an erroneous legal or factual determination is alleged, even though he did not participate in the proceedings before the judge. Bukovi, 22 BRBS at 98; Hitt v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 353, 354 (1984). In such an appeal, the Director may only challenge the judge's analysis of the existing evidence and may not raise any new issues which would require new fact-finding by the administrative law judge. Hitt, 16 BRBS at 354; Outland v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 552, 554 (1981). See also Puccetti v. Ceres Gulf, 24 BRBS 25, 28-29 (1990) (Board permitted Director to raise issue of maximum compensation rate for first time on appeal where stipulations potentially violate Section 15(b) and issue of proper maximum compensation rate is legal issue, which may be raised at any time).

21.2.3 Inadequate Briefing

A party seeking review of a decision must submit a petition for review to the Board that specifies the petitioner's contentions. 20 C.F.R. § 802.210. See Stark v. Washington Star Co., 833 F.2d 1025, 1030, 20 BRBS 40, 47-48 (CRT) (**D.C. Cir.** 1987) (doubtful that claimant adequately preserved alleged error for appeal where, in petition for review to Board, he did not identify treatment of discovery motion as issue and referred to it only in most offhand way).

The reasoning behind this specificity requirement is that "[t]he circumscribed scope of the Board's review authority necessarily requires a party challenging the decision below to address that decision and demonstrate why substantial evidence does not support the result reached." Carnegie v. C & P Tel. Co., 19 BRBS 57, 58 (1986). See Shoemaker v. Schiavone & Sons, Inc., 20 BRBS 166 (1988) (employer failed to meet threshold requirements for Board's scope of review where it failed to explain its contention that Section 33(g) bars medicals, or to cite any case or law in support of its statement).

The Board will not address issues appealed but inadequately briefed unless the party seeking review is not represented by counsel or the alleged errors are basic to the proper administration of the LHWCA or to the rendering of justice in the individual case. Collins v. Oceanic Butler, Inc., 23

BRBS 227, 229 (1990) (where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review--must **specifically** state issues to be considered by the Board); Pendleton v. General Constr. Co., 9 BRBS 755, 759-60 (1978) (Board refused to address issue where employer/carrier failed to argue or brief applicable evidence and law); Sweitzer v. Lockheed Shipbuilding & Constr. Co., 8 BRBS 257, 260 (1978) (Board declined to consider employer's unbriefed contentions that claimant did not satisfy requirements of Sections 12 and 13); Shelton v. Washington Post Co., 7 BRBS 54, 57 (1977) (only where alleged error is basic to proper administration of LHWCA or to rendering of justice in individual case will Board consider alleged errors which have not been adequately briefed).

See Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 325 (1983) (issues raised, but not briefed); Frisco v. Perini Corp., Marine Div., 14 BRBS 798, 800 (1981). See also Prater v. Upper Beaver Coal Co., 6 BLR 1-448, 1-449 (1983) (where claimant does not identify error by ALJ but merely contends certain evidence establishes entitlement, Board does not review evidence and affirms ALJ); Fish v. Director, OWCP, 6 BLR 1-107, 1-109 (1983) (brief inadequate which makes general statements without identifying errors).

21.2.4 Issues Raised in Response Brief

The Board generally will not consider new issues raised by the respondent without the benefit of a cross-appeal, if the new assertions challenge the final decision of the ALJ. Felt v. San Pedro Tomco, 25 BRBS 362, 366 (1992); Briscoe v. American Cyanamid Corp., 22 BRBS 389, 392 (1989) (where employer failed to file cross-appeal of ALJ's Section 33(g) finding, Board declined to consider employer's arguments on that issue).

The Board will entertain new issues so raised only if they are offered in support of the administrative law judge's final order, and are not advanced either to alter, expand or diminish the rights of any party under the decision on review. Felt, 25 BRBS at 366; Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 193 (1984) (Board declines to consider Sections 12 and 13 raised in response brief). See Boies v. National Steel & Shipbuilding Co., 7 BRBS 81, 85 (1978).

21.2.5 Interlocutory Appeals

The Board has adopted the established federal practice of forbidding piecemeal appeals on interlocutory matters except where they are specifically authorized by Congress. Arjona v. Interport Maintenance, 24 BRBS 222, 223 (1991) (ALJ's order was not final and appealable where it did not purport to resolve controversy but instead remanded case to district director for further proceedings); Estate of Cowart v. Nicklos Drilling Co., 23 BRBS 42, 48 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990), aff'd en banc, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991), aff'd, 505 U.S. 469 (1992) (where ALJ did not issue final order on award of attorney's fee, Board could not address issue); Hudnall v. Jacksonville Shipyards, 17 BRBS 174, 175-76 (1985); Holmes & Narver, Inc. v. Christian, 1 BRBS 85, 87 (1974).

See also Green v. Ingalls Shipbuilding, Inc., 29 BRBS 81 (1995) (where ALJ did not resolve controversy between the parties, but instead denied employer's motion for summary judgment and remanded the case to the district director for further proceedings, the ALJ's Decision and Order was not final and no exception to the rule against taking appeals of interlocutory orders applied).

The Board has on occasion exercised its discretion, however, and allowed an interlocutory appeal based on what it viewed as its responsibility to properly direct the course of an adjudicatory process. Baroumes v. Eagle Marine Services, 23 BRBS 80 (1988); Murphy v. Honeywell, Inc., 8 BRBS 178, 180 (1978). See Niazy v. Capital Hilton Hotel, 19 BRBS 266, 268-69 (1987) (allegation that intervenor-petitioner effectively denied opportunity to respond to employer's motions to compel constituted extraordinary circumstances which allowed for interlocutory review of ALJ's discovery orders); Tignor v. Newport News Shipbuilding & Dry Dock Co., 29 BRBS 135 (1995) (interlocutory review of a discovery order is allowed only when extraordinary circumstances are present); Percoats v. Marine Terminals Corp., 15 BRBS 151, 152 (1982) (accepting interlocutory appeal of district director's order denying depositions). See also Silva v. Massman Constr. Co., 9 BRBS 932, 934 (1979) (ALJ's decision is not interlocutory and thus ripe for appeal); Martin v. Kaiser Steel Corp., 9 BRBS 903, 905 (1979).

Generally, orders are not appealable if they do not finally resolve all issues in a case. Review of such orders is permissible, however, in that "small class [of cases] which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Co., 337 U.S. 541, 546 (1949) (the **collateral order doctrine**). Under the collateral order doctrine, review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); see, e.g., Butler v. Ingalls Shipbuilding, Inc., 28 BRBS 114 (1994) (order compelling discovery is interlocutory and not appealable as it does not resolve an "important issue which is completely separate from the merits of the action" and it may be reviewed on appeal from a final judgment).

21.2.6 Standing

Section 21(b)(3) of the LHWCA provides that the Board may "determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof." 33 U.S.C. § 921(b)(3). See 20 C.F.R. §§ 802.202(a) ("Any party...may appear before and/or submit written argument to the Board").

The Board has held that this language and Section 802.201(a) of the regulations permit automatic Director standing in any case **before the Board** and that the Director has standing to appeal settlement agreements to ensure proper administration of the settlement provisions of the LHWCA. White v. Ingalls Shipbuilding Div./Litton Sys., 12 BRBS 905, 908 (1980), aff'd in part.

part, 681 F.2d 275, 14 BRBS 988 (**5th Cir.** 1982), overruled on other grounds by *Newpark Shipbuilding & Repair v. Roundtree*, 723 F.2d 399, 16 BRBS 34 (CRT), cert. denied, 469 U.S. 818 (1984) (Director has standing to participate in the appeal of a [Board] decision [before the Court of Appeals]”); *Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates)*, 519 U.S. 248 (1997) (**United States Supreme Court** held that the Director may appear before the court of appeals, not as a **petitioner** seeking review, but as a **respondent**).

See also *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 302-05, 15 BRBS 62, 65-67 (CRT) (1983) (as a party respondent before **Second Circuit**, Director entitled to petition for writ of certiorari in case involving scope of coverage under LHWCA); *O’Berry v. Jacksonville Shipyards*, 21 BRBS 355, 359 (1988), overruled in part by *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (Director, as party-in-interest, had standing to raise issue of claimant’s entitlement to benefits for earlier claim). Specifically, section 802.201(a) states that “[t]he Director, OWCP...shall [under certain circumstances] be considered a party adversely affected” for purposes of initiating appeal to the Board. 20 C.F.R. § 802.201(a).

But see *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 115 S.Ct. 1278 (1995) (**Supreme Court** held that the Director of the OWCP will ordinarily **not** have standing to appeal a final decision of the Board, since only a person adversely affected can seek appellate review).

[ED. NOTE: The Yates Court distinguished Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) from Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997) by arguing that Newport News is relevant only to the question of the Director’s standing as a petitioner to the Court of Appeals, and not as a respondent. Thus, the Court held in Yates that the Director may appear before the Court of Appeals as a respondent, as this issue was not addressed by Newport News. Additionally, the Court in Yates stated that the “Director, even as respondent, is free to argue on behalf of the petitioner.” Unfortunately, the Court in Yates may have confused the issue of standing by the Director before the Court of Appeals to an even greater degree than it was before.]

The Director may generally appeal to the Board whenever an erroneous legal or factual determination is alleged. *Capers v. Youghiogeny & Ohio Coal Co.*, 6 BLR 1-1234, 1-1237 n.4 (1984); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353, 354 (1984). Moreover, the Director has standing to appeal an award under Section 8(f) regardless of his participation before the judge. *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79, 81 (1987). In such cases, the Director has a legitimate interest in protecting the Special Fund against undue distribution. *Powell v. Brady-Hamilton Stevedore Co.*, 17 BRBS 1, 2 (1984).

21.2.7 Substantial Question of Law or Fact

The Board is authorized to decide appeals raising a substantial issue of law or fact, pursuant to Section 21(b)(3) of the LHWCA. 33 U.S.C. § 921(b)(3); Potomac Iron Works v. Love, 673 F.2d 537, 538, 14 BRBS 777, 778 (**D.C. Cir.** 1982), rev'g and remanding BRB No. 81-170 (May 18, 1981) (**D.C. Circuit** reversed Board's decision that no substantial issue of law or fact was presented in case which involved appeal of award of \$144 in costs for travel to informal conference by out-of-state claimant); Bray v. Director, OWCP, 664 F.2d 1045, 1047-48, 14 BRBS 341, 342-44 (**5th Cir.** 1981) (distinction between jurisdiction under Section 21 and enforcement proceedings under Section 18--Board had jurisdiction to decide appeal concerning interpretation of language in compensation order issued by district director as to amount of compensation due because proceeding did not involve enforcement, but rather raised questions of legal interpretation); Jennings v. Sea-Land Serv., 23 BRBS 12, 17-18, on recon., vac'd, 23 BRBS 312 (1989) (issue of whether Section 14(f) assessment, already paid, is question of law which Board may properly hear and decide on appeal); Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 81 (1989); Powell v. Brady-Hamilton Stevedore Co., 17 BRBS 1, 2 (1984) (Director had legitimate interest in protecting Special Fund against undue distribution, however slight).

Cf. Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1384, 17 BRBS 135, 139 (CRT) (**9th Cir.** 1985) (Board lacks jurisdiction to decide appeals of supplementary orders assessing additional compensation under Section 14(f) as this issue involves enforcement under Section 18); Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT) (**5th Cir.** 1983).

21.2.8 Direct Appeals from District Director to Board

Generally, when entitlement to compensation benefits under the LHWCA is in dispute, the controversy is referred from the district director to the Office of Administrative Law Judges for formal resolution. See generally Maine v. Brady-Hamilton Co., 18 BRBS 129 (1986) (en banc).

The Board has held, however, that in certain situations, including disputes over attorney's fee awards before the district director, the dispute is typically not within the adjudicatory power of the administrative law judge and therefore should be appealed directly to the Board. 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). Cf. Pearce v. Director, OWCP, 647 F.2d 716 (**7th 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. For the majority view opposing the **Seventh Circuit** see Healy Tibbitts Builders, Inc. v. Cabral, 201 F.3d 1090, 33 BRBS 209(CRT) (**9th Cir.** 2000), cert. denied, 531 U.S. 956 (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.).

The Board has enunciated **three basic principles with regard to whether a district director's action should be reviewed by an administrative law judge or by the Board:**

- (1) The review of discretionary acts of the district director must be undertaken by the Board. Mazzella v. United Terminals, 8 BRBS 755, 758, aff'd on recon., 9 BRBS 191 (1978);
- (2) The proper route for appeal of the district director's determination of strictly legal issues is directly to the Board. Tupper v. Teledyne Movable Offshore, 13 BRBS 614, 615-16 n.1 (1981); Lonergan v. Ira S. Bushey & Sons, Inc., 11 BRBS 345, 346 (1979);
- (3) When a dispute involves questions of fact, the case must be referred to the administrative law judge. Anweiler v. Avondale Shipyards, 21 BRBS 271, 271-72 (1988) (where review of assistant district director's assessment of Section 30(e) penalty would involve rendering factual determinations, jurisdiction of case properly lay with ALJ—Board remanded case to assistant district director for referral to OALJ).

The district director's attorney's fee determination involving the adequacy of a fee award or whether the employer is liable for the fee should be appealed directly to the Board, unless a disputed question of fact is at issue. Glenn v. Tampa Ship Repair & Dry Dock, 18 BRBS 205, 207 (1986) (overruling language of Jarrell v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 423 (1979) and Taylor v. Cactus Int'l, 13 BRBS 458 (1981), to the extent they are inconsistent).

The **Seventh Circuit** has reversed a decision by the Board which reviewed a district director's denial of commutation under Section 14(j) (since repealed by the 1984 Amendments). Pearce v. Director, OWCP, 647 F.2d 716, 13 BRBS 241 (**7th Cir.** 1981), rev'g 5 BRBS 573 (1977). The court stated that the Board should have refused to hear the appeal where there was no hearing record to review, since it had no authority to consider the evidence gathered by the district director, and should not have substituted its views for those required to have been set forth by an administrative law judge. Id. at 725, 13 BRBS at 254.

The Board has distinguished Pearce with regard to attorney's fee awards, since there is normally no need for a hearing record and the administrative law judge has no role if no factual issues are raised. Glenn, 18 BRBS at 207 n.1. The Board stated that in cases raising only legal issues or discretionary acts of the district director, the Board's jurisdiction is invoked because a substantial question of law is raised under Section 21(b)(3). The Board has declined to follow Pearce. Tupper, 13 BRBS at 615 n.1.

With regard to penalties assessed pursuant to Section 14(f), the Board initially held that, unless a factual dispute exists, direct appeal to the Board is appropriate. Patterson v. Tideland's Marine Serv., 15 BRBS 65, 69 (1982), vac'd, 719 F.2d 126, 16 BRBS 10 (CRT) (**5th Cir.** 1983);

Lawson v. Atlantic & Gulf Stevedores, 9 BRBS 855, 858 (1979). The **Ninth Circuit** and the **Fifth Circuit** have held that the Board has no jurisdiction to review a district director's supplemental default order finding employers in default of their obligation to pay additional compensation owing under Section 14(f).

Section 18(a) requires that default orders must be enforced by the federal district court for the judicial district in which the employer has its principal place of business, or maintains an office, or in which the injury occurred. Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1384, 17 BRBS 135, 136 (CRT) (**9th Cir.** 1985); Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT) (**5th Cir.** 1983), rev'g 15 BRBS 65 (1982). Cf. Bray v. Director, OWCP, 664 F.2d 1045, 1048, 14 BRBS 341, 343-44 (**5th Cir.** 1981) (appeal to Board from district director's compensation order allowed, as no enforcement involved).

The Board continues to hear appeals involving Section 14(f) where no default order has been issued. Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74, 77-78 (1986), vac'd and remanded, No. 86-1199 (**D.C. Cir.** 1987) (employer paid all amounts due, but appealed Section 14(f) assessment; issue of law properly before Board).

21.2.9 Scope of Review

The Board's review of an administrative law judge's decision pursuant to LHWCA is limited to consideration of evidence in the formal case record. 33 U.S.C. § 921(b)(3); Armor v. Maryland Shipbuilding & Dry Dock Co., 22 BRBS 316, 318 (1989); Williams v. Hunt Shipyards, Geosource, Inc., 17 BRBS 32, 34 (1985). Only the record developed before the judge may be considered on appeal; no new evidence can be considered, nor can the Board conduct a *de novo* review. Wynn v. Clevenger Corp., 21 BRBS 290, 293 (1988); Hansley v. Bethlehem Steel Corp., 9 BRBS 498.2, 499 (1978).

The Board's scope of review is limited by the substantial evidence standard. See Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144, 25 BRBS 85, 87 (CRT) (**9th Cir.** 1991); Newport News Shipbuilding & Dry Dock Co. v. Parker, 935 F.2d 20, 27, 24 BRBS 98, 113-14 (CRT) (**4th Cir.** 1991) (Board did not exceed its scope of review by substituting its Section 13(a) finding for ALJ's finding, where ALJ's determination was not supported by substantial evidence); Newport News Shipbuilding & Dry Dock Co. v. Loxley, 934 F.2d 511, 514, 24 BRBS 175, 179-80 (CRT) (**4th Cir.** 1991), cert. denied, 504 U.S. 910 (1992) (Board exceeded its review powers by disregarding ALJ's findings of fact, which were supported by substantial evidence); Penrod Drilling Co. v. Johnson, 905 F.2d 84, 87, 23 BRBS 108, 112 (CRT) (**5th Cir.** 1990); Kendall v. Director, OWCP, 806 F.2d 257, 19 BRBS 54, 56 (CRT) (**4th Cir.** 1986); Presley v. Tinsley Maintenance Serv., 529 F.2d 433, 435-36, 3 BRBS 398, 399 (**5th Cir.** 1976).

"**Substantial evidence**" has been defined as "more than a mere scintilla," or that quantum of evidence that a "reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951);

Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1145, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); Abosso v. D.C. Transit Sys., 7 BRBS 47, 50 (1977); Avignone Freres Inc. v. Cardillo, 117 F.2d 385, 386 (D.C. Cir. 1940).

The Board must affirm a decision if the findings of the administrative law judge are supported by substantial evidence in the record considered as a whole, if they are rational, and if the decision is in accordance with law. Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 467 (1968); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 361 (1965); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 974 (1947); see also Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419 (9th Cir. 1995) (Board may not substitute its views for that of an ALJ, but instead must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial evidence).

Questions of witness credibility are for the judge, as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses. Mijangos v. Avondale Shipyards, 948 F.2d 941, 945, 25 BRBS 78, 81 (CRT) (5th Cir. 1991) (Board exceeded its statutorily-defined powers of review when it impermissibly reweighed evidence and made its own credibility determinations); Calbeck v. Strachan Shipping Co., 306 F.2d 693, 695 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963); John W. McGrath Corp. v. Hughes, 289 F.2d 403, 405 (2d Cir. 1961).

It is solely within the judge's discretion to accept or reject all or any part of any testimony, according to his judgment. Perini Corp. v. Heyde, 306 F. Supp. 1321, 1327 (D.R.I. 1969). The Board will not interfere with credibility determinations, unless they are "inherently incredible or patently unreasonable." Cordero v. Triple A Mach. Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), aff'g 4 BRBS 284 (1976), cert. denied, 440 U.S. 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13, 16 (1978). See Roberson v. Bethlehem Steel Corp., 8 BRBS 775, 777 (1978), aff'd sub nom. Director, OWCP v. Bethlehem Steel Corp., 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980) (Board may only inquire into existence of evidence to support findings). See Mijangos, 948 F.2d at 944-45, 25 BRBS at 81 (choice between reasonable inferences is left to ALJ and may not be disturbed if it is supported by evidence).

In reviewing findings of fact, the Board may not reweigh the evidence, but may only inquire into the existence of evidence to support the findings. Mijangos, 948 F.2d at 944-45, 25 BRBS at 80-81; South Chicago Coal & Dock Co. v. Bassett, 104 F.2d 522, 525 (7th Cir. 1939), aff'd, 309 U.S. 251 (1940), overruled by McDermott Int'l v. Wilander, 498 U.S. 337 (1991); Miffleton v. Briggs Ice Cream Co., 12 BRBS 445, 447 (1980), aff'd mem., 659 F.2d 252 (D.C. Cir. June 12, 1981). **Recently the Fourth Circuit took the Board to task for making a determination that the circuit court opined the ALJ had not done:**

Whatever its powers of 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.

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., (Dillard), 230 F.3d 126 (4th Cir. 2000).

The Board is not bound to accept an ultimate finding or inference, however, if the decision discloses that it was reached in an invalid manner. Howell v. Einbinder, 350 F.2d 442, 444 (**D.C. Cir.** 1965).

The Board is not required to accept the trier-of-fact's decision when it is unable to conscientiously conclude that the decision is supported by substantial evidence. Goins v. Noble Drilling Corp., 397 F.2d 392, 394 (**5th Cir.** 1968). A finding lacking the support of substantial evidence is not in accordance with law and therefore must be set aside. Director, OWCP v. General Dynamics Corp., 787 F.2d 723, 724-25, 18 BRBS 88, 90-91 (CRT) (**1st Cir.** 1986); Southern Stevedoring Co. v. Voris, 190 F.2d 275, 278 (**5th Cir.** 1951). See Carper v. Dominion Cassion Corp., 14 BRBS 186, 189 (1981), rev'd mem., 679 F.2d 260 (**D.C. Cir.** 1982) (since ALJ's reliance on doctor's report is unreasonable, the finding is not supported by substantial evidence).

The Board may not make new findings of fact where the judge has failed to address an issue. Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, 293, 24 BRBS 75, 78 (CRT) (**D.C. Cir.** 1990) (in reaching unaddressed question of causation, Board exceeded its scope of review); Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701, 14 BRBS 538, 543 (**2d Cir.** 1982), rev'g 14 BRBS 1 (1981) (Board erred in finding that claimant's heart attack was not work-related, since Board engaged in impermissible fact-finding to supplement deficient ALJ decision). Accord Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110, 115, 14 BRBS 716, 725-26 (**4th Cir.** 1982), rev'g 13 BRBS 580 (1981). Cf. Prolerized New England Co. v. Benefits Review Bd., 637 F.2d 30, 36, 12 BRBS 808, 814 (**1st Cir.** 1980), cert. denied, 452 U.S. 938 (1981) (although Board's holding on status was based on certain fact-finding, such fact-finding was permissible since record was clear on these points). The Board can take cognizance of uncontradicted evidence. Stancil v. Massey, 436 F.2d 274, 278 (**D.C. Cir.** 1970).

In its reviewing capacity, the Board functions as a "quasi-judicial body empowered to resolve legal issues, not to engage in the overall administration of the LHWCA through promulgation of rules." Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306, 1314 n.7, 10 BRBS 852, 857-58 n.7 (**5th Cir.** 1979).

21.2.10 Stay of Payments

The last clause of Section 21(b)(3) of the LHWCA provides that compensation required by an award must be paid even while a case is on appeal, unless a stay of payments is granted by the Board. 33 U.S.C. § 921(b)(3). A stay of payments shall not be issued unless the employer/carrier can establish **irreparable injury**. Meehan Seaway Service Co. v. Director, OWCP, 4 F.3d 633, 27 BRBS 108 (CRT) (**8th Cir.** 1993) (to stay must show payment would cause extreme financial hardship to employer/carrier; traditional irreparable injury standard is constitutional even when ALJ's award is challenged on due process grounds); Edwards v. Director, OWCP, 932 F.2d 1325, 1330, 24 BRBS 146, 153 (CRT) (**9th Cir.** 1991) (Board's authority to issue stays only upon showing of irreparable injury does not expand merely because employer raises due process challenge); Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 1192, 22 BRBS 52, 56 (CRT) (**5th Cir.** 1989) (neither employer nor carrier even attempted to allege, much less prove, irreparable injury from payment to claimant of accrued benefits).

See also Smith v. Aerojet Gen'l Shipyards, 16 BRBS 49, 55 (1983) (Board rejected employer's assertion that it is unconstitutional to require it to pay compensation benefits while an appeal is pending-since employer had been afforded full hearing before ALJ on issue of liability, employer had been afforded due process).

An employer who wishes to stop paying compensation once an award is issued, must use the administrative procedural process rather than unilaterally stop compensation. Vincent v. Consolidated Operating Co., 17 F.3d 782 (**5th Cir.** 1994); Bunol v. George Engine Co., 996 F.2d 67, 69 (**5th Cir.** 1993); In re Compensation Under the Longshore and Harbor Workers' Compensation Act, 889 F.2d 626, 631-32 (**5th Cir.** 1989), cert. denied, 494 U.S. 1082 (1990).

In granting a stay, the Board once indicated that it need not make a specific finding of irreparable damage based on evidence submitted to the Board. Rivere v. Raymond Fabricator, Inc., 18 BRBS 6, 9 (1985) (invalidating 20 C.F.R. § 802.105 as contrary to congressional intent). Rather, the Board exercises its discretionary authority to weigh the relative hardships in each case. Id. at 9. The Board, however, is again applying the traditional standard used by the **Fifth and Ninth Circuits** in Rivere and Edwards. See Meehan, 27 BRBS at 111 (CRT).

21.2.11 Remand by Board

Section 21(b)(4) of the LHWCA provides:

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

33 U.S.C. § 921(b)(4). See 20 C.F.R. §§ 802.404, 802.405.

The regulations require that, on remand, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board. 20 C.F.R. § 802.405(a). It is error for a judge to fail to follow the Board's directive. Obert v. John T. Clark & Son of Maryland, 23 BRBS 157, 159 (1990) (where ALJ reconsidered claimant's entitlement to Section 20(a) presumption on remand, he erred by failing to follow Board's directive since Board's earlier decision specifically stated that claimant was entitled to presumption); Randolph v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 443, 446 (1989) (ALJ erred in issuing Decision on Remand without following directive set forth in Board's Decision and Order).

The Board has, in some instances, **remanded a case to a judge different** from the one who originally heard the case. Wade v. Gulf Stevedore Corp., 8 BRBS 335, 342, on recon., 8 BRBS 627 (1978) (directed that case be assigned to ALJ who had not previously considered injury alleged by claimant). See also Kendall v. Bethlehem Steel Corp., 3 BRBS 255, 257-58 (1976), aff'd, 551 F.2d 307 (4th Cir.), cert. denied, 434 U.S. 829 (1977) (determinations that require evaluation of credibility of witnesses' testimony could be made by second ALJ when judge who heard live testimony had retired).

[ED. NOTE: The Board also has the appellate authority to direct that, on remand, a different administrative law judge hear the case when it is necessary to preserve the appearance of justice and act to preserve in the public mind the image of absolute impartiality and fairness. See Cochran v. Consolidation Coal Co., (BRB No. 94-0478)(Aug. 31, 1995)(Unpublished), for a thorough discussion in a Black Lung Act decision by the Board on this issue.]

A rehearing of the evidence or a reopening of the record is generally not required when the Board remands a case to the judge, where the parties were afforded ample opportunity prior to the issuance of the original decision to develop the evidence which they seek to have admitted after remand. See McDougall v. E.P. Paup Co., 21 BRBS 204, 212 n.5 (1988) (ALJ limited to consideration of evidence in formal case record); Dionisopoulos v. Pete Pappas & Sons, 16 BRBS 93, 97 (1984).

But see Force v. Director, OWCP, 938 F.2d 981, 986, 25 BRBS 13, 20-21 (CRT) (9th Cir. 1991) (case remanded to ALJ for employer to have opportunity to submit evidence to meet its burden of proof regarding apportionment of settlement that covers multiple parties); Ramirez v. Southern Stevedores, 25 BRBS 260, 264-65 (1992) (case remanded for ALJ to permit employer to submit expert's testimony regarding suitable alternate employment, where ALJ refused to allow post-hearing deposition by employer's vocational expert but held record open for post-hearing deposition of claimant's treating physician); Dupre v. Cape Romain Contractors, 23 BRBS 86, 95 (1989) (where no fee petition served on employer, Board vacated ALJ's award of attorney's fees and costs and remanded case to ALJ for reconsideration of issue, so that employer may be given reasonable opportunity to respond to claimant's fee petition before new award issued); Swain v. Bath Iron Works Corp., 14 BRBS 657, 663 (1982) (on remand, ALJ may reopen record if necessary); Bakke v. Duncanson-Harrelson Co., 13 BRBS 276, 278-79 (1980) (ALJ's convening of second hearing not abuse of discretion because ALJ charged with responsibility to inquire fully into matters at issue, 20

C.F.R. § 702.338, and has wide discretion in manner in which proceedings are conducted. 20 C.F.R. § 702.339.).

When the ALJ is unavailable, different rules apply. See Gamble-Skogmo, Inc. v. Federal Trade Comm'n, 211 F.2d 106, 115 (8th Cir. 1954). A judge on remand may not rely on the record developed before another judge where **credibility** determinations are at issue **and** a party requests a *de novo* hearing. Creasy v. J.W. Bateson Co., 14 BRBS 434, 435 (1981).

In order to preserve the issue for appeal, a party must object to a substitute judge's failure to conduct a new evidentiary hearing at the fact-finding level. Pigrenet v. Boland Marine & Mfg. Co., 656 F.2d 1091, 1095, 13 BRBS 843, 845-46 (5th Cir. 1981).

[ED. NOTE: *It is important to note that only final orders of the Board are appealable. See, e.g., Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir. 1984) (en banc). Additionally, a Board order remanding a claim to an ALJ for further proceedings is not an appealable final order. Director, OWCP v. Bath Iron Works Corp., 853 F.2d 11 (1st Cir. 1988); see also Tideland Welding Service v. Director, OWCP, 817 F.2d 1211 (5th Cir. 1987).]

21.2.12 Law of the Case

When a case is before the Board for a second time, and the same issue is raised in the second appeal, the Board usually holds that its prior decision is “the law of the case” and that it will not re-examine that issue. Wayland v. Moore Dry Dock, 25 BRBS 53, 58 (1991) (Board declined to address employer's contention regarding extent of disability issue as it was resolved in Board's first decision); Armor v. Maryland Shipbuilding & Dry Dock Co., 22 BRBS 316, 319 (1989) (Board's earlier holding that written offer of compensation as settlement of claim without award is valid tender of compensation pursuant to Section 28(b), constituted law of the case); Brocklehurst v. Giant Food, 22 BRBS 256, 258 (1989) (where issue of D.C. Workmen's Compensation Act jurisdiction resolved in prior appeal, earlier finding constituted law of case); Dean v. Marine Terminals Corp., 15 BRBS 394, 396-97 (1983); Whitlock v. Lockheed Shipbuilding & Constr. Co., 15 BRBS 332, 334 (1983); Presley v. Tinsley Maintenance Serv., 15 BRBS 245, 249 (1983). See United States v. U.S. Smelting, Refining & Mining Co., 339 U.S. 186, 198 (1950).

The doctrine states that “determinations rendered by a tribunal in a given case are generally viewed as binding on that tribunal if it subsequently rehears the case.” Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77, 80 (1988).

The Board has recognized three exceptions to the law of the case doctrine:

- (1) there has been a change in the underlying factual situation;
- (2) intervening controlling authority demonstrates the initial decision was erroneous; or

- (3) the first decision was clearly erroneous and to let it stand would produce manifest injustice.

Williams v. Healy-Ball-Greenfield, 22 BRBS 234, 237 (1989).

21.2.13 Retroactivity

21.2.13.1 Case Law

The **United States Supreme Court** recently announced a new standard for the retroactivity of case law. In Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), the **Court** stated:

When this Court applies a rule of federal law to the parties before it, the rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97.

21.2.13.2 Statutes

In applying the 1972 Amendments, procedural provisions, such as the statute of limitations, see Todd Shipyards Corp. v. Allan, 666 F.2d 399, 401, 14 BRBS 427, 429 (**9th Cir.** 1982), cert. denied, 459 U.S. 1034 (1982), and repeal of benefit ceilings, see Hastings v. Earth Satellite Corp., 628 F.2d 85, 94, 14 BRBS 345, 353 (**D.C. Cir.** 1980), cert. denied, 449 U.S. 905 (1980), have been applied retroactively. Jurisdictional provisions are not applied retroactively. See Wynn v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 31, 33 (1983), overruled in part by Peterson v. General Dynamics Corp., 25 BRBS 71 (1991); Paul v. General Dynamics Corp., 16 BRBS 290, 291-92 (1984), overruled in part by Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). The 1984 Amendments specify effective dates in Section 28.

The rule is different, however, in occupational disease cases: coverage under the LHWCA must be determined with reference to the statutory law in effect at the time an injury becomes manifest, not at the time of the event which caused the injury. Peterson v. General Dynamics Corp., 25 BRBS 71, 75 (1991). See also SAIF Corp./Oregon Ship v. Johnson, 908 F.2d 1434, 23 BRBS 113 (CRT) (**9th Cir.** 1990); Railco Multi-Constr. Co. v. Gardner, 902 F.2d 71, 23 BRBS 69 (CRT) (**D.C. Cir.** 1990); Castorina v. Lykes Bros. Steamship Co., 758 F.2d 1025, 17 BRBS 72 (CRT) (**5th Cir.**), cert. denied, 474 U.S. 846 (1985); Insurance Co. of North America v. U.S. Dep't of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (**2d Cir.** 1992), cert. denied, 507 U.S. 909 (1993).

[ED. NOTE: *The factual scenario in Peterson is noteworthy. In that case, the decedent last worked for his longshore employer in 1967. Manifestation of his occupational disease did not occur until he was diagnosed with lung cancer in November 1984. The Board, noting SAIF Corp./Oregon Ship v. Johnson, held that the LHWCA, as amended in 1972 and 1984, applied. Since the decedent had worked in the employer's shipyard, he satisfied the situs requirement of Section 3(a) of the post-1972 LHWCA. The Board also found that as a model shop worker involved in submarine construction he was a maritime employee pursuant to Section 2(3). Similarly see Insurance Co. of North America v. U.S. Dep't of Labor, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), cert. denied, 507 U.S. 909 (1993) (Date of manifestation of occupational disease with long latency period, rather than date of last exposure, determines whether LHWCA as amended, applies to employee or survivor seeking benefits.). Here the **Second Circuit** found that the expanded situs requirement (after the 1972 Amendments) applies to employees and their survivors, even though the employee was exposed to the hazardous stimuli before the effective date of the Amendments, in an area that was not a covered situs before the 1972 Amendments.]*

21.3 REVIEW BY U.S. COURTS OF APPEALS

The decision of the Benefits Review Board may be appealed to the United States court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c). Specifically, section 21(c) of the LHWCA provides:

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings, may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

33 U.S.C. § 921(c).

Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996) provided in pertinent part:

...That no funds made available by this Act be used by the Secretary of Labor after September 12, 1996, to review a decision under the [LHWCA] (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the [Board] for more than 12 months except as otherwise specified herein; Provided further, That any such decision pending a review by the [Board] for more than one year shall, if not acted upon by the Board

before September 12, 1996, be considered affirmed by the [Board] on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals; Provided further, That beginning on September 13, 1996, the [Board] shall make a decision on an appeal of a decision under the [LHWCA] 933 U.S.C. 901 et seq.) not later than 1 year after the date the appeal to the [Board] was filed; however, if the [Board] fails to make a decision within the 1-year period, the decision under review shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals;....

Beginning on September 13, 1996, in any appeal to the [Board] that has been pending for one year, the petitioner may elect to maintain the proceeding before the [Board] for a period of 60 days. Such election shall be filed with the Board no later than 30 days prior to the end of the one-year period. If no decision is rendered during this 60-day period, the decision under review shall be considered affirmed by the Board on the last day of such period, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

Cong. Rec.--House (April 25, 1996).

***[ED. NOTE:** The appropriations bill enacted for Fiscal Year 1997, Pub.L. No. 104-208 (Sept. 28, 1996), unlike its predecessor, did not contain a provision for extending the time for review for an additional 60 days. See Barker v. Bath Iron Works Corp., 30 BRBS 198 (1996). H.R. Conf. Rep. No. 863, 104th Cong., 2d Sess., states in pertinent part: "Provided further, That no funds made available by this Act may be used by the Secretary of Labor to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months: Provided further, That any such decision pending a review by the Benefits Review Board for more than one year shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals..."*

Congress has continued to renew the one-year time limit for the Board to decide longshore appeals. See The Consolidated Appropriations Act, Public Law No. 106-554. However, most recently Congress has used language eliminating any possible question on calculating the time period. See Pascual v. First Marine Contractors, Inc., 32 BRBS 299 (1999) for a case which was issued during the "confusion." The present language reads: "That any such decision pending a review by the Benefits Review Board for more than 1 year shall be considered affirmed by the Benefits Review Board on the 1-year anniversary of the filing of the appeal, and shall be considered

the final order of the Board for purposes of obtaining a review in the United States courts of appeals.”]

In Director, OWCP v. Sun Ship, Inc., 150 F.3d 288 (3d Cir. 1998), the **Third Circuit** held that a Board decision issued on September 12, 1996, was a nullity under the LHWCA [and Omnibus Appropriations Bill] since the word “before” meant “before,” and not “on or before,” and proceeded to review the prior ALJ’s decision as the Board’s final order.

The Board has held that when a case is on appeal before it and a second subsequent appeal in the case is taken, the appeals will be consolidated and the one year period of review provided by Public Law No. 104-134 will commence on the date of the later appeal. Brickhouse v. Jonathan Corp., (BRB Nos. 95-1556 and 96-1278)(Dec. 20, 1996)(Unpublished).

[ED. NOTE: This consolidation of appeals for purposes of lengthening the Public Law No. 104-134 period seemingly lacks an authoritative basis in view of Congress’ specific intent to limit the time in which an appealed matter is before the Board. However, the Board has seen fit to use it on a regular basis, particularly when there is an appeal on the merits of an ALJ decision followed by an appeal of the ALJ order on attorney fees.]

In Brickhouse v. Jonathan Corp., the second appeal concerned the district director’s Order Designating Authorized Treating Physician. Prior to the issuance of a decision by the Board, Jonathan Corporation moved for dismissal of this second appeal. The Board, relying on 20 C.F.R. § 802.401(a) granted this relief with prejudice. Consequently, the only appeal pending in the matter was the employer’s original appeal of the ALJ’s Decision and Order. The Board found that it still retained jurisdiction to decide this appeal even though the Public Law No. 104-134 time period had run:

...Arguably, since employer filed a motion to withdraw the consolidated case prior to September 12, 1996, the original May 25, 1995 appeal date should apply, in which case the administrative law judge’s decision could be administratively affirmed pursuant to Public Law No. 104-134, since this appeal was more than one year old on September 12, 1996. However, in view of the consolidation of the two appeals and our order stating that employer’s second appeal extended the period of review until June 26, 1997, we will consider the issues raised by employer in its appeal of the administrative law judge’s decision.

Brickhouse, (BRB Case Nos. 95-1556 and 96-2457)(Dec. 20, 1996)(Unpublished) slip op. 3.

In Hutchins v. Bath Iron Works Corp., (BRB No. 99-331) (Jan. 28, 2000) (Unpublished), the matter on appeal was “inadvertently dismissed from the Board’s docket” on September 15, 1999. After discovering the error, the Board reinstated the appeal on the docket on January 12, 2000. The Board found that, “Under these circumstances, the one-year period was tolled during the time the case was dismissed.

***[ED. NOTE:** The Board's action in Brickhouse is unsupported in that it lacks a reasonable foundation.*

***CAUTION:** The Board's interpretation of the Public Law automatic affirmation may be suspect in another respect. Although it has generally done so in the past, the Board has indicated that it is under no obligation to send out notices referencing the Public Law and stating, e.g., that: "This decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeals." In fact, the Board may be without legal authority to issue such notices since it is forbidden to spend funds on a matter pending for longer than the time limits stated in Public Law 104-134 itself.*

*Specifically, **20 C.F.R. § 802.403 provides for the method of issuing Board decisions.** A copy of a Board decision is to be sent by certified mail "or otherwise presented to all parties to the appeal and the Director." The transmittal of the decision of the Board "shall indicate the availability of judicial review of the decision under Section 21(c) of the LHWCA when appropriate." Proof of service of Board decisions "shall be certified by the clerk of the Board or by another employer in the office of the Clerk of the Board who is authorized to certify proof of service." Parties may file a petition for review with the appropriate U. S. Court of Appeals within 60 days after a decision by the Board has been filed "pursuant to § 802.403(b), which provides for sending a copy of the Board's decision to the parties by certified mail, and to the Director." 20 C.F.R. §802.410. See Delay v. Director, OWCP, 134 F.3d 377 (**9th Cir.** 1998) (Table).*

***Query:** Has the Public Law affected the service regulation, and if so, to what extent? Is there now an onerous burden on the party filing the appeal to keep track of its own time in which to file a circuit appeal? Could this be remedied by the Board sending out notices just prior to the one year automatic affirmation running?]*

Constitutional challenges have been launched against Public Law 104-134. However, at least the **Fifth, Eleventh and Ninth Circuits** have found Public Law 104-134 to pass constitutional muster. Shell Offshore Inc. v. Director, OWCP, 122 F.3d 312, 315 (**5th Cir.** 1997), cert. denied 118 S.Ct. 1563 (1998); Donaldson v. Coastal Marine Contracting Corp., 116 F.3d 1449, 1450 (**11th Cir.** 1997); Ramey v. Stevedoring Services of America, 134 F.3d 954, 31 BRBS 206 (CRT) (**9th Cir.** 1998) (the court also noted that Public Law 104-134 should not be interpreted to preclude motions for reconsideration with the Board).

21.3.1 Proper Circuit for Appeal

Section 21(c) provides for review by the court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c).

In **cumulative injury cases**, appeal lies in any circuit where the claimant worked and was exposed to the danger, prior to manifestation of the disease. A flexible rule in selection of the forum is best when injury is the result of exposure to harmful stimuli. Hon v. Director, OWCP, 699 F.2d 441, 443-44, 5 BLR 2-43, 2-46 (**8th Cir.** 1983).

The **District of Columbia Circuit** has held that it has jurisdiction in any case arising under the DCW extension of the LHWCA, regardless of where the injury occurred. Director, OWCP v. National Van Lines, 613 F.2d 972, 979, 11 BRBS 298, 304 (**D.C. Cir.** 1979), cert. denied, 448 U.S. 907 (1980).

21.3.2 Process of Appeal

Section 21(c) provides that an appeal from a Board decision is to be made to the court of appeals **within 60 days of the filing of the Board's decision**. 33 U.S.C. § 921(c); 20 C.F.R. § 802.406. Specifically, Section 802.406 of the implementing regulations provides that a decision rendered by the Board shall become final after 60 days after the issuance of the decision unless a written petition for review praying that the order be modified or set aside is filed in the appropriate court of appeals prior to the expiration of the 60 day period. 20 C.F.R. § 802.406.

But see Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996) (providing for an **automatic affirmation** of the ALJ opinion after certain time periods have run (as opposed to an actual "filing" of a decision of the Board)).

The Board's decision is "filed" the date on which it is "issued." The period to take an appeal to the circuit court commences at that time, and not on the date the Board's decision is received by the petitioner or counsel. Kendall v. Director, OWCP, 806 F.2d 257, 19 BRBS 54, 56 (CRT) (**4th Cir.** 1986); Clay v. Director, OWCP, 748 F.2d 501, 502, 17 BRBS 16, 17 (CRT) (**8th Cir.** 1984). The statute requires filing with the appellate court within 60 days; mailing the petition for review within the time period does not equitably toll the 60 day period. Brown v. Director, OWCP, 864 F.2d 120 (**11th Cir.** 1989). The 60 day filing period for appeals is not subject to equitable tolling or estoppel. Felt v. Director, OWCP, 11 F.3d 951 (**9th Cir.** 1993); Cooley v. Director, OWCP, 895 F.2d 1301 (**11th Cir.** 1990) (where a petition is *pro se*, 60 day limit for filing petition for review is a "rigid" requirement, is jurisdictional and is not subject to equitable tolling or estoppel).

But see Nealon v. California Stevedore & Ballast Co., 996 F.2d 966, 970, 27 BRBS 31, 34 (**9th Cir.** 1993) (running of appeal period under Section 21(a) requires that order be both (1) submitted to district director, and (2) served on the parties); Director, OWCP v. Hileman, 897 F.2d 1277, 1279, 23 BRBS 52, 54 (CRT) (**4th Cir.** 1990) (because Board entertained motion for

reconsideration on its merits, the period for petitioning court of appeals for review did not begin to run until date of Board's en banc affirmance of dismissal). Inasmuch as the 60-day appeals period is jurisdictional, untimely appeals will not be heard. Clay, 748 F.2d at 503, 17 BRBS at 17 (CRT).

Several circuits have specifically ruled that the petition for review must be received within the 60 day period. Felt v. Director, OWCP, 11 F.3d 951, 27 BRBS 165 (CRT) (**9th Cir.** 1993) citing Shendock v. Director, OWCP, 893 F.2d 1458, 1462-64 (**3d Cir.** 1990) (en banc), cert. denied, 498 U.S. 826 (1990); Adkins v. Director, OWCP, 889 F.2d 1360, 1361-63 (**4th Cir.** 1989); Brown v. Director, OWCP, 864 F.2d 120, 121 (**11th Cir.** 1989) (petition was mailed one week before expiration of 60 day period, but was not received by court until 61 days after Board's order); Mussatto v. Director, OWCP, 855 F.2d 513, 514 (**8th Cir.** 1988) (per curiam) (petition was received by Board on sixtieth day and forwarded to court, but was not received by court until sixty-ninth day); Bolling v. Director, OWCP, 823 F.2d 165 (**6th Cir.** 1987) (per curiam).

In Felt, the petitioner placed his petition in the mail on the day that the 60 day filing period expired. The **Ninth Circuit** held that the petitioner erred in equating mailing with filing. While the Federal Rules of Appellate Procedure permit the filling of papers by mail, the papers will not be regarded as filed until they are received by the Clerk. Fed. R. App. P. 25 (a). Felt, 11 F.3d at 952, 27 BRBS at 167 (CRT).

The 60 day filing period is a jurisdictional requirement. Unless the petition is actually received by the court of appeals within this period, the court lacks subject-matter jurisdiction. Id.

“Equitable tolling or estoppel simply is not available when there are jurisdictional limitations.” Shendock, 893 F.2d at 1466; see also Brown, 864 F.2d at 124 (holding that equitable tolling principles do not apply to the filing period under § 921(c)). Nor does the “excusable neglect” escape hatch in Federal Rule of Appellate Procedure 4(a)(5) apply to administrative review statutes such as this one. Felt, 11 F.3d at 953, 27 BRBS 167 (CRT) citing Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 44 (**2d Cir.** 1976), aff'd on other grounds sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); see also Adkins, 889 F.2d at 1361.

21.3.3 Jurisdiction

Section 21(c) confers exclusive jurisdiction to hear a petition for review of a final order of the Board in the court of appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c); Dantes v. Western Found. Corp., 614 F.2d 299, 300-01, 11 BRBS 753, 754-55 (**1st Cir.** 1980). Cf. AFIA/CIGNA Worldwide v. Felkner, 930 F.2d 1111, 1116-17, 24 BRBS 154, 158-59 (CRT) (**5th Cir.**), cert. denied, 502 U.S. 906 (1991) (Board's decision in **Defense Base Act** case is reviewed by district court in compensation district where injury occurred); Home Indem. Co. v. Stillwell, 597 F.2d 87, 89-90 (**6th Cir.**), cert. denied, 444 U.S. 869 (1979) (same).

In general, the court of appeals can transfer a case appealed in the wrong circuit. Pearce v. Director, OWCP, 603 F.2d 763, 771, 10 BRBS 867, 873-74 (**9th Cir.** 1979), transferred, 647 F.2d

716 (7th Cir. 1981). But see Dantes, 614 F.2d at 301, 11 BRBS at 755 (“Where, as here, the court lacks jurisdiction over subject matter ... [a defect] which precludes it from acting at all, *a fortiori* a court lacks power to transfer.” Atlantic Ship Rigging Co. v. McLellan, 288 F.2d 589, 591 (3d Cir. 1961)).

21.3.4 Standard of Review

The court of appeals reviews the administrative law judge’s decision *de novo*, under the same “substantial evidence” standard which binds the Board. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144-45, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); Walsh v. Norfolk Dredging Co., 22 BRBS 67, 72 (CRT) (4th Cir. 1989) (unpub.).

The **Ninth Circuit** maintains that the Court of Appeals reviews decisions of the Board for errors of law and adherence to the substantial evidence standard, and may affirm on any basis contained in the record. Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419 (9th Cir. 1995); see also Abel v. Director, OWCP, 932 F.2d 819, 821, 24 BRBS 130, 133 (CRT) (9th Cir. 1991);

The **Fifth Circuit** and **Second Circuits** are in agreement. In Mendoza v. Marine Personnel Co., Inc., 46 F.3d 498 (5th Cir. 1995), the court held that Board decisions are reviewed for errors of law and adherence to the substantial evidence standard that governs the Board’s review of the ALJ’s factual determinations. In Crawford v. Director, OWCP, 932 F.2d 152, 154, 24 BRBS 123, 127 (CRT) (2d Cir. 1991), the court stated that they “will only consider whether the BRB made any errors of law and whether the ALJ’s findings of fact, in light of the entire record, are supported by substantial evidence.” *Id.*

See Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085, 1089, 21 BRBS 18, 21-22 (CRT) (11th Cir. 1988) (scope of review limited to examining Board’s decision for errors of law and to making certain that Board has properly adhered to its substantial evidence standard of review); Whitmore v. AFIA Worldwide Ins., 837 F.2d 513, 515, 20 BRBS 84, 87 (CRT) (D.C. Cir. 1988) (only issues court may consider are: (1) whether Board adhered to applicable scope of review; (2) whether Board committed any errors of law; and (3) whether ALJ’s findings of fact are supported by substantial evidence on record taken as a whole); Moore v. Director, OWCP, 835 F.2d 1219, 1220, 20 BRBS 68, 70 (CRT) (7th Cir. 1987) (court’s review “is limited to an evaluation of whether the ALJ’s and the Board’s decisions are rational, supported by substantial evidence and consistent with the applicable law.”).

While special deference is generally not accorded by the courts to the Board’s interpretation of the LHWCA, see Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 278 n.18, 14 BRBS 363, 367 n.18 (1980); Abel v. Director, OWCP, 932 F.2d 819, 821, 24 BRBS 130, 133 (CRT) (9th Cir. 1991); American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 730, 22 BRBS 15, 19 (CRT) (6th Cir. 1989); Director, OWCP v. Detroit Harbor Terminals, 850 F.2d 283, 287, 21 BRBS 85, 91-92 (CRT) (6th Cir. 1988), the **Third Circuit** has indicated that it will

“respect” the Board’s interpretation if it is “reasonable.” Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805, 808 (3d Cir. 1988); Sea-Land Service v. Rock, 953 F.2d 56, 59 (3d Cir. 1992). The court can affirm a decision based on reasoning different than that used by the Board or the judge. United Brands Co. v. Melson, 594 F.2d 1068, 1072 n.10, 10 BRBS 494, 497 n.10 (5th Cir. 1979).

In Aetna Casualty & Surety Co. v. Director, OWCP, 97 F.3d 815, 30 BRBS 81 (CRT) (5th Cir. 1996), the **Fifth Circuit** gave deference to the Board since the Board was interpreting its own regulations. This is in accord with the **Fifth Circuit’s** own rule that it will give the agency deference as long as the agency remains consistent in interpreting its own regulations and does not deviate from them.

The courts of appeals are divided over whether the Director’s interpretation of the LHWCA is entitled to any special deference. Several circuits have concluded that the Director, as the policy-making authority, is to be accorded deference. Director, OWCP v. General Dynamics Corp., 982 F.2d 790, 795, 26 BRBS 139, 146 (CRT) (2d Cir. 1992); Abel v. Director, OWCP, 932 F.2d 819, 821, 24 BRBS 130, 133 (CRT) (9th Cir. 1991); Newport News Shipbuilding & Dry Dock Co. v. Howard, 904 F.2d 206, 208-09, 23 BRBS 131, 133-34 (CRT) (4th Cir. 1990). The **Sixth Circuit**, however, has concluded that the Director’s interpretation is not entitled to any particular deference. American Shipbuilding Co. v. Director, OWCP, 865 F.2d 727, 730, 22 BRBS 15, 19 (CRT) (6th Cir. 1989); Director, OWCP v. Detroit Harbor Terminals, 850 F.2d 283, 287-88, 21 BRBS 85, 91-92 (CRT) (6th Cir. 1988).

However, in a non-LHWCA case, the **Supreme Court** has held that the amount of deference owed to any given interpretation by an agency “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” United States v. Mead Corp., 533 U.S. 218 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

Although the **Second Circuit** generally accords deference to the Director’s interpretation, it has concluded that the Director’s interpretation is not entitled to any special deference where the Director’s position in the litigation is adversarial. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 510, 23 BRBS 40, 47-48 (CRT) (2d Cir. 1990). Similarly, the **First Circuit** has concluded that where the Director’s position does not involve the textual interpretation either of the LHWCA or of the regulations promulgated under the LHWCA, but rather is based upon an interpretation of judge-made case law, his position is accorded no special deference because the Director has no special expertise nor Congressional grant of authority to interpret case law. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 79-80, 26 BRBS 116, 126-29 (CRT) (1st Cir. 1992).

21.3.5 Finality/Interlocutory Appeal

A court of appeals only has jurisdiction to review a “final order” of the Board. 33 U.S.C. § 921(c); Lazarus v. Chevron USA, Inc., 958 F.2d 1297, 1303-04, 25 BRBS 145, 150-51 (CRT) (5th Cir. 1992); RMK-BRJ v. Brittain, 832 F.2d 565, 566, 20 BRBS 38, 39 (CRT) (11th Cir. 1987); Tideland Welding Serv. v. Director, OWCP, 817 F.2d 1211, 1212, 20 BRBS 9, 10 (CRT) (5th Cir. 1987); Simms v. Valley Line Co., 709 F.2d 409, 413, 15 BRBS 178, 181 (CRT) (5th Cir. 1983). See also, Fourney v. Kenneth S. Apel, Commissioner of Social Security, 524 U.S. 266 (1998) (Social Security case wherein Court notes that “congressional statutes governing appealability normally proceed by defining “classes” of cases where appeals will (or will not) lie...the Statutes at issue here do not give courts the power to redefine, or to subdivide, those classes, according to whether or not they believe, in a particular case, further agency proceedings might obviate the need for an immediate appeal”).

An order is usually considered “final” when it “resolv[es] the contested matter, leaving nothing to be done except execution of the judgment.” Director, OWCP v. Bath Iron Works Corp., 853 F.2d 11, 13, 21 BRBS 130, 136 (CRT) (1st Cir. 1988). The rationale behind the finality requirement is that it prevents piecemeal adjudication and avoids delays caused by intermittent appeals. Cooper Stevedoring Co. v. Director, OWCP, 826 F.2d 1011, 1014, 20 BRBS 27, 29 (CRT) (11th Cir. 1987); Washington Metro. Area Transit Auth. v. Director, OWCP, 824 F.2d 94, 95, 20 BRBS 13, 16 (CRT) (D.C. Cir. 1987). But see Chavez v. Director, OWCP, 961 F.2d 1409, 1414, 25 BRBS 134, 141 (CRT) (9th Cir. 1992) (ripeness concerns should be given less weight in agency adjudications than in judicial ones).

Where the Board remands a case to the judge, the Board decision is not a final decision appealable to the circuit court. Director, OWCP v. Bath Iron Works Corp., 853 F.2d 11, 14, 21 BRBS 130, 137 (CRT) (1st Cir. 1988); Cooper Stevedoring Co., 826 F.2d at 1014, 20 BRBS at 30 (CRT); Washington Metro Area Transit Auth., 824 F.2d at 96; 20 BRBS at 16 (CRT); Jacksonville Shipyards v. Estate of Verderane, 729 F.2d 726, 727, 16 BRBS 72, 73 (CRT) (11th Cir. 1984), supplemental opinion, 772 F.2d 775 (11th Cir. 1985); Newpark Shipbuilding & Repair v. Roundtree, 723 F.2d 399, 406, 16 BRBS 34, 40 (CRT) (5th Cir. 1984) (en banc), overruling in part Ingalls Shipbuilding Div., Litton Sys. v. White, 681 F.2d 275, 14 BRBS 988 (5th Cir. 1982), cert. denied, 469 U.S. 818 (1984).

The **Ninth Circuit** has held that where the Board remanded a case and the administrative law judge made findings on remand pursuant to the Board’s instructions, the employer could file an appeal directly with the circuit. National Steel & Shipbuilding Co. v. Director, OWCP, 703 F.2d 417, 418, 15 BRBS 146, 147 (CRT) (9th Cir. 1983). The court reasoned that as liability and extent of damage had been determined, a summary affirmance by the Board adhering to a previous ruling would be a purely ministerial act. The court therefore had jurisdiction over the appeal. Id. at 418-19, 15 BRBS at 147-48.

For the purpose of appealing a denial or an award of compensation, the time for filing a notice of appeal is measured from the date the ALJ rules on a motion to withdraw for reconsideration. Tideland Welding Service v. Sawyer, 881 F.2d 157 (5th Cir. 1989), reh'g denied 886 F.2d 1314 (5th Cir. 1989).

An **exception to the finality requirement**, known as the “**collateral order**” doctrine has been recognized. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); Bish v. Brady-Hamilton Stevedore Co., 880 F.2d 1135, 1137, 22 BRBS 156, 157-58 (CRT) (9th Cir. 1989); Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316, 21 BRBS 150, 152 (CRT) (11th Cir. 1988).

To come within the collateral order exception, the order must:

- (1) conclusively determine the disputed question;
- (2) resolve an important issue completely separate from the merits of the action; and
- (3) be effectively unreviewable on appeal from a final judgment.

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987); Edwards v. Director, OWCP, 932 F.2d 1325, 1328-29, 24 BRBS 146, 149-51 (CRT) (9th Cir. 1991) (Board order staying compensation was appealable collateral order); Rivere v. Offshore Painting Contractors, 872 F.2d 1187, 1190, 22 BRBS 52, 54 (CRT).

21.3.6 Standing

Section 21(c) states that “[a]ny person adversely affected or aggrieved” may appeal a final order of the Board to the courts of appeals. 33 U.S.C. § 921(c); Bath Iron Works Corp. v. Coulombe, 888 F.2d 179, 180, 23 BRBS 21, 22 (CRT) (1st Cir. 1989) (where Board ruled in petitioner’s favor on award, petitioner was not an “adversely affected or aggrieved” party).

The Director of the OWCP will ordinarily not have **standing as a petitioner** to appeal a final order of the Board because only a person “adversely affected or aggrieved” may seek appellate review. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995). For the Director to show that his responsibility for employee compensation made him a “person adversely affected or aggrieved” within the meaning of the LHWCA, he is required to “establish such a clear and distinctive responsibility for employee compensation as to overcome the universal assumption that ‘person adversely affected or aggrieved’ leaves private interests (even those favored by public policy) to be litigated by private parties.” Id. Therefore, because the Director charged with providing “information and assistance” to **all** persons covered by the LHWCA, he cannot also be a person “adversely affected or aggrieved.” Id.

However, the Director **may** have standing before the Court of Appeals in his capacity as administrator of the LHWCA Special Fund established by 33 U.S.C. § 944. Where the Special Fund is not involved the Director has no pecuniary interest and has been held to lack standing to **file** an appeal.

See also Fusco v. Perini N. River Assocs., 601 F.2d 659, 670, 10 BRBS 624, 641 (**2d Cir.** 1979), vac'd and remanded on other grounds, 444 U.S. 1028 (1980), rev'd in part and reaff'd in relevant part, 622 F.2d 1111, 12 BRBS 328 (**2d Cir.** 1980), cert. denied, 449 U.S. 1131 (1981) (no standing in case involving Section 2(3) status); Director, OWCP v. Donzi Marine, 586 F.2d 377, 380-82, 9 BRBS 404, 407-09 (**5th Cir.** 1978) (distinguishing cases under Federal Coal Mine Health and Safety Act); I.T.O. Corp. of Baltimore v. Benefits Review Bd., 542 F.2d 903, 907, 4 BRBS 343, 353 (**4th Cir.** 1976) (en banc), cert. denied, 433 U.S. 908 (1977) (standing requires injury in fact, economic or otherwise).

Cf. Shahady v. Atlas Tile & Marble Co., 673 F.2d 479, 483, 14 BRBS 779, 782 (**D.C. Cir.** 1982) (“This court has previously held that the Director’s general supervisory and enforcement interest, apart from any pecuniary interest is sufficient ...”); Director, OWCP v. National Van Lines, 613 F.2d at 977 n.6, 11 BRBS at 301 n.6 (Director has standing as petitioner both because of his responsibility for administration of LHWCA and his financial interest as administrator of Special Fund).

The **United States Supreme Court** recently determined that the Director of the OWCP has **standing to participate as a respondent** in the appeal of a Board decision. Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates), 519 U.S. 248 (1997). The **Court** distinguished Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) from Yates by arguing that Newport News is relevant only to the question of the Director’s standing as a petitioner to the Court of Appeals, and not as a respondent. Thus, the Yates Court held that the Director may appear before the Court of Appeals as a respondent, as this issue was not addressed by Newport News. The **Court** rejected the argument that Section 21 of the LHWCA requires the Director to demonstrate an “adverse effect or aggrievement” in order to appear as a respondent. (“Section 21(c) of the Act, by its very terms, defines only who ‘may obtain a review of [a final order of the Board],’ 33 U.S.C. § 921(c); it does not purport to delineate who may appear in those proceedings once a proper party initiates them.”) The **Court** interpreted Federal Rule of Appellate Procedure 15(a) as conferring the right to appear as a respondent upon the Director. Specifically, Rule 15(a) “applies to ‘review of an order of an administrative agency [or] board,’” and requires that “the agency must be named respondent.” Ultimately, Yates holds that “[w]here there is already a case or controversy between parties properly before a court...that court’s jurisdiction is not extended by the inclusion of an additional party whose presence is also consistent with Article III (of the Constitution).” The **Court** finally maintains that the “**Director, even as a respondent, is free to argue on behalf of the petitioner.**” Id. (citing Director, OWCP v. Perini N. River Assoc., 459 U.S. 297, 301 (1983)).

[ED. NOTE: It is noteworthy that the court in Perini merely addressed (but did not answer) the issue of whether the Director has standing under Section 21 of the LHWCA. Perini also took as a

given (because it had been conceded in the lower court) the answer to another question: Whether the Director (as opposed to the Board) is the proper party respondent to an appeal from the Board's determination. See 459 U.S. at 304, n.13. Obviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal: The National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination. 29 U.S.C. §§ 152(1), 160(f). Indeed, it can be argued that if the Director is the proper party respondent in the court of appeals (as the regulations infer, see 20 C.F.R. §§ 802.410), then in initiating an appeal he/she would end up on both sides of the case.]

The courts in several circuits have also allowed the Director of the OWCP standing as a party respondent. In the **District of Columbia Circuit**, the Director is a party respondent in all petitions for review under Section 21(c), regardless of his participation before the Board. The Director may elect to support the Board's decision in whole or in part, urge its reversal or remain neutral. Shahady, 673 F.2d at 485, 14 BRBS at 784. See Ingalls Shipbuilding Div., Litton Sys. v. White, 681 F.2d 275, 287, 14 BRBS 988, 999-1000 (**5th Cir.** 1982), overruled by Newpark Shipbuilding & Repair v. Roundtree, 723 F.2d 399, 16 BRBS 34 (CRT) (**5th Cir.** 1984). See also Director, OWCP v. Perini N. River Assocs., 459 U.S. 297, 302-05, 15 BRBS 62, 65-67 (CRT) (1983) (Director may petition for writ of certiorari as his status as a proper respondent before **Second Circuit** is conceded).

21.4 TIMELINESS OF APPEAL

21.4.1 Appeal to Benefits Review Board

Section 21(a) of the LHWCA provides:

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

33 U.S.C. § 921(a). See 20 C.F.R. § 702.350.

One issue that has arisen under Section 21(a) is when the appeal period begins to run. The Board has concluded that the appeal period begins to run the date the decision is filed in the district director's office. Hernandez v. Bethlehem Steel Corp., 20 BRBS 49, 51 (1987); Benschoter v. Brady-Hamilton Stevedore Co., 18 BRBS 15, 16 (1985) (improper mailing of decision or order to the parties does not extend the time for filing an appeal).

The **Seventh Circuit** adopted a similar interpretation in Jeffboat, Inc. v. Mann, 875 F.2d 660, 22 BRBS 79 (CRT) (**7th Cir.** 1989), where it held that the district director's failure to mail a copy

of the judge's order to employer's counsel did not prevent the order from being "filed" and becoming effective. The court therefore found that the employer's notice of appeal from that order, filed more than 30 days after the order was filed in the district director's office, but less than 30 days after the employer's counsel learned of the judge's decision or received a copy, was untimely. *Id.* at 663-64, 22 BRBS at 81-82 (CRT). The court stated that the language of 20 C.F.R. § 702.349 does not make proper mailing a part of filing. *Id.* at 663, 22 BRBS at 81 (CRT).

[ED. NOTE: "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) (5th 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 (5th 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.".)]

The **Ninth Circuit** came to the opposite conclusion in *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31 (CRT) (9th Cir. 1993). The court concluded that the running of the appeal period under Section 21(a) requires that the order be both (1) submitted to the district director; and (2) served on the parties. *Id.* at 970, 27 BRBS at 34.

Any appeal filed after the 30-day period will be dismissed as untimely because the Board lacks jurisdiction to review it. *Insurance Co. of North America v. Gee*, 702 F.2d 411, 414, 15 BRBS 107, 113 (CRT) (2^d Cir. 1983) (failure of district director to send copy of ALJ's order to petitioner's attorney as required by regulation does not enlarge time for appeal provided by statute).

A timely motion for reconsideration of the judge's decision will toll the time for filing a notice of appeal. *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 923, 926 (1978), rev'd on other grounds, 593 F.2d 234, 10 BRBS 614 (3^d Cir. 1979); *General Dynamics Corp. v. Hines*, 1 BRBS 3, 6 (1974). See 20 C.F.R. § 802.205A(b)(1); *Kuhn v. Associated Press*, 16 BRBS 46 (1983). After the judge rules on the motion for reconsideration, a **new notice of appeal** must be filed. See 20 C.F.R. § 802.206(f). *Tideland Welding Serv. v. Sawyer*, 881 F.2d 157, 160-61, 22 BRBS 122, 125 (CRT) (5th Cir. 1989), cert. denied, 495 U.S. 904 (1990); *Aetna Casualty & Surety Co., v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81 (CRT) (5th Cir. 1996). Similarly, a claimant's motion for reconsideration of a Board summary affirmance will toll the 60-day period for filing a petition for review. *Ramey v. Stevedoring Services of America*, 134 F.3d 954 (9th Cir. 1998).

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.

If a petitioner fails to file a petition for review within 30 days after the Board acknowledges its notice of appeal, the Board will issue a show cause order requiring the petitioner to explain why the appeal should not be dismissed. See 20 C.F.R. § 802.217(b). If, due to a clerical oversight, the Board fails to issue such an order, it has entertained the appeal in the interests of justice where the claimant had assumed that her appeal had been properly filed and accepted, and was pending for two years. Franklin v. Port Allen Marine Serv., 16 BRBS 304, 306 (1984).

In Porter v. Kwajalein Services, Inc., 32 BRBS 56 (1998), the Board found that a claimant's motion before the ALJ to rescind a settlement cannot be construed as a notice of appeal to the Board as it was directed to the ALJ. The motion did not evince an intent to seek Board review, but requested further review before the ALJ. Furthermore, the Board opined that it is not in the interest of justice to consider the motion to the ALJ as notice of appeal to the Board in light of the strong policy favoring the finality of settlements.

21.4.2 Appeal to Court of Appeals

Section 21(c) of the LHWCA provides a petitioner with 60 days following the issuance of a Board order to obtain review of that order. 33 U.S.C. § 921(c); 20 C.F.R. § 802.406. See Fairchild v. Director, OWCP, 863 F.2d 17, 17, 22 BRBS 41, 42 (CRT) (**6th Cir.** 1988) (Fed. R. App. P. 15(a), governing review of agency orders, does not allow court of appeals to accept date letter or petition was received by Board as date of filing with court of appeals); Kendall v. Director, OWCP, 806 F.2d 257, 19 BRBS 54, 56 (CRT) (**4th Cir.** 1986); Clay v. Director, OWCP, 748 F.2d 501 (**8th Cir.** 1984) (60 day time period runs from date Board decision is filed and not on the date decision is received by petitioner); Brown v. Director, OWCP, 864 F.2d 120 (**11th Cir.** 1989) (statute requires filing with appellate court within 60 days; mailing petition for review within the time period does not equitably toll 60 day period); Cooley v. Director, OWCP, 895 F.2d 1301 (**11th Cir.** 1990) (where a petitioner is *pro se*, 60 day limit for filing petition for review is a "rigid" requirement, is jurisdictional and is not subject to equitable tolling or estoppel).

"Issuance" in Section 921(c) of a Decision and Order by the Board means filing with the clerk of the Board and nothing more. Stevedoring Services of America v. Director, OWCP, 29 F.3d 513 (**9th Cir.** 1994). The meaning of "filing" under Sections 921(a) and 919(e) is irrelevant. Id. Thus, the 60 day limitations period for seeking judicial review commences running on the day of filing regardless of when petitioning party receives actual notice. Id.

As with an appeal to the Board, a timely motion for reconsideration will toll the time for filing a notice of appeal with a court of appeals. Director, OWCP v. Hileman, 897 F.2d 1277, 1279,

23 BRBS 52, 54 (CRT) (4th Cir. 1990). See, however, Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996) (provides for an automatic affirmation of ALJ opinion after certain time periods have run) (discussed at Topic 21.3, supra).

21.5 COMPLIANCE

Section 21(d) of the LHWCA provides:

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

33 U.S.C. § 921(d).

In Williams v. Jones, 11 F.3d 247, 27 BRBS 142 (CRT) (1st Cir. 1993), the **First Circuit** held that a district court order directing enforcement of the compensation order pursuant to Section 21(d) must be vacated due to the lack of compliance with the service of process requirements imposed by Federal Rule of Civil Procedure 4 and Federal Rule of Civil Procedure 81(a)(6). The court ordered that the case be remanded to permit the effect of service of process upon the employer. At such time as service of process is effected, the employer should be permitted to submit to the district court for consideration any order obtained in reference to a Section 22 modification proceeding, failing which the district court may reinstate the Section 21(d) enforcement order previously entered. Id.

The **First Circuit** readily distinguished Section 21(d) from Section 18(a). Section 18(a) enforcement proceedings normally are used to enforce compensation awards which have become “effective” but are not yet “final,” that is, during the pendency of an appeal to the Board from the judge’s initial award, or from the Board to the court of appeals. See, e.g., Beach v. Noble Drilling Corp., 29 BRBS 22 (1995) (Unless a timely decision is filed with the Board, the decision becomes final within 30 days of being filed with the district director. Thus, the time for filing a notice of appeal runs from the date the decision is **filed**, not from the date of service.)

[ED. NOTE: For more on the interplay and distinctions between Sections 18 and 21(d) of the LHWCA, see Topic 18.]