TOPIC 23 EVIDENCE

23.1 ADMINISTRATIVE PROCEDURE ACT--GENERALLY

Section 23 of the LHWCA provides:

> **(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.**
>
> **(b) Hearings before a deputy commissioner or Board shall be open to the public and shall be stenographically reported, and the deputy commissioners, subject to the approval of the Secretary, are authorized to contract for the reporting of such hearings. The Secretary shall by regulation provide for the preparation of a record of the hearings and other proceedings before the deputy commissioner or Board.**

33 U.S.C. § 923.

[ED. NOTE: *For information on claim procedure, the adjudicatory process, discovery and APA formal hearing requirements, see Topic 19 generally.**]***

Section 556(e) of the Administrative Procedure Act (APA) states that the transcript of testimony and exhibits, together with all papers and requests filed in a proceeding, constitute the exclusive record for decision. See 5 U.S.C. § 556(e).

Pursuant to 20 C.F.R. § 702.338, evidence must be formally admitted into the record; a decision issued based on evidence not formally admitted violates the APA. Ross v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 224 (1984) (ALJ did not rule on objections to admission, and thus documents never became part of record).

In Williams v. Hunt Shipyards, Geosource, Inc., 17 BRBS 32 (1985), the judge erroneously decided a motion for modification on the basis of evidence which was never formally admitted into evidence. See Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986) (Board cannot consider

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

The hearing provisions of Section 556 of the APA are mirrored in Sections 23 and 27 of the LHWCA, as well as the regulations that pertain to adjudication. 20 C.F.R. §§ 702.331 to 702.351. See also Grandy v. Vinnell Corp., 14 BRBS 504 (1981) (Section 19(d) of the LHWCA incorporates APA procedures).

Section 23(a) of the LHWCA provides that the hearing officer (now administrative law judge) shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure. It also states that declarations of a deceased employee shall be sufficient to establish injury if corroborated by other evidence. See Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985). See also Rule 81(a)(6) of the Federal Rules of Civil Procedure, providing that the Federal Rules apply to proceedings for enforcement or review under the LHWCA.

[ED. NOTE: *In Director, OWCP v. Greenwich Collieries (Maher Terminals) 512* ***U.S.*** *267 (1994), the* ***Supreme Court*** *held that an injured worker claiming compensation must prove the elements of her claim by a "preponderance of the evidence." The* ***Court*** *found that the "true doubt" rule under which the claimant wins if the evidence is evenly balanced, is inconsistent with Section 7(c) of the APA as that section is applied to the LHWCA. See Topic 23.7.1, infra.****]***

Section 23(b) provides for open hearings on the record and requires that hearings be stenographically reported.

Section 27(a) grants the ALJ the authority to issue subpoenas, administer oaths, compel attendance and testimony of witnesses, production of documents, and "all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office." 33 U.S.C. §§ 923(a)(b), 927(a).

Section 27(b) pertains to district court enforcement of lawful orders issued by adjudicators under Section 27(a). See 5 U.S.C. § 556(c).

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

Section 702.338 requires parties or their representatives to attend the hearings, dictates that the judge shall inquire into all matters at issue and receive evidence pertaining thereto, and allows the ALJ to reopen the hearing for the receipt of new evidence deemed necessary. See Bingham v.

General Dynamics Corp., 14 BRBS 614 (1982); Sprague v. Bath Iron Works Corp., 11 BRBS 134 (1979), decision following remand, 13 BRBS 1083 (1981), aff'd sub nom. Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11 (CRT) (**1st Cir.** 1982) (ALJ may inquire into matters not in the record to determine whether they are relevant or subject to discovery).

An attorney's statement of the case is not evidence. Cronin v. Pro-Football, Inc., (BRB Nos. 99-1257 and 99-1257A)(Sept. 12, 2000)(Unpublished); see Johnsen v. Orfanos Contractors, Inc., 25 BRBS 329 (1992). In Johnsen, the Board reviewed an ALJ's finding that the injury at issue did not occur on navigable waters. The Board rejected the claimant's contention that the ALJ erred in finding that no evidence was presented indicating that the claimant was exposed to lead while in employer's boat, as it was supported only by the claimant's attorney's opening statement.

23.2 ADMISSION OF EVIDENCE

[ED. NOTE:** For a discussion on the use of **deposition evidence**, see infra, Topic 24.3. For a discussion on **OSHA compliance as substantial rebuttal evidence**, see infra, Topic 27.1.14.**]

Evidence must be formally admitted into the record. The adjudicative inquiry functions primarily to ascertain the rights of the parties without the constraint of common law or statutory rules of evidence or technical rules of procedure. Section 23(a); see Darnell v. Bell Helicopter Int'l, Inc., 16 BRBS 98, aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984).

The judge must fully inquire into matters that are fundamental to the disposition of the issues in a case, and must receive into evidence all relevant and material testimony and documents. Williams v. Marine Terminals Corp., 14 BRBS 728, 732 (1981); Bachich v. Seatrain Terminals of California, 9 BRBS 184 (1978); 20 C.F.R. § 702.338.

The failure to inquire into a matter which is fundamental to the disposition of the issues in the case is a violation of 20 C.F.R. § 702.338. Gray & Co. v. Highlands Ins. Co., 9 BRBS 424 (1978). Such inquiry is necessary to insure an informed decision. Sprague v. Bath Iron Works Corp., 11 BRBS 134 (1979). See also Camporeale v. Pittston Stevedoring Corp., 8 BRBS 297 (1978).

In Bachich, 9 BRBS 184 (1978), the judge erred by refusing to accept two medical reports offered by the employer at the close of the hearing. In that case, the reports were "relevant and material" to the dispute at issue in that case. Cf. Champion v. S & M Traylor Bros., 14 BRBS 251 (1981), rev'd on other grounds, 690 F.2d 285, 15 BRBS 33 (CRT) (**D.C. Cir.** 1982); Smith v. Ceres Terminal, 9 BRBS 121 (1978) (ALJ properly refused to admit evidence under the circumstances of those cases).

The standards governing the admissibility of evidence in administrative hearings are less stringent than those which govern under the Federal Rules of Civil Procedure. The ALJ is not bound by common law or statutory rules of evidence or technical or formal rules of procedure, but must conduct hearings in a manner which will best ascertain the rights of the parties. Casey v. Georgetown Univ. Med. Ctr., 31 BRBS 147 (1997). Brown v. Washington Metro. Area Transit Auth., 16 BRBS 80, 82 (1984), aff'd, 764 F.2d 926 (**D.C. Cir.** 1985) (rejecting claimant's argument that admissibility of depositions is limited by Fed. R. Civ. Proc. 32).

The judge has great discretion concerning the admission of evidence, Hughes v. Bethlehem Steel Corp., 17 BRBS 153, 155 n.1 (1985), and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. Wayland v. Moore Dry Dock, 21 BRBS 177 (1988); Champion, 14 BRBS at 255; Smith, 9 BRBS 121; see also Williams, 14 BRBS at 732-33 (within ALJ's discretion to exclude evidence offered in violation of pre-hearing order). The ALJ's rulings regarding the admissibility of evidence are reversible only if

they are arbitrary, capricious, an abuse of discretion, or not in accordance with law. See Ramirez v. Southern Stevedores, 25 BRBS 260 (1992).

A judge may allow the admission of videotape and photographic evidence if it is relevant to the extent of the claimant's alleged disability. Walker v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 101 (1979); see also Hughes v. Bethlehem Steel Corporation, 17 BRBS 153 (1985) (ALJ properly admitted transcript of videotaped interview of the deceased employee under specific language of Section 23(a) of the LHWCA). (See Surveillance Evidence at Topic 23.3, infra)

The judge may also take administrative judicial notice of facts if it is done in the proper manner. In so doing, the judge must provide the parties with "the opportunity to contradict the noticed facts with evidence to the contrary." Jordan v. James G. Davis Constr. Corp., 9 BRBS 528.9, 530 (1978).

Thus, the Board has affirmed a judge's decision to give little weight to a doctor's testimony based, in part, on the doctor's listing in the Directory of Medical Specialists. Lindsay v. Bethlehem Steel Corp., 18 BRBS 20 (1986). The Board noted that the judge did not rely solely on the Directory in discrediting the doctor; the employer submitted evidence as to the doctor's qualifications which the judge found uncertain and the judge properly concluded that the Directory was admissible under Rule 201 of the Federal Rules of Evidence, Fed. R. Evid. 201(b)(2), as a source whose accuracy cannot reasonably be questioned.

The Board in Lindsay also affirmed the judge's refusal to take administrative notice of medical textbooks submitted by employer where the judge relied instead on medical reports and testimony. The judge concluded that the doctors' evaluations were more reliable than textbooks as the doctors had personally examined the claimant.

[ED. NOTE: *In Mullins v. Betty B. Coal Co., (BRB No. 95-1149) (Case No. 90-BLA-2597) (Mar. 14, 1996), a Black Lung Act decision, the Board held that an ALJ may take notice Altmen & Weil Survey of Law Firm Economics when considering a fee petition, but nevertheless found that the decision granting an award was not reasoned because the survey was not part of the record. Will this philosophy be extended to LHWCA cases? And if extended, will it then become more broadly applied? For instance, to the AMA's American Medical Directory which gives the specialties and board certifications of physicians?****]***

A judge may draw an adverse inference against a party, concluding that where a party does not submit evidence within his control, that evidence is unfavorable. Cioffi v. Bethlehem Steel Corp., 15 BRBS 201 (1982); Hansen v. Oilfield Safety, Inc., 8 BRBS 835, aff'd on recon., 9 BRBS 490 (1978), aff'd sub nom. Oilfield Safety & Mach. Specialties, Inc. v. Harman Unlimited, Inc., 625 F.2d 1248, 14 BRBS 356 (**5th Cir.** 1980). See Lindsay, 18 BRBS 20 (any error by ALJ in drawing adverse inference is harmless).

The judge may admit at the hearing new evidence which has not previously been offered during informal proceedings. The regulations do not require that all medical evidence be completed

and presented to the district director before the case is transferred for a formal hearing. McDuffie v. Eller & Co., 10 BRBS 685 (1979) (rejecting argument that medical examination not completed before transfer to ALJ is inadmissible).

The regulations sanction adjourning the hearing and later reopening the proceedings for receipt of additional evidence. A judge may add a new party under similar procedures. The party joined in this manner is not prejudiced solely because it did not participate in the informal proceedings before the district director, where that party was afforded the opportunity to cross-examine the opponent at a second formal hearing. Bingham v. General Dynamics Corp., 14 BRBS 614 (1982).

The Board, in Parks v. Newport News Shipbuilding & Dry Dock Co., 32 BRBS 90 (1998), affirmed a judge's decision to allow a claimant to enter additional evidence after her case was completed. The employer's due process rights were not violated since the judge agreed to allow the employer the opportunity to depose the three doctors who submitted identical affidavits composed by the claimant's counsel and signed under oath by the three physicians. The employer, however, made no effort to supplement the record. The Board further noted that the evidence submitted by the claimant was material and relevant to the issue in dispute, namely whether the decedent had asbestosis.

In Ion v. Duluth, Missabe and Iron Range Railway Co.(Duluth II), 32 BRBS 268) (1998), the Board noted that an ALJ is acting in his discretion in determining that further vocational evidence went beyond the scope of rebuttal and therefore, was inadmissible.

A claimant's testimony regarding the decedent's level of financial support constitutes record evidence of the decedent's support and there is no requirement under the LHWCA nor Section 152 of the Tax Code that the claimant further substantiate her testimony with documentation (so long as the testimony does not lack credibility). Angelle v. Steen Production Service, Inc., 34 BRBS 157 (2000).

23.3 SURVEILLANCE EVIDENCE

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that all information that is relevant to a pending controversy should be disclosed unless it is privileged or enjoys immunity. The majority of federal cases construing the scope of immunity for trial preparation materials hold that surveillance evidence must be disclosed. See, e.g., Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505 (**D. Haw.** 1989); Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160 (**S.D.N.Y.** 1986); Martin v. Long Island R.R. Co., 63 F.R.D. 53 (**E.D.N.Y.** 1974); but see contra Bogatay v. Montour R.R. Co., 177 F. Supp. 269 (**W.D. Pa.** 1959); Hikel v. Abousy, 41 F.R.D. 152 (**D. Md.** 1966).

In a case arising under the Jones Act, the **Fifth Circuit** has held that a surveillance videotape of an injured worker's daily activities constituted **substantive evidence subject to disclosure pursuant to a discovery request**. The trial court's admission of the tape solely for impeachment purposes, when the evidence was in part substantive, constituted reversible error. Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513 (**5th Cir.** 1993), cert. denied, 511 **U.S.** 1029 (1994); cf. Harrison v. Taiwan Super Young Co. Ltd., 105 F.3d 665 (**9th Cir.** 1997) (unpublished); see also Denty v. CSX Transportation, Inc., 168 F.R.D. 549 (**E.D.N.C.** 1996) (Fed.R.Civ.Pro. 26(a)(3) clearly excludes from pretrial discovery material which will be used "solely for impeachment purposes;" the obvious rationale for excluding impeachment material from discovery is that their disclosure would substantially impair their impeachment value.)

[ED. NOTE:** Query--When, or how often, does evidence only have impeachment value and no substantive value at all?**]

Substantive evidence establishes the truth of a matter to be decided by the trier of fact. Impeachment evidence is offered to discredit the witness and to reduce the effectiveness of the testimony. The Court concluded in Chaisson that the tape, even if it had some impeachment value, should have been disclosed since it also had some substantive value.

But see Wainwright v. Dawn Services, Inc., 1991 WL 197113, 1991 Lexis 13652 (**E.D. La.** 1991) (unpublished) (affirming U.S. Magistrate's denial to compel disclosure of tapes to be used as impeachment evidence).

Photographic evidence such as motion pictures, videotapes and still pictures, may be admitted into evidence if relevant to a material issue and properly authenticated. The decision whether to admit surveillance films and the weight to be accorded such evidence are matters within the discretion of the judge. Spectrum Arena v. Workmen's Compensation Appeal Bd., 51 Pa. Cmwlth. 381, 414 A.2d 445 (**Pa. Commw. Ct.** 1980) (the referee, in a back injury case, did not "capriciously disregard" a surveillance film showing claimant carrying a shopping bag and going to visit neighbors).

An ALJ may consider video tapes and/or photographs in his decision and order. An ALJ is not bound by common law or statutory rules of evidence or by technical rules of procedure. Thus, an ALJ may investigate and conduct the hearing so as best to ascertain the rights of the parties. Walker v. Newport News Shipbuilding and Dry Dock Co., 10 BRBS 101 (1979), aff'd 618 F.2d 107 (**4th Cir.** 1980), cert. denied 446 **U.S.** 943 (1980).

Such discretion is not unlimited, however, and an abuse thereof will result in a reversal. See, e.g., United States v. Blackwell, 694 F.2d 1325 (**D.C. Cir.** 1982); United States v. Harris, 534 F.2d 207 (**10th Cir.** 1975), cert. denied, 429 **U.S.** 941 (1976).

In Westinghouse Electric Co. v. Workers' Compensation Appeal Board, 96 Pa. Cmwlth. 443, 507 A.2d 1287 (**Pa. Commw. Ct.** 1986), the court held that it was error to refuse to admit into evidence surveillance films. Although the films were **not** admissible to establish that the claimant suffered no disability, they were admissible to impeach the credibility of the claimant's evidence on the extent of his disability.

The common law standard of admissibility for photographic evidence remains intact under the Federal Rules of Evidence (FRE) as Rule 402 imposes a relevancy requirement and Rule 90(a) mandates **authentication or identification as a condition precedent to admissibility** and this request is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims, i.e., that the evidence accurately represents its subject. Moore v. Leaseway Transp. Corp., 49 **N.Y.**2d 720, 402 N.E.2d 1160 (1980).

Thus, otherwise probative motion pictures of a claimant's activities will be excluded, in the absence of proper authentication. For example, where the camera person was not available to authenticate the pictures and where his successor could not authenticate the full and complete movie account and where the claimant "did not know" if he was the subject in the films, the proffered evidence was excluded. General Accident, Fire & Life Assurance Corp. v. Camp, 348 S.W.2d 782 (**Tex. Civ. App.** 1961). Motion pictures taken of the claimant after the injury were admitted, however, because the camera person corroborated the film as an accurate depiction of what he had witnessed. Raban v. Industrial Comm'n, 25 Ariz. App. 159, 541 P.2d 950 (**Ariz. Ct. App.** 1975).

Once authenticated, any confusion or uncertainty over surveillance evidence goes to the weight of the evidence, rather than its admissibility. Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (**4th Cir.** 1982).

***[ED. NOTE:** For a good discussion on surveillance in this area, see "The Use of Surveillance Videos at the Formal Hearing From the Judge's Perspective" by District Chief Judge David W. DiNardi (1993) and found on the OALJ web site, www.oalj.dol.gov, under "Longshore Speeches and Memoranda."]*

Evidentiary Value

If the purpose of surveillance films is to impeach a claimant's assertions as to the extent of his disability, the degree of impeachment must be substantial to have any effect on the fact-finder. Demonstrative evidence such as a surveillance film is, like all evidence, subject to interpretation and is weighed along with all other evidence in the case.

Cases under the LHWCA, a humanitarian and beneficent statute, particularly are to avoid a "harsh and incongruous result." There are times, however, when but one conclusion can be drawn from video evidence under the LHWCA. In Phillips v. California Stevedore & Ballast Co., 9 BRBS 13, 16 (1978), the judge relied primarily on the medical opinion of the independent examiner that the claimant could no longer physically perform certain tasks.

The Board, however, after watching the same surveillance films as the judge, reversed the award of benefits with these words:

> The movie films, however, show claimant actually engaging in many of the same physical tasks ... without any evident restriction or discomfort. It is "patently unreasonable" to believe that the claimant can mount, dismount and ride a horse but cannot climb and ascend from ships' ladders and cargoes. To reach any other conclusion is to exult fantasy over reality.

9 BRBS at 16.

The evidentiary value of surveillance film is diminished if there is an attempt at improper influence by evoking emotional responses instead of rational ones. Distortion can be intentional or inadvertent and, sometimes, can result from the technical expertise of the photographer. Such distortion can be countered by the other side's expert witness. All of these factors bearing upon the authenticity and reliability of the evidence are considered by the judge as part of the evaluation process.

Two compensation cases will illustrate problems that have surfaced in reported cases. In Fee v. Calcasieu Paper Co., 112 So.2d 439 (**La. Ct. App. 1st** 1959), videos of a claimant disabled by spinal disc disease showing him shoveling gravel were not enough to justify reopening the case and terminating benefits. In this case, the record reflected that elaborate detective work was done to induce the disabled man to dig, to conceal cameras in fox holes and to spy on his other activities. The net result was to convince the judge that the man was indeed disabled because he moved cautiously, used only his arms and hands and never bent his back.

In another case, the activities recorded on surveillance films were apparently induced by payment under the pretext that the claimant, in need of money at the time, was aiding in a criminal investigation. The appellate court, however, held that the films were properly admitted because

films "need not be taken with either the knowledge or consent of the claimant," even if taken after the commencement of litigation. Isadore v. Workmen's Compensation Appeal Bd., 77 Pa. Cmwlth. 346, 465 A.2d 1096 (**Pa. Commw. Ct.** 1983).

Thus, the use of surveillance films at the formal hearing requires a balancing of the interests protected by the work-product doctrine against the interest that would be advanced by disclosure. What is good cause for discovery depends upon the reason a certain document is classified as work product and the reason advanced for demanding discovery. This balancing of interests actually is a question of fairness tempered by the basic concepts of the adversary system and the desirable aspects of pretrial discovery to expedite the trial of a particular case.

23.4 ADMISSION OF HEARSAY EVIDENCE

Hearsay evidence is generally admissible if considered reliable. See Vonthronsohnhaus v. Ingalls Shipbuilding, Inc., 24 BRBS 154 (1990), Richardson v. Perales, 402 **U.S.** 389 (1971). As hearings before the administrative law judge follow relaxed standards of admissibility, the admission of evidence depends on whether a reasonable mind might accept it as **probative**. Young & Co. v. Shea, 397 F.2d 185 (**5th Cir.** 1968), cert. denied, 395 **U.S.** 920 (1969). Hearsay evidence, where it possesses rational probative force, may constitute substantial evidence to support an administrative finding. Camarillo v. National Steel & Shipbuilding Co., 10 BRBS 54, 60 (1979).

In Colliton v. Defoe Shipbuilding Co., 3 BRBS 331, 335 (1976), the Board stated:

> [U]nder the Administrative Procedure Act, evidence is not, because of its nature as hearsay, automatically inadmissible in hearings before administrative agencies subject to the Act. 5 U.S.C. § 556(d). ... However, agency findings cannot be based solely on hearsay....

Ex parte medical reports may constitute substantial evidence without corroborating evidence provided the opposing party is afforded the opportunity of cross-examining the physician. Avondale Shipyards v. Vinson, 623 F.2d 1117, 1121-22 (**5th Cir.** 1980); Darnell v. Bell Helicopter Int'l, Inc., 16 BRBS 98 (1984), aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984).

The relaxed admissibility standard for hearsay evidence does not dispense with the **right of cross-examination**. Southern Stevedoring Co., Inc. v. Voris, 190 F.2d 275 (**5th Cir.** 1951). The opportunity to cross-examine has been required in cases involving the introduction of ex parte medical reports. Avondale Shipyards v. Vinson, 623 F.2d 1117 (**5th Cir.** 1980); Southern Stevedoring Co. v. Voris, 190 F.2d 275; Brown v. Washington Metro. Area Transit Auth., 16 BRBS 80 (1984), aff'd, 764 F.2d 926 (**D.C. Cir.** 1985); Darnell v. Bell Helicopter Int'l, Inc., 16 BRBS 98 (1984), aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs, 746 F.2d 1342, 17 BRBS 13 (CRT) (**8th Cir.** 1984).

In Longo v. Bethlehem Steel Corp., 11 BRBS 654 (1979), the Board, relying on Richardson, 402 **U.S.** 389, upheld the admission into evidence of *ex parte* medical reports, despite their hearsay nature. The Board reasoned that since the judge permitted a post-hearing deposition of the doctor to be taken, the right of cross-examination by the adverse party was protected. The Board thus distinguished holdings by the **Fifth Circuit** that *ex parte* reports were inadmissible where there was no opportunity to cross-examine. Southern Stevedoring Co., Inc., 190 F.2d 275. See Bethlehem Steel Corp. v. Clayton, 578 F.2d 113, 8 BRBS 663 (**5th Cir.** 1978).

In general, the Board will affirm the admission and consideration of an *ex parte* report where the author is not biased and has no interest in the case, the opposing party has the opportunity to subpoena or cross-examine the witness, including post-trial, and the report is not inconsistent on its

face. Darnell, 16 BRBS at 100. See also Feezor v. Paducah Marine Ways, 13 BRBS 509 (1981) (Board reverses the exclusion of *ex parte* reports by the ALJ on due process grounds).

[ED. NOTE:** See Scott v. Flynt, M.D., 704 S. 2d 998 (S. Ct. of Mississippi 1996) (Held: Scope of waiver of medical privilege in either a medical malpractice or personal injury action is limited to information relevant to the injury placed in issue by plaintiff, and evidence obtained by opposing party from ex parte contacts with patient's medical providers, without prior patient consent, is inadmissible.) If such were applied to the LHWCA, would not the scope need to be wider than the "relevant injury" so that the employer/carrier could inquire as to preexisting conditions in order to develop a Section 8(f) claim? **]

Although procedural safeguards must be applied, the judge in this case could both admit the relevant evidence **and** afford the opposing party the opportunity for rebuttal. Cf. Hughes, 17 BRBS at 155, where the Board upheld a judge's ruling admitting the transcript of an interview with a deceased claimant.

The Board relied on Section 23(a) of the LHWCA which states:

> **Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.**

33 U.S.C. § 923(a). The requirement for an opportunity for cross-examination is not applicable to this provision. This portion of Section 23(a) focuses on corroboration and a decedent's statements are not corroboration. (However, the section does not say that uncorroborated statements by a decedent cannot support a finding.)

Section 23 is a statutory recitation of the so-called **"legal residuum" rule**, which is that hearsay evidence standing alone is not sufficient to support the judgment of an administrative tribunal unless there is a residuum of legally admissible evidence to corroborate it. See B. Schwartz, Administrative Law (1976) §§ 117-119; K.C. Davis, Administrative Treatise (1980) §§ 16.6-16.8.

[ED. NOTE:** These authors discuss the viability of the legal residuum rule after Richardson v. Perales, 402 **U.S.** 389 (1971). Davis believes the rule has been repudiated. Schwartz disagrees.**]

In Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11 (CRT) (**lst Cir.** 1982), aff'g Sprague v. Bath Iron Works Corp., 13 BRBS 1083 (1981), the court affirmed the Board's holding that the judge properly excluded a letter written by a doctor to the employer's attorney under the work product rule of Federal Rule of Civil Procedure 26(b)(3). The court noted that although the

Federal Rules technically only apply to proceedings to enforce or review compensation orders, see Fed. R. Civ. Proc. 81(a)(6), application of Rule 26 (b)(3) is reasonable on policy grounds.

23.5 ALJ CAN ACCEPT OR REJECT MEDICAL TESTIMONY

[ED. NOTE:** Determining the credibility of witnesses, including expert medical witnesses, is within the purview of the ALJ and the Board must respect the judge's evaluation of all testimony. See also infra, Topic 24.2 [Expert Witnesses].**]

The judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his/her personal observation and judgment to resolve conflicts in the medical evidence. A judge is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (**5th Cir.** 1962); Ennis v. O'Hearne, 223 F.2d 755 (**4th Cir.** 1955).

In Parks, 32 BRBS 90, the Board held that the judge's interpretation of the CAP/NIOSH (Committee of the College of American Pathologists and the National Institute for Occupational Safety and Health) criteria was supported by evidence. Specifically, the judge found that the interpretation of the phrase "associated with," contained in the CAP/NIOSH report, can reasonably mean that asbestos bodies need only be present on the same tissue slide, or in the same histologic section as the fibrosis in order to be considered "associated with" the fibrosis and thus arrive at a diagnosis of asbestosis. (The employer's expert required that the asbestosis bodies be imbedded in the fibrous tissue, or immediately adjacent to the fibrous tissue in order for the asbestos bodies to be "associated with" the fibrosis.)

The judge, in Parks, 32 BRBS 90, found that sufficient doubt had been cast upon the employer's expert's interpretation of the CAP/NIOSH criteria by other physicians and that no physician other than the employer's expert directly disputed the diagnostic criteria under CAP/NIOSH employed by the claimant's physicians and adopted by the judge. Thus, the judge concluded that the decedent had asbestosis and that there was a causal nexus between the decedents's asbestos exposure and his death.

The trier of fact determines the credibility of the medical witnesses. Such determinations are to be respected on appeal. John W. McGrath Corp. v. Hughes, 289 F.2d 403 (**2d Cir.** 1961). The judge determines the credibility and weight to be attached to the testimony of a medical expert. The trier of fact can base one finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion on that issue. Pimpinella v. Universal Maritime Service, Inc., 27 BRBS 154 (1993) (causation and disability are two separate issues, and ALJ may accept or reject all or any part of any witness' testimony according to his judgment).

The judge is not required to accept the opinion or theory of a medical expert that contradicts the findings of the adjudicator which are based on common sense. Avondale Indus., Inc. v. Director, OWCP, 977 F.2d 186 (**5th Cir.** 1992). It is within the ALJ's discretion to give more weight to the opinion of a doctor who was able to provide an explanation for the claimant's pain than to a doctor who could offer several possible theoretical reasons but could not relate the possible causes

specifically to the claimant and did not have an independent recollection of her. Cotton v. Army & Air Force Exchange Services, 34 BRBS 88 (2000).

The opinion of a treating physician that a claimant is unable to work at his former job is entitled to greater weight than the opinion of a non-treating physician. Downs v. Director, OWCP, 152 F.3d 924, (**9th Cir.** 1998) (Table)(July 10, 1998); see also Magallanes v. Bowen, 881 F.2d 747 (**9th Cir.** 1989)(Health and Human Services administrative law decision); Loza v. Apfel, 219 F.3d 378 (**5th Cir.** 2000)(Social Security administrative law decision).

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. Hyde, 306 F. Supp. 1321, 1327 (**D.R.I.** 1969).

In DM & IR Railway Company v. Director, OWCP, 151 F.3d 1120 (**8th Cir.** 1998), the **Eighth Circuit** found that, in Director, OWCP v. Greenwich Collieries, 512 **U.S.** 267 (1994), the Supreme Court did not diminish the scope of the fact-finding and credibility-determining roles traditionally assigned to ALJs. **Thus, the long-held standard that the LHWCA is to be liberally construed in favor of awarding benefits survived the *Collieries* decision in all but "true doubt" situations where the ALJ expresses doubt about which testimony to credit.** For example, the ALJ was free to discredit the testimony of a lay witness (owner of a fitness center) that contradicted the opinions of numerous medical experts.

Medical evidence can constitute substantial evidence to support an employer's rebuttal of the Section 20(a) presumption. Dearing v. Director, OWCP, 27 BRBS 72 (CRT) (4th Cir. 1993).

23.6 ALJ DETERMINES CREDIBILITY OF WITNESSES

[ED. NOTE: *Determining the credibility of witnesses, including expert medical witnesses, is within the purview of the ALJ and the Board must respect the judge's evaluation of all testimony.* See also *infra, Topic 24.2 [Expert Witnesses]* ***]***

In U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 **U.S.** 608, 14 BRBS 631 (1982), the claimant contended that he awakened the morning of November 20th with severe pains in his neck, shoulders, and arms. Subsequently, he filed a claim under the LHWCA alleging that he had sustained an injury during the course of his covered employment the day before. The judge discredited the claimant's testimony and the corroborating testimony of a co-worker who claimed to have witnessed the accident and found that a work-related accident never occurred November 19th. The **D.C. Circuit** remanded on the basis that the "injury" which occurred the morning of November 20 was entitled to the Section 20(a) presumption.

The **Supreme Court** reversed the **D.C. Circuit** by holding that the claimant had alleged an injury at work November 19th. Since the judge had found that no work-related injury occurred on that date, there was no basis for invoking the Section 20(a) presumption for the "injury" which arose in bed. "The statutory presumption is no substitute for the allegations necessary to state a prima facie case." Id. at 616. Implicit in this holding is the authority of the judge to assess the credibility of each witness, including a claimant, even as to the existence of a work-related accident or injury. See also Sharp v. Marine Corps Exch., 11 BRBS 197 (1979).

The **Fifth Circuit** sustained a credibility determination which was "tenuous, credulous and unwise," but corroborated by substantial evidence in the record. Plaquemines Equip. & Mach. Co. v. Neuman, 460 F.2d 1241, 1242 (**5th Cir.**), cert. denied, 409 **U.S.** 914 (1972).

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. Hyde, 306 F. Supp. 1321, 1327 (**D.R.I.** 1969). The ALJ is not bound by the opinion of one doctor and can rely on the independent medical evaluator's opinion and evidence from the medical records over the opinion of the treating doctor. Duhagan v. Metropolitan Stevedore Co., 31 BRBS 98 (1997).

The Board should not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (**9th Cir.** 1978), cert. denied, 440 **U.S.** 911 (1979); Phillips v. California Stevedore & Ballast Co., 9 BRBS 13 (1978). In Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (**5th Cir.** 1991), 25 BRBS 78 (CRT)(1991), the **Fifth Circuit** found that the Board had exceeded its statutorily defined powers of review: " The Board impermissibly reweighed the evidence and made its own credibility determinations." The court noted that all of the ALJ's determinations were amply supported by the record. The ALJ had clearly explained that he chose not to rely on the evidence tending to show that the claimant could physically perform certain jobs because he did not rely on certain testimony. He further explained that he found the doctors'

opinions on employment potential unrealistic because those opinions failed to consider the pain endured by the claimant.

The Board has upheld an ALJ's admission of a claimant's criminal record and history of lying where the ALJ determined that this evidence was relevant to his claim of stress disorder, since in diagnosing the claimant's psychiatric conditions, the doctors relied on what the claimant told them. Houghton v. Marcom, Inc., (BRB Nos. 99-0809 and 99-1315)(April 25, 2000)(Unpublished)(criminal record and history of lying were properly admitted as this evidence was relevant to claimant's trustworthiness as a witness), 33 BRBS 711 (ALJ) (1999)..

23.7 ALJ MAY DRAW INFERENCES BASED ON EVIDENCE PRESENTED

Section 557 of the APA, 5 U.S.C. § 557, applies when hearings are conducted in accordance with 5 U.S.C. § 556. Section 557(c)(3)(A), requires that decisions rendered under the APA include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented in the record." The rule is designed to allow reviewing bodies to carry out their function of determining whether decisions have been made according to the applicable statutes. Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade, 412 **U.S.** 800 (1973).

The judge must detail adequately the rationale behind the decision, and articulate why specific medical evidence was relied upon. Williams v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 61 (1985); Whittington v. National Bank of Washington, 12 BRBS 439 (1980); Corcoran v. Preferred Stone Setting, 12 BRBS 201 (1980). The judge should also **analyze independently and discuss** the medical evidence. The failure to do so will violate the APA's requirement for a reasoned analysis. Williams, 17 BRBS 61; Frazier v. Nashville Bridge Co., 13 BRBS 436 (1981). The incorporation of factual and legal assertions from the brief of a party by the judge is impermissible if it fails to reflect an independent review of the evidence by the judge. Williams, 17 BRBS 61.

The Board has remanded cases for clarification where the judge made conclusory findings of fact without comment on conflicting evidence or without explicit acceptance or rejection of parts thereof. Williams, 17 BRBS 61; Williams v. Nicole Enters., 15 BRBS 453 (1983); Bonner v. Ryan-Walsh Stevedoring Co., Inc., 15 BRBS 321 (1983); Frazier v. Nashville Bridge Co., 13 BRBS 436 (1981); Willis v. Washington Metro. Area Transit Auth., 12 BRBS 18 (1980).

The Board has also remanded in cases where the judge neglected to make specific fact-findings in applying the LHWCA, or made ambiguous findings. Jones v. Midwest Mach. Movers, 15 BRBS 70 (1982); McDevitt v. George Hyman Constr. Co., 14 BRBS 677 (1982); Grimes v. Exxon Co., U.S.A., 14 BRBS 573 (1981); Bentley v. Sealand Terminals, 14 BRBS 469 (1981); Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141 (1980); Moore v. Paycor, Inc., 11 BRBS 483 (1979). It has also remanded where the judge failed to address issues raised by the parties during the hearing. Wade v. Gulf Stevedore Corp., 8 BRBS 335 (1978).

In other instances, the Board has directed the judge to make additional findings of fact or to provide a more complete rationale for the conclusions. See generally Betz v. Arthur Snowden Co., 14 BRBS 805 (1981); Whitlock v. Lockheed Shipbuilding & Constr. Co., 12 BRBS 91 (1980); Lozupone v. Stepheno Lozupone & Sons, 12 BRBS 148 (1979). In general, an order of a judge must contain a sufficient rationale for the appellate tribunal to discern the reasons for the findings and thereby assess whether they are supported by substantial evidence and are in accordance with the law. Corcoran v. Preferred Stone Setting, 12 BRBS 201 (1980).

At the same time, however, appellate tribunals should not "review decisions in order to perfect the administrative process to the nth degree." Administrative decisions should be affirmed,

even when the findings lack clarity, if the reasoning can be discerned. Alabama Power Co. v. Federal Power Comm'n, 511 F.2d 383, 392 (**D.C. Cir.** 1974). See, e.g., Richardson v. Safeway Stores, Inc., 14 BRBS 855 (1982); Hodgson v. Kaiser Steel Corp., 11 BRBS 421 (1979); Caudle v. Potomac Elec. Power Co., 9 BRBS 502 (1978), aff'd, 612 F.2d 586 (**D.C. Cir.** 1980).

In determining the facts, the adjudicator operates under the statutory policy of resolving all doubtful fact questions in favor of the injured employee. Strachan Shipping Co. v. Shea, 406 F.2d 521, 522 (**5th Cir.**) (per curiam), cert. denied, 395 **U.S.** 921 (l969); Young & Co. v. Shea, 397 F.2d 185, 188-89 (**5th Cir.** 1968), cert. denied, 395 **U.S.** 920 (1969). But see Topic 23.7.1, infra, on the inapplicability of the **"true doubt" rule** to LHWCA cases when the evidence is evenly balanced.

After ascertaining and articulating the basic facts, it is the prerogative of the judge to draw inferences therefrom. Cardillo v. Liberty Mut. Ins. Co., 330 **U.S.** 469 (1947). In Cardillo, the **United States Supreme Court** upheld the prerogative of the adjudicator to determine whether the injury occurred during the course of employment based on inferences from the basic facts. The **Court** stated:

> In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited. ... If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable.

330 **U.S.** at 477.

If the order of the judge is supported by substantial evidence on the record as a whole and is in accordance with the law, it must be affirmed by the Board. The review by an appellate court is limited to determining whether the Board concluded correctly that the order of the judge complied with that standard. Avondale Indus., Inc. v. Director, OWCP, 977 F.2d 186, 189 (**5th Cir.** 1992).

The substantial evidence standard is less than a preponderance of the evidence. It is not necessary that the conclusions of the judge constitute the sole inference that can be deduced from the basic facts. The judge determines the credibility of witnesses and of conflicting medical evidence. Avondale, 977 F.2d 186. The inference must be based, however, on the evidence, or the adjudicator abuses its discretion. Ennis v. O'Hearne, 223 F.2d 755 (**4th Cir.** 1955).

23.7.1 The "True Doubt" Rule Is Inconsistent with § 7(c) of the Administrative Procedure Act

Prior to the **Supreme Court** decision of Director, OWCP v. Greenwich Collieries, (Maher Terminals), 512 **U.S.** 267, 28 BRBS 43 (CRT) (1994), in adjudicating benefits claims under the LHWCA, the Department of Labor applied what it calls the **"true doubt"** rule. Invocation of the true doubt rule allowed a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence, i.e., when the evidence was evenly balanced, the benefits claimant prevailed. However, in Greenwich Collieries, the **Supreme Court** held that an injured worker claiming compensation under the LHWCA must prove the elements of his claim by a "preponderance of the evidence." 512 **U.S.** 267.

[ED. NOTE: *The "true doubt" rule had previously been applied in Longshore cases to assist the claimant when the evidence in the record was of equal weight, favoring neither the claimant nor employer. Greenwich Collieries, by holding that claimants can prevail only if they meet their burden of proof by a preponderance of evidence without the assistance of the true doubt rule, significantly affects Longshore procedure and puts an end to what many have called a "longshore common law" practice. However, one must note that at least one circuit court has found that Greenwich Collieries did not diminish the scope of the fact-finding and credibility-determining roles traditionally assigned to ALJs. DM & IR Railway Company v. Director, OWCP, 151 F.3d 1120 (**8th Cir.** 1998). Thus, the long-held standard that the LHWCA is to be liberally construed in favor of awards benefits survived the Collieries decision in all but "true doubt" situations where the ALJ expresses doubt about which testimony to credit. For example, the ALJ was free to discredit the testimony of a lay witness (owner of a fitness center) that contradicted the opinions of numerous medical experts. DM & IR Railway.**]***

The **Court** in Greenwich Collieries held that Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), which places the "burden of proof" on a proponent of the rule or order, applies to cases arising under the LHWCA. Id. Thereafter, the **Court** found **that the application of the true doubt rule is inconsistent with § 7(c) of the APA** because it eases the claimant's burden of proving the validity of his claim. Id. Section 7(c) of the APA states in pertinent part that:

> Except as otherwise **provided by statute**, the proponent of a rule or order has the burden of proof....

5 U.S.C. § 556(d) [Section 7(c)] (emphasis added).

[ED. NOTE: *Thus, while the "true doubt" rule may not necessarily violate the APA in principle, it specifically does violate APA practice when applied to the LHWCA because the LHWCA itself does **not** statutorily provide for a "true doubt" rule.**]***

The invalidation of the true doubt rule by Greenwich Collieries affects the amount of proof necessary for an expert medical opinion to support a contested claim. See, e.g., Holmes v. Universal Maritime Service Corp., 29 BRBS 18, 21, n.3 (1995) ("The holding in Greenwich Collieries does affect the issue of whether causation is established on the record as a whole"); see also Keele v. Joint Port Labor Relations Committee, 29 BRBS 99, 106 (ALJ) (1995) (Claimant failed to meet his burden of proof that his stroke was due to his employment, based on Greenwich Collieries).

23.8 ALJ MAY ACCEPT OR REJECT AMA GUIDES UNLESS REQUIRED

The 1984 Amendments to the LHWCA include a requirement that determinations of **hearing loss** shall be in accordance with the Guides to the Evaluation of Permanent Impairment of the American Medical Association. See 33 U.S.C. § 908(13)(E). Prior to that statutory modification, the Board had held that, as the judge has discretion to accept or reject medical testimony, that discretion applied to the utilization of the A.M.A. Guides in determining scheduled disabilities. Robinson v. Bethlehem Steel Corp., 3 BRBS 495 (1976).

In Fisher v. Strachan Shipping Co., 8 BRBS 578 (1978), the Board upheld the decision of the judge not to follow the A.M.A. Guides. In Jones v. I.T.O. Corp. of Baltimore, 9 BRBS 583 (1979), the Board sustained the order of the judge which was influenced by the A.M.A. Guides. Hearing loss is the only determination which the LHWCA requires to be in accordance with the A.M.A. Guides.

23.9 FORMAL HEARINGS WILL BE TRANSCRIBED

All formal hearings before a judge shall be mechanically or stenographically reported. Copies may be obtained from the official reporter by the parties and the general public. Corrections of the official transcript may be approved by the judge for "errors of substance." 29 C.F.R. § 18.52.