

# TOPIC 27 POWERS OF ADMINISTRATIVE LAW JUDGES

## 27.1 PROCEDURAL POWERS GENERALLY

Section 27(a) of the LHWCA provides:

**(a) The deputy commissioner or Board shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking, of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.**

33 U.S.C. § 927(a).

When Congress amended the LHWCA in 1972 to vest duties previously performed by the district director in administrative law judges (adjudicatory functions), it did not alter the references which appear throughout the LHWCA, including Section 27(a), to the powers and duties of the district director. Percoats v. Marine Terminals Corp., 15 BRBS 151, 153 (1982). This chapter will therefore be devoted to a discussion of which of the powers listed in Section 27 remain vested in the district director and which are now the exclusive province of the administrative law judge.

Once a case is referred to OALJ, jurisdiction is removed from the district director and is solely vested in OALJ. Boone v. Ingalls Shipbuilding, Inc., 28 BRBS 119, 122 (1994), vacated and remanded on other grounds, Ingalls Shipbuilding, Inc. v. Director, OWCP (Boone), 102 F.3d 1385 (5th Cir. 1996) (Decision and Order on Recon.) (en banc) (Brown, J., concurring), replacing withdrawn decision found at 81 F.3d 561 (5th Cir. April 26, 1996). See Neal v. Strachan Shipping Co., 1 BRBS 279, 281 (1975) (“The law is well settled that removal of jurisdiction from one tribunal to another, removes all jurisdiction to act...”). See also Ingalls Shipbuilding, Inc. v. Director, OWCP, (Yates), 519 U.S. 248 (1997); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995); Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants, 17 F.3d 130 (5th Cir. 1994) (Director has a clear non-discretionary duty to transfer case to OALJ where substantive legal or actual disputes are to be decided); 33 U.S.C. § 919(d); 20 C.F.R. §§ 702.316, 702.242(c).

***[ED. NOTE: For a detailed discussion of powers reserved by the District Director, see the opinion of Justice Scalia in Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122 (1995) (Held, Director was not “person adversely affected or aggrieved” within meaning of LHWCA by Board’s decision, and she thus lacked standing to appeal order, since agency could not, absent***

*specific authorization to appeal, be adversely affected or aggrieved in its regulatory or policy-making capacity, and LHWCA did not give Director authorization to appeal.). See also, Ingalls Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248 (1997) (Held, Department of Labor is the “agency” which must be named as respondent on review of decision of Board in LHWCA case, pursuant to rule of appellate procedure, and thus Director may be named as a respondent in the courts of appeals.) and Scalia dissent in Ingalls.]*

### **27.1.1 ALJ Can Exclude Evidence Offered in Violation of Order**

The Board has interpreted Section 27(a) of the LHWCA to include the power of an administrative law judge to exclude evidence offered in violation of a pre-hearing order. Durham v. Embassy Dairy, 19 BRBS 105, 108 (1986) (may exclude even relevant and material testimony for failure to comply with terms of prehearing order); Williams v. Marine Terminals Corp., 14 BRBS 728, 733 (1981). Pre-hearing orders facilitate the conduct of a hearing: they provide the parties advance opportunities to prepare arguments, raise issues, and seek discovery. Williams, 14 BRBS at 733. Misplacement of such an order does not relieve a party of responsibility for knowledge of its contents. Durham, 19 BRBS at 108.

### **27.1.2 ALJ Can Compel Attendance at Deposition**

The use, for discovery purposes, of pre-hearing depositions in administrative proceedings is specifically provided for in Section 27(a). Lopes v. George Hyman Constr. Co., 13 BRBS 314, 320-21 (1981). District directors lack the authority, however, to order the taking of depositions because the use of depositions is a function of the adjudicatory powers which reside in administrative law judges. Percoats v. Marine Terminals Corp., 15 BRBS 151, 154-55 (1982). Depositions are a tool of adjudication and all powers related to the conduct of hearings are now vested solely in the administrative law judge. Id. at 155.

Section 27(a) vests the judge with the discretionary power to grant a motion to compel the prehearing deposition of a party. Creasy v. J.W. Bateson Co., 14 BRBS 434, 436 (1981); Sledge v. Sealand Terminal, Inc., 14 BRBS 334, 338 (1981), decision after remand, 16 BRBS 178 (1984); Sanchez v. Pittston Stevedoring Corp., 5 BRBS 458, 462 (1977). The judge has the power to allow the use of depositions when "the ends of justice would be served." Carter v. General Elevator Co., 14 BRBS 90, 93 (1981); Lopes, 13 BRBS at 321. Discovery is not available, however, to parties as a matter of constitutional right *per se*: to obtain relief from an administrative denial of the discovery privilege, a party must demonstrate an abuse of discretion which results in prejudice to it. Carter, 14 BRBS at 93.

### **27.1.3 ALJ Issues Subpoenas, Gives Oaths**

**[ED. NOTE: For information on the subpoena process, see the ALJ web site at [www.oalj.dol.gov](http://www.oalj.dol.gov).]**

Following the 1972 Amendments, the Board initially held that the district director still retained the power to issue subpoenas for records and documents because this ability was seen as a necessary and fundamental prerequisite for performing the statutory duty of conducting prehearing investigations. Rabb v. Marine Terminals Corp., 11 BRBS 498, 501 (1979).

This decision was overruled, however, in Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 132 (1986) (en banc), when the Board held that district directors are not empowered to issue subpoenas *duces tecum*. The Board held that the power to issue subpoenas was transferred to the administrative law judges pursuant to the 1972 Amendments. Id. at 133. See also Sanchez v. Pittston Stevedoring Corp., 5 BRBS 458, 462 (1977) (under Section 27(a), the ALJ has the power to issue subpoenas). The judge therefore has the discretionary power to grant or deny a motion to compel the production of documents. Sledge v. Sealand Terminal, Inc., 14 BRBS 334, 338 (1981), decision after remand, 16 BRBS 178 (1984).

**The OALJ has the exclusive authority to issue subpoenas**, whether the case is before the OWCP or the OALJ. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129 (1986) (en banc); Butler v. Ingalls Shipbuilding, Inc., 28 BRBS 114 (1994) (“There is no dispute that the administrative law judge has the authority to issue this order.” (citing Maine)). This includes both the power to issue a subpoena *duces tecum* as well as a subpoena over a person. Maine, 18 BRBS at 132.

The subpoena power of OALJ may have its origin in several statutory provisions which were in effect **prior** to the 1972 Amendments. Section 19(a) of the LHWCA provides that the "deputy commissioner [now district director] shall have full power and authority to hear and determine all questions in respect of such claim" filed under the LHWCA. 33 U.S.C. §919(a). Section 23(a) of the LHWCA states that the "deputy commissioner...may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a). Furthermore, Section 27(a) of the LHWCA specifically provides:

The deputy commissioner...shall have power to preserve and enforce order during any such proceedings; **to issue subpoenas** for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths; to examine witnesses; and **to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.**

33 U.S.C. §927(a) (emphasis added).

These provisions “reflect the dual roles of adjudicator and administrator” held by the district director **prior** to the 1972 Amendments. Maine, 18 BRBS at 131. However, the Board in Maine additionally found that these provisions cannot be read in isolation, as they were significantly

affected by the 1972 Amendments. The 1972 Amendments added Section 19(d), which transferred to Department of Labor hearing officers (now ALJs) the adjudicative functions formerly held by the deputy commissioner (now district director). Specifically, this provision states:

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

33 U.S.C. §919(d).

Relevant regulations further specify that formal hearings shall be conducted by an ALJ assigned to the case by the Office of the Chief Administrative Law Judge. See 20 C.F.R. §§ 702.331, 702.332.

In amending the LHWCA in 1972 to transfer the duties previously performed by the district director to the ALJ, Congress neglected to alter the references to the district director's authority previously cited and referenced to throughout the LHWCA. Maine, 18 BRBS at 131. "Notwithstanding repeated statutory references to the adjudicatory authority of the district director, a fair reading of Section 19(d) should dispel any confusion over the present roles of the district director and administrative law judge." Id. "[A]ll adjudicatory functions reside only in the administrative law judge; administrative and pre-hearing investigative duties are performed by the deputy commissioner." Id.; see also Ingalls Shipbuilding Inc. v. Director, OWCP, (Yates), 519 U.S. 248 (1997) (OALJ is the beginning of the adjudicatory process); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) (OALJ and BRB have adjudicatory functions/powers); Barthelemy v. J. Ray McDermott & Co., Inc., 537 F.2d 168 (5th Cir. 1976); Lauzon v. Strachan Shipping Co., 602 F. Supp. 661, 664 (S.D. Tex 1985); Blake v. Hurlburt Field Pilleting Fund, 17 BRBS 14 (1985); Percoats v. Marine Terminals Corporation, 15 BRBS 151 (1982); Clefstad v. Perini N. River Assoc., 9 BRBS 217 (1978); Neal v. Strachan Shipping Co., 1 BRBS 279 (1974).

***[ED. NOTE: For an example of the confusion caused by this oversight, see StafTex Staffing v. Director, OWCP, 217 F.3d 365 (5th Cir. July 18, 2000); re-issued at 237 F.3d 409 (5th Cir. July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.)]***

**The Board's en banc decision in Maine is not limited to the specific facts or case. See, e.g., Butler v. Ingalls Shipbuilding, Inc., 28 BRBS 114 (1994) ("There is no dispute that the administrative law judge has the authority to issue this order." (citing Maine)).**

***[ED. NOTE: It is important to point out that the Board in Maine sat en banc. Specifically, the Board noted that “[d]ue to the importance of the issues presented, [we have reconsidered] this case en banc.” 18 BRBS 129 at 130 (citing 33 U.S.C.A. § 921(b)(5)). Although the Board is authorized to sit in panels of five members, 33 U.S.C. § 921(b)1 and (5), it normally sits in panels of three, withholding en banc review for important cases and issues.]***

Clearly, the Board’s decision is **not** intended to be narrowly applied:

Our holding in this case, that **deputy commissioners** are not empowered to issue subpoenas *duces tecum*, is **required** by the Act and the **clearly expressed legislative intent** to maintain a division of responsibilities of the deputy commissioner and the administrative law judge.

18 BRBS at 131-32 (emphasis added).

Furthermore, the Board, in Maine, went on to state:

**The subpoena power**, inasmuch as it pertains to **claims for compensation under the Act**, is solely, an adjunct of the administrative law judges authority to conduct formal adjudication. If a party refuses to produce requested evidence at the deputy commissioner level, the other party need only apply to the chief administrative law judge and a subpoena will be issued by that office.

18 BRBS at 132 (emphasis added).

***[ED. NOTE: In Maine, the Board recognized that Section 44 of the LHWCA grants to the Secretary of Labor broad authority to investigate carriers and self-insurers "for the purpose of making rules, regulations and determinations under Section 44," 33 U.S.C. §§944 (d)(1), and that in carrying on these investigations the Secretary enjoys a narrow power to issue subpoenas which "does not apply to the investigation of specific claims under the Act." 18 BRBS at 133. Had Maine been case/fact specific, there would have been little need for the scholarly discourse on Section 44 and the Secretary’s narrow subpoena power.]***

In Maine, the Board specifically adopted Chief Judge Ramsey’s separate opinion in Percoats v. Marine Terminals Corp., 15 BRBS 151 (1982) (Ramsey, C.J., concurring and dissenting). In Percoats, Ramsey agreed with "the majority decision that the deputy commissioner lacks authority to compel the taking of depositions since this authority is part of the adjudicative powers vested in the administrative law judges by the 1972 amendments." 15 BRBS at 157. Importantly, Ramsey disagreed with the portion of Percoats where the majority sought to distinguish the authority to issue subpoenas *duces tecum* from the authority to compel the taking of depositions. Ramsey maintained:

The fact that a subpoena *duces tecum* involves documentary rather than testimonial evidence does not render the subpoena *duces tecum* an investigative rather than an adjudicative tool. I would hold that the subpoena *duces tecum* is a tool of adjudication which is outside the scope of the deputy commissioner's power to conduct investigations.

Percoats, 15 BRBS at 157.

Thus, in adopting Ramsey's separate opinion in Percoats, the Board in Maine accepted the position that only the OALJ has subpoena power. The Board in Maine specifically noted that it is incorrect to distinguish between that process which is necessary to compel testimony from that which requires the production of documentary and tangible evidence. Specifically:

**The compulsion of testimony and documentary evidence are equally adversarial in nature, equally part of the formal adjudicative powers, and equally outside the scope of the deputy commissioner's authority.**

Maine, 18 BRBS at 133 (emphasis added).

While only the issue of subpoenas *duces tecum* was specifically at issue in the Board's decision in Maine, the Board clearly presented its position on subpoenas in general:

**[T]he parties may simply apply to the Office of the Chief Administrative Law Judge for the proper adjudicatory officer to issue the appropriate subpoena.**

18 BRBS at 133 (emphasis added).

\* \* \*

In conclusion, **we hold** that the Act and the policies behind its provisions do not support a ruling that the deputy commissioner retains the authority to issue subpoenas under any circumstances. We conclude that the **power to issue such discovery devices was transferred to administrative law judges** pursuant to the 1972 Amendments to the Act, that their **issuance by the deputy commissioner is impermissible** because their use is solely within the ambit of the adjudicatory process, and that subpoenas of any type are inconsistent with the informal nature of proceedings before the deputy commissioner.

18 BRBS at 134 (emphasis added).

The federal regulations for longshore also support the Board's position. The Regulations addressing the district director's duties and functions, 20 C.F.R. §702.311, *et. seq.*, stress the informality of the proceedings at that level. However, the regulations addressing formal hearings before the OALJ infer a subpoena power. *See* 20 C.F.R. §§ 702.340, 702.341. For example, §702.340 (Formal hearings; witnesses) states:

(b) No person shall be **required to attend** as a witness in any proceeding before an administrative law judge at a place more than 100 miles... (emphasis added).

20 C.F.R. § 702.340(b)

Additionally, Section 702.341 states that:

**testimony**...may be taken by **deposition or interrogatory** according to the Federal Rules of Civil Procedure as supplemented by local rules of practice...[S]uch depositions or interrogatories must be completed within reasonable times to be fixed by the Chief Administrative Law Judge or administrative law judge assigned to the case.

20 C.F.R. § 702.341 (emphasis added).

### **Obtaining Subpoenas**

*[ED. NOTE: For more on subpoenas, see the ALJ web site at [www.oalj.dol.gov](http://www.oalj.dol.gov).]*

All subpoena requests must be made in writing. This can be done in one of two ways. Subpoenas may be obtained by either requesting, in writing, pre-printed subpoenas from OALJ or by downloading subpoena forms from the OALJ web site at [www.oalj.dol.gov](http://www.oalj.dol.gov) and submitting them for approval to the appropriate judge.

### Downloading subpoenas

When a subpoena form is downloaded from the web site, the subpoenaing party must complete the application information, print the subpoena and send it to the appropriate ALJ with a request for issuance of the subpoena. The information filled out on these forms on-line is not transmitted over the Internet. The forms must be printed after completion and mailed to the trial judge. If approved by the presiding judge, the subpoena will be returned with the case number inscribed, the judge's signature and an *embossed USDOL seal*.

## Obtaining Pre-printed subpoenas

These may be obtained by contacting the appropriate judge's office. At the presiding judge's discretion, that office will provide up to 10 blank subpoenas with embossed seals and signatures. The case number will be inscribed on the subpoena, thus **limiting its use to that particular case**. Some ALJs may impose additional requirements for issuance of subpoenas, but in all cases, requests for more than 10 subpoenas must include a written justification.

## Who to Contact

For unassigned OALJ cases, requests should be directed to the applicable District Office, or if one is not sure which District Office has the case, to the National Office in Washington, D.C. Once a case is assigned to a presiding judge, all subpoena requests must be made to that judge's office. The National Office will NOT issue subpoenas once a case is assigned. All requests for subpoenas in cases still pending before OWCP (the district director's office) should be directed to the OALJ National Office in Washington, DC.

## Requirements for Validity

To be valid, a subpoena must: (1) show the case number, (2) bear the embossed seal of the Department of Labor, and (3) bear the signature of the administrative law judge having the authority to issue the subpoena. The subpoena should be served with both page 1 and page 2. If practical, the subpoena should be printed as a two-sided copy on a single sheet of paper.

## Duties of Person Issuing Subpoena

### ***Notice against improper use of subpoenas***

A party or an attorney responsible for the issuance and service of an administrative subpoena must adhere to the following principles:

- (1) the subpoena must be issued for a lawful purpose within the statutory authority of the issuing agency;
- (2) the documents requested must be relevant to that purpose; and
- (3) the subpoena demand must be reasonable and not unduly burdensome.

Misuse of subpoenas may result in sanctions, including dismissal of the case under 29 C.F.R. §§ 18.6(d)(2), 18.29, 18.34(g)(3), 18.36. See also Fed R. Civ. P. 45(c)(1).

Moreover, when one requests subpoenas from OALJ one is representing that the subpoenas will be used in an administrative proceeding before OALJ or OWCP. Federal criminal statutes provide penalties of up to \$10,000 and/or imprisonment of up to 5 years for knowing and willful

submission of false statements to the Federal Government. 18 U.S.C. 1001; see also 18 U.S.C. § 1546.

#### *Notice regarding expenses*

A witness, other than a witness for the Federal Government, may not be required to attend a deposition or hearing unless the mileage and witness fees are paid in advance. See 29 C.F.R. § 18.24(a).

#### *Prior notice of use of subpoena in discovery*

Notice must be given pursuant to 29 C.F.R. § 18.22(c) when using a subpoena to direct appearance at a deposition. In addition, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. Fed. R. Civ. P. 30(b)(1), as made applicable by 29 C.F.R. § 18.1(a). Similarly, use of a subpoena on a third party to command production of documents and things or inspection of premises before the hearing requires prior notice to all parties prior to service of the subpoena on the nonparty. Fed. R. Civ. P. 45(b)(1), as made applicable by 29 C.F.R. § 18.1(a). See *McCurdy v. Wedgewood Capital management Co., Inc.*, No. Civ. A. 97-4304, 1998 WL 964185, \*6 (E.D. Pa Nov. 16, 1998).

#### Duties of Persons Responding to Subpoena

Any subpoenaed organization not a party to this adversary proceeding shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Fed. R. Civ. P. 30(b)(6) made applicable by 29 C.F.R. § 18.1(a).

A person responding to a subpoena to produce documents should produce them as they are kept in the usual course of business, or shall organize and label them to correspond with the categories in the demand. See, e.g., Fed. R. Civ. P. 45(d)(1).

Any motion to quash or limit the subpoena shall be filed in compliance with 29 C.F.R. § 18.24(c).

#### Notice to entities covered by the regulations implementing the Health Insurance Portability and Accountability Act of 1996

This section pertains to the privacy of individually identifiable health information. If a subpoena purportedly issued under the authority of OALJ does not bear a raised, embossed seal, it is not valid under 45 C.F.R. §§ 164.512(e), 164.512(f) or 164.512(l). These regulations went into effect on April 14, 2001; the general rule compliance date is April 14, 2003 (April 14, 2004 for small health plans).

## Rules

The general rule governing subpoenas is found at 29 C.F.R. § 18.24. Sections 555 and 556 of the Administrative Procedure Act, 5 U.S.C. §§ 553 et. seq., are also relevant to ALJ subpoenas. Section 555, in pertinent part, reads as follows:

§ 555. Ancillary matters

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(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply. \*\*\*

5 U.S.C. § 555.

Section 556 reads in pertinent part:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

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(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may

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(2) issue subpoenas authorized by law;

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5 U.S.C. § 556.

### Subpoena Enforcement

For subpoena enforcement, a party must have the ALJ certify the facts to the appropriate federal district court. Dunn v. Lockheed Martin, 2001 WL 294165 (N.D. Tex., March 27, 2001)(No. 3:01-CV-359-G). In order for the federal district court to have jurisdiction, the ALJ must authenticate or vouch for the facts in writing or attest to the facts as being true or as represented. A-Z International v. Phillips, 179 F.3d 1187, 1193 (9<sup>th</sup> Cir. 1999). Only the ALJ hearing the case can certify the matter since he or she is given the power to enforce subpoenas necessary to his or her

considerations. Dunn. In Dunn, no facts had been certified to the court showing that anyone had disobeyed or resisted any lawful order or process, or neglected to produce, after having been ordered to do so, any pertinent book, paper, or document, or refused to appear after having been subpoenaed. Thus the federal district court found that it lacked jurisdiction. See Section 27(b) of the LHWCA and Topic 27.3.

#### 27.1.4 Authority to Grant Summary Decision

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

*\*For a detailed discussion of summary decision procedures and rules, see supra, Topic 19.4.2.]*

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

#### 27.1.5 Power to Approve Agreed Settlements

\_\_\_\_\_ Both judges and district directors, within their respective spheres of authority, have the power to approve agreed settlements between parties. Clefstad v. Perini N. River Assocs., 9 BRBS 217, 220 (1978). To the extent that an agreed settlement is reached during the informal stage of proceedings, approval or disapproval of that settlement is the district director’s function. Id. at 221.

In Blake v. Hurlburt Field Billeting Fund, 17 BRBS 14 (1985), the Board stated that “the interest in judicial efficiency was best served by allowing administrative law judges to approve settlements where the case had been referred to that office for hearing prior to the settlement being reached.” 17 BRBS at 16.

However, when a case is set for hearing, and certainly after a case is heard, remand to the district director is not contemplated. See Bell v. Marine Terminals Corporation, 95-LHC-1538 (ALJ) (October 19, 1995). Section 702.241(c) of the Regulations provides in relevant part:

Where a case is pending before the ALJ **but not set for hearing**, the parties may request the case be remanded to the District Director for consideration of the settlement.

20 C.F.R. § 702.241(c) (Emphasis added).

The issue of the claimant's attorney's fee should, if possible, be resolved at the time the parties negotiate a settlement of compensation. Carswell v. Wills Trucking, 13 BRBS 340 (1981). Carswell spoke in terms of submitting the agreement to the presiding adjudicatory officer. 13 BRBS at 347. Additionally, in Carswell, the Board stressed the need for a settlement package. 13 BRBS at 346. In Enright v. St. Louis Ship, 13 BRBS 572, the Board noted its Carswell holding and went on to state that if the parties were unable to agree on attorney fees, liability would be determined for the fee and the amount of the fee would then be determined by the presiding officer in the "usual manner" with itemized fee applications being submitted to **each level** of the process in which services were performed and the presiding officers must give a detailed rationale for any substantial reduction from the requested fees.

***JED. NOTE:** While, not specifically holding so, clearly the Board has implied that when a § 8(i) settlement includes settlement of attorney's fees, the presiding officer (whether it is the ALJ or the District Director--depending on where the settlement is submitted) should pass judgment on the settlement of all attorney fees. If attorney fees are not a part of the settlement package, then the attorney fee applications should be dealt with in the "usual manner" by the submission of attorney fee applications to each level of the process in which services were performed.]*

While the power to approve settlements is vested in the district director (as well as the ALJ), the **Fourth Circuit** has upheld the authority of a duly authorized assistant district director to approve an agreed settlement where that assistant district director had been authorized to perform all the functions of a district director. House v. Southern Stevedoring Co., 703 F.2d 87, 88-89, 15 BRBS 114, 117-18 (CRT) (**4th Cir.** 1983), aff'g 14 BRBS 979 (1982). The court recognized the modern judicial doctrine approving broad subdelegation of authority within administrative agencies where subdelegation is in keeping with the nature of the statutory duties and with Congress' intent. Id. at 88, 15 BRBS at 117 (CRT).

#### **27.1.6 Authority to Enter Order in Contested Claim**

A district director has no authority to enter an order in a contested claim. Pearce v. Director, OWCP, 647 F.2d 716, 724-25, 13 BRBS 241, 253 (**7th Cir.** 1981), transfer, 603 F.2d 763, 10 BRBS 867 (**9th Cir.** 1979); O'Berry v. Jacksonville Shipyards, Inc., 22 BRBS 430, 432-33 (1989), recon. of 21 BRBS 355 (1988) (where district director did not have authority to issue 1973 compensation order because 1972 Amendments had already taken effect and all adjudicative functions had been removed from district directors, the order was void from its inception, i.e., it was a complete nullity and without legal effect); Carter v. Merritt Ship Repair, 19 BRBS 94, 96 (1986); Roulst v. Marco Constr. Co., 15 BRBS 443, 447 (1983) (because employer rejected recommendations of district director within time limits prescribed by regulations, district director was without authority to subsequently issue compensation order). When an issue is in dispute, only an administrative law judge can hold a formal hearing and make findings to resolve the dispute. Carter, 19 BRBS at 96.

### 27.1.7 Authority to Modify Existing Compensation Order

Where a modification request is before the district director and the parties are unable to agree on disputed issues, the district director cannot modify the compensation order but must refer the case to the Office of Administrative Law Judges. Arbizu v. Triple A Mach. Shop, 15 BRBS 46, 48 (1982). A district director does not have the power to modify a judge's decision. Carter v. Merritt Ship Repair, 19 BRBS 94, 96 (1986). The district director "may only perform administrative and prehearing investigative functions and facilitate settlement." Id.

A district director's modification of a judge's decision is of no legal effect, it is a legal nullity. Hernandez v. Bethlehem Steel Corp., 20 BRBS 49, 50-51 (1987) (where assistant district director possessed no authority to interpret or modify ALJ's decision, that decision was reinstated in its entirety).

### 27.1.8 Holding of Informal Conference

The district director has the power to hold an informal conference in order to facilitate settlement. The holding of an informal conference, however, is a discretionary act of the district director. Matthews v. Jeffboat, Inc., 18 BRBS 185, 187 (1986).

**[ED. NOTE: However, in lieu of FMC Corporation v. Perez, 128 F.3d 908 (5<sup>th</sup> Cir. 1997) (The awarding of Section 28(b) fees is not appropriate if there has not been an informal conference with the Department of Labor.). Accord Todd Shipyards Corp. v. Director, OWCP, 950 F.2d 607 (9<sup>th</sup> Cir. 1991); Staftex Staffing v. Director, OWCP, 217 F.3d 365 (5<sup>th</sup> Cir. July 18, 2000); re-issued at 237 F.3d 409 (5<sup>th</sup> Cir. July 25, 2000)(then subsequently re-issued again on March 26, 2001 using the 237 F.3d 409 cite.); but see, Mary J. Hawkins (Widow of Gilbert W. Hawkins) v. Harbert International, Inc. and Insurance Company of North America, 33 BRBS 198 (1999) (Although technically no informal conference had been held, the review of the claim by two claims examiners satisfied the informal process requirements of the LHWCA.); Flanagan Stevedores, Inc. v. Gallagher, 219 F.3d 426 (5<sup>th</sup> Cir. 2000). The Board found Bolton v. Halter Marine, Inc., \_\_\_ BRBS \_\_\_, (BRB No. 01-0182) (Oct. 2, 2001) to be analogous to Flanagan. For more on this, see Topic 28.1.2 Attorney Fees—Successful Prosecution.]**

### 27.1.9 Authority to Enter Section 14(f) Assessment

The district director has the authority to make a Section 14(f) assessment for failure to pay compensation within ten days after it becomes due. Patterson v. Tidelands Marine Serv., 15 BRBS 65, 67-68 (1982), vac'd on other grounds, 719 F.2d 126, 16 BRBS 10 (CRT) (5<sup>th</sup> Cir. 1983). The district director's role in making such an assessment is merely ministerial, substantive issues that arise are referred to another administrative level. Id.

### **27.1.10 Authority to Issue Supplementary Compensation Order**

Where there is a default in payment, the person to whom compensation is due and payable should apply to the district director for a supplementary compensation order. Ries v. Harry Kane, Inc., 15 BRBS 460, 464 (1983). An allegation of a default in payments is capable of being heard by the district director in an application for a supplementary compensation order, where a claimant may seek a default order and appropriate additional assessments of compensation. Id.

### **27.1.11 Authority to Award Attorney's Fees**

The district director has the authority to award any fees for services performed through the termination of the informal conference proceeding. Revoir v. General Dynamics Corp., 12 BRBS 524, 527-28 (1980). See Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15 (1990).

The attorney should apply to the judge for fees for all services performed after the informal conference proceedings are terminated until the date upon which the judge files the Decision and Order or the Decision and Order on Reconsideration. Id. See Taylor v. Cactus Int'l, Inc., 13 BRBS 458, 461 (1981), overruled in part by Glenn v. Tampa Ship Repair & Dry Dock, 18 BRBS 205 (1986) (district director may not award attorneys' fee to claimant's counsel where informal conference was inconclusive, no agreement had been reached, and formal hearing before ALJ had been requested by employer).

The claims examiner or assistant district director generally lacks the authority to determine an attorney's fee: they may make recommendations to the district director, but the district director must make the final determination. Tupper v. Teledyne Movable Offshore, 13 BRBS 614, 617 (1981); Traina v. Pittston Stevedoring Corp., 8 BRBS 715, 721, reaff'd on recon., 9 BRBS 191 (1978).

There is no authority to delegate acts discretionary or quasi-judicial in nature. Traina, 8 BRBS at 721. The Board has held, however, that an assistant district director, authorized to perform all the functions of a district director, possessed the authority to determine an attorney's fee where no district director had been appointed and the assistant district director was acting in that capacity. Hill v. Nacirema Operating Co., 12 BRBS 119, 121-22 (1980).

### **27.1.11.1 Resolving Contract Disputes--Generally**

Relying on Section 19(a), the Board has recognized the authority of administrative law judges to resolve contract disputes between employers and insurance companies when the contract issues were either necessary to the resolution of the claimant's arguments or enhanced judicial economy. Schaubert v. Omega Services Industries, 32 BRBS 233 (1998) (As claimant once had a meritorious claim for benefits, ALJ has the authority to address the issue of the responsible employer under the borrowed employee doctrine and this authority included addressing the ancillary contract issues.).

Brady v. Hall Brothers Marine Corp. of Gloucester, 13 BRBS 854 (1981). See also Stillwell v. The Home Indemnity Co., 5 BRBS 436 (1977); Droogsmas v. Pensacola Stevedoring Co., Inc., 11 BRBS 1 (1979). Cf. Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5<sup>th</sup> Cir. 2001). In Temporary Employment Services, the **Fifth Circuit** found that the ALJ did not have jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between the borrowing employer and the loaning employer. Additionally the court found that the ALJ did not have jurisdiction to address a waiver of subrogation by the loaning employer's carrier. The jurisdiction issue turned on the interpretation of that part of Section 19(a) of the LHWCA stating that an ALJ has authority "to hear and determine all questions in respect of such claims." The **Fifth Circuit** concluded that the contract dispute was not integral to the longshore compensation claim and that the Board and the ALJ did not have the statutory authority to determine that issue.

*[ED. NOTE: In Weber v. S.C. Loveland Co. (Weber III), \_\_\_ BRBS \_\_\_ (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30 2002), the Board distinguished Temporary Employment Services. The issue in Weber was which of two, if any insurers was on the risk for longshore benefits at the time of the claimant's injury and is liable for those benefits. In Weber, the claimant was injured in Jamaica and the Board found that the claimant was "covered under the LHWCA." There were two insurance policies in question.. One covered injuries within the United States and included Longshore coverage. The other covered injuries outside the U.S. and did not include Longshore coverage. The Board noted that in Temporary Employment Services, the **Fifth Circuit** held that contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board. However, the Board found that Weber "does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of employers' carriers is liable." Thus the Board found that the ALJ has the authority to address the issue.]*

The Board has reasoned that compensation under the LHWCA was a federally created right, that insurance coverage is mandated by the LHWCA, that the adjudication of compensation liability may turn on an interpretation of a compensation insurance contract and that therefore, a non-Article III tribunal could constitutionally exercise authority to initially determine insurance contract disputes. Valdez v. Bethlehem Steel Corp., 16 BRBS 143 (1984).

In Rodman v. Bethlehem Steel Corp., 16 BRBS 123 (1984), the Board stated:

The authority for Congress to promulgate a workers' compensation scheme for maritime employees is now undisputed. Moreover, the authority of Congress to delegate the initial resolution of claims arising under this workers' compensation scheme to non-Article III tribunals is unquestioned. See generally Crowell v. Benson, 285 U.S. 22 (1932). In promulgating this Act, Congress specifically required that all employers who engage in activities covered under the Act either seek insurance coverage or be self-insured. 33 U.S.C. § 939; see 33 U.S.C. §§ 904, 934-

938. Thus, the adjudication of compensation liability under the Act may turn on the interpretation of the compensation insurance contract. It is consistent with the adjudication of compensation claims arising under the Act, and in fact quite necessary, that the tribunal vested with the authority to determine compensation liability also have the authority to adjudicate insurance contract disputes which arise out of the Act and claims filed thereunder.

Rodman, 16 BRBS at 125.

However, in Rodman as in the majority of cases before the Board, the Board was focused on the administrative law judge's need to decide issues in order to determine compensation liability. For instance, in Rodman, the Board went on to state:

[A]t issue is the jurisdiction of the administrative law judge to merely adjudicate those limited insurance contract disputes which arise out of or under the Act, the resolution of which are necessary in order to determine compensation liability in claims under the Act. Determining the responsible carrier, for example, is often necessary in order to award compensation. ... After review of the Act, its legislative history and the cases ... we can discern no constitutional barrier to permitting administrative law judges to adjudicate insurance contract disputes which arise out of or under the Act.

Rodman 16 BRBS at 126.

Similarly, in Aetna Life Ins. Co. V. Harris, 578 F.2d 52 (3d Cir. 1978), rev'g 6 BRBS 494 (1977), the **Third Circuit** found that, pursuant to Section 19(a), an administrative law judge could decide the issue of whether a non-workmen's compensation insurance carrier was entitled to reimbursement for payments it had made outside the LHWCA from the award to which a claimant had been found entitled under the LHWCA. The court based its decision on its findings of a close factual relationship between reimbursement and compensation claims and on the policy consideration of avoiding duplicative litigation and expenditures of time and money by the parties and the courts.

While the above cited cases provide for the limited resolution of contract disputes arising between employers and insurance companies, this jurisprudentially created authority is present only for the resolution of compensation related issues. In other words, if the adjudication of the compensation liability turns on an interpretation of a compensation insurance contract, then the administrative law judge has authority to determine the insurance contract dispute.

### **Louisiana Oilfield Indemnity Act (LOIA)**

The Louisiana Oilfield Indemnity Act (LOIA) provides that certain indemnification provisions contained in some agreements relative to oil, gas or water wells or drilling for minerals

are invalid due to the inequity between independent contractors and oil companies. La. Rev. Stat. Ann. § 9:2780. To invalidate a contractual clause as being against public policy, a party must show that the contract requires “defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault on the part of the indemnitee, ... .” La. Rev. Stat. Ann. § 9:2780(A). Both the **Fifth Circuit** and the Louisiana Supreme Court have held that if the indemnitee is not at fault, the LOIA does not apply to invalidate a waiver of subrogation in its favor. In Schaubert v. Omega Services Industries, 32 BRBS 233 (1998), the Board found that the LOIA, as a fault-based statute, cannot apply to cases arising under the LHWCA, a non-fault statute.

### **27.1.11.2 Resolving Contract Disputes Involving Employer Attorney Fees**

In Gray & Co., Inc. v. Highlands Insurance Co., 9 BRBS 424 (1978), the Board held that an administrative law judge has power pursuant to the LHWCA to order an insurance carrier to pay attorney’s fees incurred by its insured employer in defending a claim. However, that case is generally distinguishable from one in which an employer requests that its attorney fee be paid by one or more carriers. In Gray & Co., Inc., the employer asserted (and there is no evidence to contradict the assertion) that none of the carriers involved in Gray & Co., Inc. objected to Gray’s request for an attorney fee award. Gray & Co., Inc., 9 BRBS at 427. Furthermore, Gray & Co., Inc. relied on Harris, supra, in which the **Third Circuit** found that there was a close factual relationship between reimbursement and compensation claims.

*[ED. NOTE: Gray & Co., Inc. has been indirectly overruled by Medrano v. Bethlehem Steel Corp., 23 BRBS 223 (1990). See infra.]*

In Rodman, 16 BRBS 123, the Board opined that when no constitutional barrier to permitting an administrative law judge from adjudicating insurance contract disputes is discernable, there is jurisdiction. Thus, one might argue that the judge could adjudicate an attorney fee dispute between an employer and carrier(s).

*[ED. NOTE : The Board’s position in Rodman assumes a broad grant of power under the LHWCA and is diametrically opposite to the view that administrative agencies have only the power specifically granted to them by Congress.]*

However, the following analysis of the pertinent LHWCA sections does not disclose substantial Congressional authority to award an attorney fee to an employer. The pertinent sections of the LHWCA are Sections 28 and 26.

### **LHWCA Jurisprudence**

Section 28 specifically deals with attorney fees in reference to “a person seeking benefits.” However, nowhere within that provision is there a reference to an attorney fee award on behalf of an employer. The language of Section 28(a) providing for an attorney fee states that any such

attorney fee “shall be paid by the employer or carrier to the attorney for the claimant...” 33 U.S.C. §928(a).

In fact, the Board itself has reversed an administrative law judge’s award of attorney’s fees to an employer:

Section 28 of the Act, ... under which fees for attorneys can be granted, allows for the award of fees only to a **claimant’s** representative. The administrative law judge’s award of a fee for employer’s counsel is therefore reversed.

Medrano v. Bethlehem Steel Corp., 23 BRBS 223, 226 (1990) (emphasis in original). See also Mackey v. Marine Terminals, Inc., 21 BRBS 129, 132 (1988) (“while Section 28 of the Act... provides for employer’s liability for claimant’s attorney’s fee, it does not also provide for attorney’s fee awards for employer if it successfully defends against the claim.). The Board apparently indirectly overruled Gray & Co., Inc. when it issued Medrano, 23 BRBS 223, noted, supra.

Section 26 dealing with “Costs” likewise does not provide support for an award of an attorney fee to an employer. Section 26 is available only where a claim was instituted or continued without reasonable ground. Furthermore, the Board has ruled that attorney fees may not be considered costs within the meaning of Section 26. Toscano v Sun Ship, Inc., 24 BRBS 207 (1991); and the **Ninth Circuit** has ruled that an administrative law judge does not have the authority to impose costs. Metropolitan Stevedore Co. v. Brickner, 11 F.3d 887, 27 BRBS 132 (CRT) (**9th Cir.** 1993).

### “The American Rule”

According to the “American Rule”, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser. Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975). Only two exceptions to the “American Rule” exists: (1) where the parties have entered into an enforceable agreement providing for the same; see, e.g., Hall v. Cole, 412 U.S. 1, 4 - 5 (1973), or (2) where fees are authorized by statute. Alyeska Pipeline, 421 U.S. at 257.

The second exception will first be addressed. By enacting Section 28 of the LHWCA Congress created a statutory exception to the American Rule. Under certain circumstances, liability for the attorney fees of a claimant’s attorney would be shifted to the employer.

While noting Congress’ general awareness and acceptance of the American Rule, the **United States Supreme Court** stated in Alyeska that “[w]hat Congress has done...is to make specific and explicit provisions for the allowance of attorney’s fees under selected statutes granting or protecting various federal rights.” 421 U.S. at 260. The LHWCA was among those statutes specifically listed by the Court as **including explicit attorney fee provisions**. 421 U.S. at 260 n. 33. The **Supreme Court** concluded:

Under this scheme of things, it is apparent that the circumstance under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

Thus, where a specific exception to the American Rule has been crafted by Congress, it cannot be enlarged upon by the courts. The Alyeska Court's reasoning as to the exclusivity of the LHWCA's attorney fee provisions was followed by the **Fifth and Ninth Circuits**. In Holliday v. Todd Shipyards Corp., 654 F.2d 415 (**5th Cir.** 1981) and Director, OWCP v. Robertson, 625 F. 2d 873 (**9th Cir.** 1980), the courts rejected attempts to devise new exceptions to the American Rule in order to hold the Special Fund liable for attorney's fees. Both courts expressed a general unwillingness to develop non-statutory exceptions for statutory classes of action where Congress has already legislated specific remedies. The **Fifth Circuit** rejected the argument for a new exception to the American Rule by stating simply that "Congress has spoken on the subject of attorneys' fee awards under the LHWCA. Only the employer or carrier, and they only in certain cases, are made liable for such fees by Section 28...." Holiday, 654 F.2d at 421.

The other exception to the American Rule is where the parties have entered into an enforceable agreement providing for the payment of attorney fees. If such an agreement were entered into by an employer and its carriers, that is a matter which is best addressed in another forum. An administrative law judge does not have jurisdiction to decide insurance contract law when it does not specifically relate to a claimant's entitlement to compensation.

#### **27.1.12 Authority to Determine Reasonableness of Refusal to Undergo Medical Examination or Treatment**

Section 7(d)(4) of the LHWCA, as amended in 1984, provides that the Secretary or judge may order the suspension of compensation if an employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by the employer's chosen physician, unless the circumstances justified the refusal. 33 U.S.C. § 907(d)(4).

Prior to the 1984 amendments, the issue of whether a claimant's refusal to undergo medical treatment is reasonable was delegated from the Secretary to the district director pursuant to Section 702.410 of the regulations. 20 C.F.R. § 702.410; Hrycyk v. Bath Iron Works Corp., 8 BRBS 300, 301-02 (1978), overruled in part by Dionisopoulos v. Pete Pappas & Sons, 14 BRBS 523 (1981).

Under the pre-1984 amended LHWCA, the reasonableness of refusal can only be decided by a district director; a judge may not make such a finding under Section 7(d). Hike v. Billeting Fund, Robins Air Force Base, 13 BRBS 1059, 1063 (1981); Ogundele v. American Sec. & Trust Bank, 15 BRBS 96, 99 (1980); Camarillo v. National Steel & Shipbuilding Co., 10 BRBS 54, 65 (1979). The new Section 7(d)(4), as amended in 1984, allows the judge to make unreasonableness/suspension findings. Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245, 248-49 (1989); 20 C.F.R. § 702.410 (1985).

### 27.1.13 Power in Relation to Section 7 Medicals [See also Topic 7]

Only the district director can excuse a physician's failure to furnish a first report of injury or treatment within the prescribed 10 day period whenever the district director finds it to be in the interest of justice to do so. Prior to the 1984 Amendments, the implementing regulations, 20 C.F.R. § 702.422(b) (1984) (amended 1985), explicitly stated that either the district director or the judge could excuse the failure to comply with the reporting requirement. However, in 1985, the regulations were revised in the wake of the 1984 Amendments to state, in pertinent part, that "[f]or good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act...." 20 C.F.R. § 702.422(b) (1996) (A subsequent subsection, Section 7(d)(4), provides that the Secretary or administrative law judge may suspend compensation if an employee unreasonably refused to undergo medical treatment).

However, it should be noted that a case raising the factual issue of whether the report was, in fact, timely filed would be referred to OALJ for resolution. Sanders v. Marine Terminals Corp., 31 BRBS 19 (1997) (factual dispute regarding necessity of recommended housekeeping assistance pursuant to § 7(a) is a fact issue for ALJ), citing Toyer v. Bethlehem Steel Corp., 28 BRBS 347, 353 (1994) and Glenn v. Tampa Ship Repair & Dry Dock, 18 BRBS 205, 208 (1986) (fee dispute before the district director would be referred to ALJ when a finding of fact regarding the date of employer's controversion is needed).

The ALJ has the authority to order payment for medical expenses already incurred and may resolve all factual issues presented in a claim referred to him/her for adjudication. Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989). Section 7(b) and implementing regulations do not authorize the Secretary and district director to oversee the provision of medical care to the exclusion of the judge. Anderson, 22 BRBS at 24.

Unresolved disputes regarding medical benefits are subject to the procedural requirements of the regulations (i.e., § 702.315(a); § 702.316), notwithstanding the general provisions of the LHWCA that the Secretary is to oversee a claimant's medical care. Sanders, supra. A claim for medical benefits that raises designated factual issues, such as the need for specific care or treatment for a work-related injury, must be referred to a judge for resolution of the disputed factual issues in accordance with Section 19(d) of the LHWCA and the APA. Sanders, supra (factual disputes regarding necessity of recommended housekeeping assistance pursuant to § 7(a) is a fact issue for ALJ). A claim for enforcement of medical benefits is accorded the same adjudicatory procedures as an initial claim for compensation, which thus may involve adjudication by a judge. Kelley v. Bureau of National Affairs, 20 BRBS 169 (1988).

## 27.1.14 OSHA Regulations

### 27.1.14.1 OSHA Compliance as Substantial Rebuttal Evidence

A question has arisen in occupational disease cases as to whether or not Occupational Safety and Health Act (OSHA) regulations should affect a claimant's Section 20 presumption. In other words, can OSHA compliance serve as the employer's substantial evidence necessary to rebut the Section 20 presumption to which a claimant is entitled after presenting a *prima facie* case? See Chao, Secretary of Labor v. Mallard Bay Drilling, Inc., \_\_\_ U.S. \_\_\_ (No. 00927) (January 9, 2002), rev'g 212 F.3d 898 (5<sup>th</sup> Cir. 2000) (One federal agency's involvement [U.S. Coast Guard] in an area does not necessarily limit or displace another's [OSHA] participation/involvement.).

*[ED. NOTE: While this discussion will focus on hearing loss cases, it is also pertinent to occupational disease cases, including those involving asbestos. In fact one of the cited cases noted infra is a Ninth Circuit asbestos case involving OSHA compliance (Todd Pacific Shipyards Corp. v. Director, OWCP, 914 F.2d 1317 (9<sup>th</sup> Cir. 1990).]*

### 27.1.14.2 Legislative Purposes Behind LHWCA and OSHA

*[ED. NOTE: In considering the adoption of a rule such as allowing OSHA compliance to serve as substantial rebuttal evidence, one must realize that such a rule would have a far-reaching and unpredictable impact on the LHWCA. Attention must be paid to the legislative purposes underlying the LHWCA. The legislative goals behind OSHA are also relevant in this inquiry.]*

The general purpose of the LHWCA is to aid covered workers by minimizing the need for litigation to secure compensation for their injuries. Reed v. S. S. Yaka, 373 U.S. 410, 415 (1963); Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596, 616-17 (1981). The LHWCA is designed to ensure that covered workers are fairly and promptly compensated for claims arising out of their employment. Donovan v. Washington Metropolitan Area Transit Authority, 614 F. Supp. 1419, 1420 (D. D.C. 1985), aff'd, 796 F.2d 481 (D.C. Cir. 1986), cert. denied, 481 U.S. 1013 (1987); Vilanova v. United States, 625 F. Supp. 651, 654 (D. P.R. 1986), aff'd in part without op. and vacated on other grounds in part without op., 802 F.2d 440 (1<sup>st</sup> Cir. 1986), reaff'd, 851 F.2d 1 (1<sup>st</sup> Cir. 1988), cert denied, 488 U.S. 1016 (1989) (fundamental purpose of the LHWCA is to provide employees with practical and expeditious remedy and at same time to limit economic burden on employers by providing that liability under LHWCA shall be exclusive of all other liability); Marsala v. Triple A South, 14 BRBS 39 (BRB 1981) (fundamental intent of the LHWCA is to compensate employees for loss of wage-earning capacity attributable to employment-related injury). Further, the LHWCA has historically been liberally construed in favor of employees. See Baltimore & Philadelphia S.B. Co. v. Norton, 284 U.S. 408, 414 (1932); Harbor Marine Contracting Co. v. Lowe, 152 F.2d 845, 847 (2<sup>d</sup> Cir. 1945), cert. denied, 328 U.S. 837 (1946); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977).

Taken together, these cases describe a compensatory regime that was intended to be and has been solicitous of covered employees while still requiring a reasonably certain connection between a bona fide injury and an employee's working conditions.

The purpose of the Occupational Safety and Health Act of 1970 was to "reduce the number and severity of work-related injuries and illnesses which...are resulting in ever-increasing human misery and economic loss." S. Rep. No. 1282, 91st Cong., 2d Sess. 1 (1970), reprinted in 1970 U.S.C.A.N. 5177, 5177. Congress did not expect that the enactment of OSHA would result in absolutely safe workplaces. Rather, the risk of significant harm was intended to be eliminated. Industrial Union Dept. AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 641 (1980). OSHA was never intended to, nor could it ever, eliminate all occupational accidents; it was intended to balance the interests of workers in workplace safety and employers in achieving profitability. Titanium Metals Corp. of America v. User, 579 F.2d 536, 543-44 (9th Cir. 1978); Anning-Johnson Co. v. U.S. Occupational Safety and Health Review Comm., 516 F.2d 1081, 1087-88 (7th Cir. 1975). The focus of OSHA is preventative, not compensatory. B & B Insulation Inc. v. Occupational Safety and Health Review Comm., 583 F.2d 1364, 1370-71 (5th Cir. 1978).

In B & B Insulation, the court noted that OSHA, by its own terms does not affect workers' compensation laws in any way. B & B Insulation, 583 F. 2d at 1371 n. 11. See 29 U.S.C. § 653(b)(4) ("Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment").

Thus, like the LHWCA, OSHA is a protective regime that reflects a compromise between employers and employees, although the balance OSHA strikes and the needs it serves are distinct from those of the LHWCA.

### **27.1.14.3 The Nexus Between OSHA and the LHWCA**

Within the LHWCA, Congress provides for the creation of reasonable and necessary regulations and standards "to protect the life, health, and safety" of workers who fall within its coverage, "and to render safe such employment and places of employment, and to prevent injury to...employees." 33 U.S.C. § 941. Section 41 provides the Secretary of Labor with the authority to conduct studies and investigations regarding the safety of maritime workers and the causes of injuries occurring within the scope of LHWCA coverage. It also empowers the Secretary to prescribe by regulation safety rules that would provide for the safety of employees otherwise covered by the LHWCA.

### **27.1.14.4 OSHA Noise Regulations**

The Secretary has promulgated an extensive set of regulations applicable to maritime employment. See 20 C.F.R. §§ 1915-22. Specifically, 29 C.F.R. § 1917 applies to employment

within a maritime terminal involving the movement of waterborne cargo between shore and vessel. Section 1917.1(a)(2)(iii) governs permissible noise exposure levels in maritime employment, and it adopts by reference the previously promulgated OSHA noise exposure guidelines contained at 29 C.F.R. § 1910.95.

OSHA regulations permit an eight-hour time-weighted average (TWA) exposure of 90 dBA (air weighted decibels) or less. See 29 C.F.R. § 1910.95 table G-16. A decibel is a reference to the lowest sound level that can be recorded. An air-weighted decibel (dBA) is filtered to remove low frequency information to which the ear does not respond as well. The OSHA regulations use the air-weighted scale. For every five decibel increase in sound level, the permissible exposure time is reduced by half. Thus, the regulations allow exposure to 95 dBA for four hours and 100 dBA for two hours and so forth. Under the OSHA regulations, no exposure exceeding 115 dBA is permitted and essentially unlimited exposure to less than 90 dBA is allowed. Expert testimony has generally stated that the normal human ear cannot perceive sounds that are below 10 dBA; that a 60 dBA is comparable to normal conversation; and that 80 dBA is comparable to city traffic. See Skrivanic v. Global Terminal & Container Service, (93-LHC-1011) (March 17, 1997) (1997) (unpublished ALJ decision).

It should be noted that Section 1910.95 does not define “injurious stimuli” or specify a particular noise exposure level that might constitute “injurious stimuli.” Damiano v. Global Terminal & Container Service, 32 BRBS 261(1998). Thus, an employer’s noise exposure surveys cannot demonstrate the absence of a work-related injury.

#### **27.1.14.5 OSHA Regulations in Relation to the Section 20 Presumption**

The fact that the OSHA regulations articulate the 90 dBA criterion is not necessarily determinative of the factual inquiry one must make as to whether a claimant suffered injury because of work exposure to injurious stimuli. See Todd Pacific Shipyards Corp. v. Director, OWCP, 914 F.2d 1317, 1322 (9th Cir. 1990) (holding that OSHA standards concerning exposure to asbestos are not necessarily determinative in LHWCA cases involving asbestos-related diseases but can be considered in determining if a claimant’s asbestos exposure was potentially harmful).

The **Ninth Circuit** in Todd Pacific Shipyards Corp. v. Director, OWCP, 914 F.2d 1317 (9th Cir. 1990), in essence, ratified a factual determination by an ALJ that, in the absence of substantial evidence to the contrary, an employer’s compliance with OSHA standards will be determinative of the issue of whether a claimant under the LHWCA was exposed to injurious stimuli. Todd Pacific Shipyards, 914 F.2d at 1322. The court did not specify precisely what would constitute substantial contrary evidence sufficient to counterbalance OSHA compliance. In Todd Pacific Shipyards, the employer demonstrated that the vessel upon which the claimant was allegedly exposed to asbestos had recently undergone an unusually thorough **asbestos** removal procedure. 914 F.2d at 1320. Against this evidence, the claimant could offer no credible evidence establishing that asbestos was still present in the vessel. Id. at 1321. In effect, the claimant produced no evidence at all that his disease could have been related to his work on this vessel.

The court, discussing its prior decision of Todd Shipyards Corp. v. Black, 717 F.2d 1280 (9th Cir. 1983), noted that the claimant need not prove that his disease was caused entirely by the covered employer: “All that must be proved is that the covered employer exposed the worker to injurious stimuli in sufficient quantities to cause the disease.” Todd Pacific Shipyards, 914 F.2d at 1320 (quoting Black, 717 F.2d at 1286) (emphasis omitted). According to the court, “minimal” exposure to injurious stimuli will not suffice to impose liability on the covered employer absent proof that the exposure had the potential to cause disease. Id. However, the court declined to consider compliance with federal asbestos exposure standards to be factually dispositive *per se*. Id.

**[ED. NOTE: This ruling is in contrast to the Board’s decisions in Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988); Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988); and Proffitt v. E.J. Bartells Co., 10 BRBS 435 (1979), all of which held that minimal exposure to injurious stimuli is sufficient to impose liability for compensation on an employer.]**

The U.S. District Court for the Southern District of Texas considered a similar issue in Hicks, et al. v. Crowley Maritime Corp., 538 F. Supp. 285 (S.D. Tex. 1982), aff’d without opinion, 707 F.2d 514 (5th Cir. 1982). In Hicks, a case brought under the Jones Act and general maritime law, the court determined that compliance with OSHA standards would not excuse an employer from liability if it failed in its duty of care under the Jones Act or failed to furnish a vessel and equipment reasonably fit for their intended use. Hicks, 707 F.2d at 290. The court was willing to consider the OSHA noise exposure standards to be some relevant evidence of what noise levels a reasonably prudent vessel owner would allow to be present on his vessels. Id. at 291.

In DeLoach v. Hall-Buck Marine, Inc., 30 BRBS 587(ALJ) (1996), the ALJ concluded that the OSHA standards can be relied upon but are not necessarily determinative if there is evidence showing that another criteria is a more appropriate measure of noise levels. DeLoach, 30 BRBS at 590 (ALJ). The claimant in DeLoach was able to invoke the Section 20(a) presumption by introducing evidence that exposure to noise levels below the 90 dBA criterion was capable of causing hearing loss and that he was exposed to such levels at his place of employment. Id. at 590-91. The decision in Vaughn v. Maher Terminals, 25 BRBS 133 (ALJ) (1991) is also instructive in this regard. In response to the contention that “absent a showing of Employer’s violation of occupational Safety and Health Act (OSHA) minimum noise level standards, exposure to ‘injurious stimuli’ may not be established,” the ALJ determined that there is “neither statutory, regulatory nor case law [nor any] basis in logic” supporting this contention since “the objective of the OSHA noise level standards (the protection of workers) cannot be rationally controlling of whether or not Claimant sustained an occupationally based hearing loss.” Id. at 137.

In Damiano v. Global Terminal & Container Service, 32 BRBS 261(1998), the Board found that noise exposure surveys cannot demonstrate the absence of a work-related injury and that such evidence is insufficient to establish that a claimant was not exposed to loud noise at any time during his employment; rather, all it establishes is that during the time reflected in the studies, the levels of noise in the various places the claimant worked did not exceed that allowed by OSHA. The Board found that while noise exposure surveys constituted relevant evidence, it did not constitute

determinative evidence of the presence or absence of injurious stimuli in workplaces which fall under the LHWCA.

Additionally in Damiano, the Board noted approvingly the ALJ's comment that the pertinent OSHA regulation, 29 C.F.R. § 1910.95, counsels against regarding the eight-hour time-weight average (TWA) exposure to 90 dBA (air-weight decibels) criterion as determinative of factual inquiries which fall outside of the OSHA context. In particular, the ALJ found that while the regulation notes that 90 dBA is permissible exposure for an eight-hour day, it nonetheless requires employers to adopt an effective hearing conservation program whenever it appears that any employee may be exposed to an eight-hour TWA of 85 dBA or more. 20 C.F.R. § 1910.95(c). The Board noted approvingly that, from this evidence, the ALJ inferred that the 90 dBA is an outer limit, and as such, lower exposures are also cause for concern.

From these preceding cases it is clear that the OSHA standards have been regarded as **determinative** (“**the restrictive view**”) only where a claimant introduced only minimal evidence suggesting exposure to injurious stimuli. Under the more “**moderate view**,” OSHA standards constitute relevant evidence of a claimant's working conditions but are **not dispositive** of the issue of whether he was exposed to injurious stimuli while in particular maritime employ. In other words, OSHA compliance, standing alone, does not constitute substantial evidence sufficient to rebut the claimant's presumption under Section 20(a). See Damiano v. Global Terminal & Container Services, 32 BRBS 261(1998); Skrivanic v. Global Terminal & Container Service, 93-LHC-1011 (March 17, 1997) (unpublished ALJ decision).

OSHA noise exposure guidelines should not be a bright-line test for evaluating hearing loss claims under the LHWCA. See Damiano; Skrivanic, *supra*. While the OSHA standard is clearly relevant to the inquiry, Todd Shipyards indicates that it is not conclusive. Beyond Todd Shipyards's result, however, there are several additional factors which suggest that rigid adherence to the OSHA standard in the LHWCA context is not appropriate.

First, the language of the OSHA hearing loss regulation itself counsels against regarding the 90 dBA criterion as determinative of factual inquiries which fall outside of the OSHA context. Section 1910.95(c), appearing immediately after Table G-16 which sets forth the 90 dBA criterion, requires employers to adopt an effective hearing conservation program whenever it appears that any employee may be exposed to an eight-hour TWA of 85 dBA or more. While there is the inference that the 90 dBA criterion is an outer limit, lower exposures are cause for concern as well. This was noted by both the ALJ and Board in Damiano.

The regulatory history associated with the promulgation of Section 1910.95 is additionally relevant. After the 90 dBA criterion was adopted, it became clear that many employees suffered significant hearing impairment from exposures of less than 90 dBA. See Forging Industry Ass'n v. Secretary of Labor, 773 F.2d 1436, 1440 (4th Cir. 1985). Accordingly, OSHA began collecting data to support a reduction in the 90 dBA threshold. *Id.* The 85 dBA hearing conservation measure

contained at Section 1910.95(c) was adopted in 1983 as an interim measure only, not as a final pronouncement. *Id.*

In Forging Industry, the **Fourth Circuit** rejected an argument that the retention by OSHA of the 90 dBA threshold amounted to an admission that exposures below that level cannot be harmful to workers. *Id.* at 1446. The court determined that the “90 dB [sic] standard [is] not written in stone” and that, as additional medical data is presented to OSHA, the 90 dBA threshold may be lowered. *Id.* at 1446.

**[ED. NOTE:** *Any judicial enshrinement of the 90 dBA threshold outside the traditional OSHA would be unwise. In fact, expert testimony has indicated that the OSHA threshold represented a political compromise. See Skrivanic v. Global Terminal & Container Service, 93-LHC-1011 (March 17, 1997) (unpublished ALJ decision); Funk v. Global Terminal & Container Service, 94-LHC-494 (March 17, 1997) (unpublished ALJ decision). In fact, there is divergent opinion among the experts as to what is a threshold noise level necessary to cause hearing loss. See Funk, *supra*.]*

While the OSHA regulations are intended to protect the health and safety of workers, it is important to note that **Section 1910.95 contains no language purporting to set forth a medical criterion**. That is, Section 1910.95 does not indicate that noise exposures above 90 dBA will cause hearing loss while exposures below 90 dBA will not. Rather, Section 1910.95 simply sets 90 dBA as the maximum permissible eight hour TWA above which the employer must either take steps to lessen its employees’ noise exposure or else provide them with effective hearing protection. Section 1910.95 does not define “injurious stimuli,” nor specify a particular noise exposure level that might constitute it. Section 1910.95 is a regulatory provision, not a medical standard.

**[ED. NOTE:** *As was stated in Skrivanic, *supra*, (and from which most of this analysis was taken), adopting a stringent rule would work a profound change in the nature of the LHWCA. As is true of all workers’ compensation statutes, the LHWCA is a tradeoff between the interests of employees and employers. In exchange for giving up the right to sue their employers for personal injuries, employees are guaranteed speedy compensation payments. Compensation liability is absolute: proof of fault is not required and liability cannot be diminished or defeated by an employee’s contributory negligence. 33 U.S.C. § 904(b). A stringent rule would impose a major restraint on this scheme. If compliance with OSHA noise exposure standards was regarded as dispositive of claims for hearing loss under the LHWCA, a busload of board-certified otolaryngologists each testifying that a claimant suffered from noise-induced hearing loss would not avail a claimant under the LHWCA. This result does not appear to be readily reconcilable with the liberal construction that the LHWCA has historically received.*

*Since liability under the LHWCA is exclusive, adopting a stringent rule would completely foreclose a substantial number of claimants from ever being compensated from work-related injuries no matter what credible medical diagnoses they might produce. Indeed, given OSHA’s far-reaching impact on the workplace, it is somewhat difficult to hypothesize a workplace injury where OSHA standards could not be at least indirectly implicated and thereby absolve an employer from liability*

*for compensation under the LHWCA. This result does not seem to be in harmony with the goals of either OSHA or the LHWCA.*

*All of this is not to say that OSHA compliance is meaningless in the longshore context. Such compliance is a valuable piece of evidence which can, absent any equally probative evidence to the contrary, amount to substantial evidence sufficient to rebut the Section 20(a) presumption. If, as is highly likely, additional evidence on both sides is produced, the fact of OSHA compliance will simply be another brick in the evidentiary wall.]*

## 27.2 DISCOVERY

The judge has broad power to direct and authorize discovery in support of the adjudication process. 33 U.S.C. § 927(a); 5 U.S.C. § 556(c); see generally 20 C.F.R. §§ 702.338--702.341; 29 C.F.R. § 18.14 et. seq.; Bonner v. Ryan-Walsh Stevedoring Co., Inc., 15 BRBS 321 (1983); Lopes v. George Hyman Constr. Co., 13 BRBS 314 (1981).

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

Pursuant to this power, the judge may compel depositions, Lopes, 13 BRBS 314; Percoats v. Marine Terminals Corp., 15 BRBS 151 (1982), compel the production of documents, Sledge v. Sealand Terminal, Inc., 14 BRBS 334 (1981), and compel a claimant to undergo a vocational rehabilitation evaluation. Villasenor v. Marine Maintenance Indus., Inc., 17 BRBS 99 (1985); Bonner, 15 BRBS at 325; Carter v. General Elevator Co., 14 BRBS 90 (1981) (denial of motion to compel deposition affirmed where no prejudice shown).

The judge may also limit post-hearing discovery to evidence relevant to a certain issue. Olsen, 25 BRBS at 49. It is also within the administrative law judge’s discretion to deny a discovery motion. Stark v. Washington Star Co., 833 F.2d 1025, 1030, 20 BRBS 40, 48 (CRT) (**D.C. Cir.** 1987); Duran v. Interport Maintenance Corp., 27 BRBS 8, 13 (1993).

Where a party fails to attend a deposition, the procedures in Section 27 should be followed to compel attendance. Creasy v. J. W. Bateson Co., 14 BRBS 434 (1981). The sanctions provided by Rule 37(d) of the Federal Rules of Civil Procedure do not apply.

### **Authority to Order Claimant to Sign an Unconditional Medical Authorization**

ALJs have ordered claimants to sign unconditional medical authorizations. See for example, Terry v. Ingalls Shipbuilding, Inc., (ALJ Case No. 1998-LHC-2760)(1999). In Terry the claimant had refused to sign an authorization, objecting strenuously to allowing the employer ex parte communication with the claimant’s physicians. The claimant had suggested his willingness to sign a limited authorization which would have allowed the employer to obtain medical documentation which the claimant felt is relevant to the claims at issue. The claimant further argued that a blanket authorization would be in clear conflict with recent state supreme court rulings in both Louisiana and Mississippi which reaffirmed the doctor patient privilege in most circumstances.

However, as the ALJ noted in his order, the claim was under the LHWCA, a federal statute and there is no independently created physician/patient privilege under the LHWCA, the common law, or other federal law. The **Fifth Circuit** has held that there is no physician/patient privilege

under federal law. U.S. v. Moore, 970 F.2d 48 (5<sup>th</sup> Cir. 1992); Gilbreath v. Guadalupe Hospital Foundation, Inc., 5 F.3d 785, 792 (5<sup>th</sup> Cir. 1993).

An ALJ has broad authority to direct and authorize discovery in support of the adjudicatory process. 33 U.S.C. 927(a); 5 U.S.C. 556(c); see generally 20 C.F.R. 702.338-702.341; 29 C.F.R. 18.14 et seq. As part of this broad power, a judge may also compel the production of documents. Sledge v. Sealand Terminal, 14 BRBS 334, 338 (1981). Based on these broad powers, it is common practice to allow employers access to a claimant's full medical record.

*[ED. NOTE: From a practical standpoint, an employer trying to determine if it has a legitimate Section 8(f) (Trust Fund) claim, would need access to all medical records, not simply those related to the work-related injury.]*

### **Ex Parte Contact With Treating Physician**

The issue of *ex parte* contact with treating physicians has yielded mixed results in the various U.S. District courts through the country. For example, the U.S. District Court for the Eastern District of Texas, Marshall Division, in Perkins v. United States, 877 F. Supp. 330, 332 (E.D. Tx. 1995), noted that the **Fifth Circuit** has never addressed the issue of whether a defense lawyer could contact a personal injury plaintiff's non-pay physician *ex parte* without authorization. The district court denied such *ex parte* contact to prevent the unwarranted disclosure of extremely personal information deserving sensitive treatment, improper arm-twisting or intimidation of a claimant's physician, exposing him to professional sanctions; such problems would not exist by simply noticing the physician for deposition and allowing both sides to participate.

Similarly, in Horner v. Rowan Companies, Inc., 153 F.D.R. 597 (S.D. Tx. 1994), the court prohibited *ex parte* contact between a defense lawyer and plaintiff's non-party treating physician, and stated that unacceptable problems were inherently attendant with *ex parte* communications including: the absence of safeguards against the revelation of matters irrelevant to the lawsuit and personally damaging to the patient; potential breaches in confidentiality having a chilling effect upon the underlying doctor-patient relationship; and placing a physician unskilled in legal matters in the position of determining what information was subject to disclosure and what remained privileged, only to be subject to civil liability in the event of any improper disclosure. The court also noted that these problems were obviated when contact occurred in the context of formal discovery.

On the other hand, some courts have allowed *ex parte* contact. For example, in Steward v. Women in Community Service, Inc., 1998 WL 777997 (D. Nev.) [No other citation available.], the District Court allowed the *ex parte* contact and dismissed the concerns enunciated in Horner, finding that public policy considerations did not justify restricting the means by which defense counsel could gain access to a plaintiff's treating physician inasmuch as Fed. R. Civ. P. 1 was designed to secure a just, speedy and inexpensive determination of every action. However, the court noted that prior to the *ex parte* communication defense counsel was required to inform the physician that he had no obligation to speak.

## 27.3

## FEDERAL DISTRICT COURT ENFORCEMENT

Section 27(b) of the LHWCA provides:

**(b) If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.**

33 U.S.C. § 927(b).

*[ED. NOTE: The wording of Section 27(b) is shadowed in The ALJ Rules of Practice and Procedure:*

*If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process or misbehaves during a hearing... as to obstruct the same ... the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies.*

*29 C.F.R. 18.29(b). See also, Stevedoring Services of America, Inc. v. Eggert, 953 F.2d 552 (9<sup>th</sup> Cir. 1992), cert. denied, 505 U.S. 1230 (1992).*

*It should also be noted that the Administrative Procedure Act, in pertinent part, states:*

*Subject to published rules of the agency and within its powers, employees presiding at hearings may...(11) take other action authorized by agency rule consistent with this subchapter.*

5 U.S.C. §§ 552a, et seq., states in Section 556(c).

**For subpoena enforcement**, *see the discussion of Dunn v. Lockheed Martin, 2001 WL 294165 (N.D. Tex. March 27, 2001) (No. 3:01-CV-359-G) (For subpoena enforcement, a party must have the ALJ certify the facts to the appropriate federal district court.) found at Topic 27.1.3 ALJ Issues Subpoenas, Gives Oaths–“Subpoena Enforcement.”]*

The judge may exclude attorneys, parties, representatives, and participants for:

- (1) Refusal to comply with directions.
- (2) Dilatory tactics.
- (3) Disorderly or unethical conduct.
- (4) Failure to act in good faith.
- (5) Violating the prohibition against *ex parte* communications.

If an attorney or representative is suspended the judge shall recess the trial for a reasonable time to allow the party to obtain another representative. No proceeding shall be delayed, however, due to an appeal to the Chief Judge of the suspension. 29 C.F.R. § 18.36.

**Contumacious conduct** by any person in proceedings before the district director or administrative law judge may be certified to the United States District Court for the district in which the conduct occurred. After a hearing, the district judge may, if warranted by the evidence, punish the offending person as if the conduct had occurred before that court. 33 U.S.C. § 927(b).

Pursuant to Section 27(b), the district courts may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the LHWCA. Stevedoring Servs. of America v. Eggert, 953 F.2d 552, 555, 25 BRBS 92, 96 (CRT) (9th Cir.), cert. denied, 505 U.S. 1230 (1992) (district court lacked subject matter jurisdiction where ALJ’s order provided credit for payments previously made by employer, instead of being a direct order to the claimant to pay the employer a sum certain). A direct order of an administrative law judge to a claimant can be compelled by the district court using the means available for punishing contempt. Id.

If the judge orders the attendance or testimony of a witness or the answering of interrogatories pursuant to Section 27(a) and that order is resisted, Section 27(b) provides that the matter shall be referred to the appropriate Federal District Court for the imposition of sanctions. Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118, 122 (1989); Creasy v. J.W. Bateson Co., 14 BRBS 434, 436 (1981). Action upon a motion to compel is a necessary prerequisite

to the enforcement procedures contemplated by Section 27(b). Sledge v. Sealand Terminal, 14 BRBS 334, 338 (1981), decision after remand, 16 BRBS 178 (1984).

According to the Board, a judge cannot resort to Section 27(b) to sanction a claimant for pursuing a fraudulent claim since the LHWCA specifically contains a provision providing sanctions for filing a fraudulent claim at Section 31(a). See Topic 31, infra. Phillips v. A-Z International, 30 BRBS 215 (1996), vacated on other grounds at A-Z Intern. v. Phillips, 179 F.3d 1187, (9<sup>th</sup> Cir. 1999)(Held: (1) Under LHWCA provision for administrative contempt powers, where ALJ “certifies the facts to the district court,” it is district court, not the Board, which has exclusive jurisdiction over the matter, and (2) absent any clear statutory directive or interpretive regulations setting forth procedural mechanism by which district court hearing was initiated, ALJ took sufficient steps to “certify the facts” to district court within meaning of contempt provision, thus depriving the Board of jurisdiction; court did not express any opinion on whether the facts certified by the ALJ constitute a violation of Section 27(b).). Section 27(b) is to be utilized to certify the facts by which a person refuses to comply with a “lawful process” of the judge or when the person disobeys a “lawful process.” The term “**process**” in a contempt provision such as Section 27(b) is generally defined as “any means used by a court to acquire or exercise its jurisdiction over a person or over specific property.” Black’s Law Dictionary 1084 (West 5th ed. 1979); see, e.g., State Farm Fire & Casualty Co. v. Miller Electric Co., 596 N.E.2d 169 (Ill. App. Ct. 1992) as cited in Phillips at 217. The term “**process**” refers to the use of summons, writs, warrants or mandates issuing from a court in order to obtain jurisdiction over a person or property. Black’s Law Dictionary 1085 (5th ed. 1979).

***[ED. NOTE: In the Ninth Circuit A-Z Intern. v. Philips litigation at 179 F.3d 1187, the Director changed positions between its initial briefing of this matter and oral arguments. Originally on appeal to the circuit, the Director and Employer shared the position that the Board lacked jurisdiction to entertain the claimant’s appeal of the Supplemental and Amended Supplemental Decisions which certified the matter to federal district court. At oral argument, however, the Director disavowed the entire jurisdictional argument in his brief, contending that because the ALJ did not complete the certification process to the district court as set forth in Section 27(b), the Board may have had jurisdiction to entertain the appeal. The Ninth Circuit, however, “disagree[d] with the Director’s tentatively expressed and, by admission at oral argument, only equivocally held, viewpoint.” The court held that “[I]n the absence of any properly promulgated interpretive regulations, the actions taken by the ALJ were sufficient ‘to certify the facts to the district court’ within the plain meaning of the statute, and thus... the Board lacked jurisdiction.” ]***

Even when a decision is on appeal to the Board, only the ALJ can certify facts which transpired at the OALJ level of litigation. Kish v. GATX, (BRB Nos. 97-0461, 00-0445 and 00-0445A)(March 20, 2000)(Unpublished)(20 C.F.R. §802.103(b) permits the Board to certify to the district court a person’s disobedience arising out of proceedings before the Board.). However, when a party must apply to the ALJ for certification of facts, that party may pursue that remedy without the Board’s dismissing the appeal of the ALJ’s decision and order.