In the Matter of:

JOHN T. DEMPSEY, **ARB CASE NO. 01-075**

COMPLAINANT, **ALJ CASE NO. 01-CAA-5**

v. **DATE: May 7, 2002**

FLUOR DANIEL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Sangeeta Singal, Esq., *Law Offices of Sangeeta Singal, San Fransico, California,*
Richard Segerblom, Esq., *Law Offices of Richard Segerblom, Las Vegas, Nevada*

For the Respondent:
Robert E. Kent, Esq., Gary E. Scalabrini, Esq., *Gibbs, Giden, Locher & Turner LLP, Los Angeles, California*

REMAND ORDER

BACKGROUND

This case arose when the complainant, John T. Dempsey, filed a complaint with the Department of Labor alleging that the respondent, Fluor Daniel Inc., violated the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 (1994) (CAA). After an investigation, the Regional Administrator of the Occupational Safety and Health Administration (OSHA) concluded that Dempsey was not Fluor Daniel's employee, a prerequisite to coverage under the CAA, and he dismissed Dempsey's complaint. Dempsey requested a hearing before a Department of Labor Administrative Law Judge (ALJ) pursuant to 29 C.F.R. § 24.4(d)(2).

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

The ALJ held the hearing on February 22, 2001, in Las Vegas, Nevada. At the beginning of the hearing, counsel for both Dempsey and Fluor Daniel informed the ALJ that because the Regional Administrator had dismissed Dempsey's complaint on the ground that Dempsey was not Fluor Daniel's employee, both counsel were prepared to litigate only the employer-employee issue. The ALJ responded that he expected counsel to proceed on "the merits" of the case as well. However, when both counsel stated that they could not do so, the ALJ conducted the hearing, and evidence was limited to the issue whether Dempsey was Fluor Daniel's employee.

Based on the hearing and the evidence of record, the ALJ concluded that Dempsey was Fluor Daniel's employee when it allegedly took the actions that formed the basis of Dempsey's CAA complaint. Accordingly, on June 27, 2001, the ALJ issued a Recommended Decision and Order ("R. D. & O.") in which he recommended that "the complaint be remanded to the Regional Administrator of the Occupational Safety and Health Administration for a determination based on the merits." R. D. & O. at 10. The ALJ's Recommended Decision and Order also advised the parties that "[t]his Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board . . . ." *Id.*

Fluor Daniel filed a timely petition for review with the Administrative Review Board ("Board"). Because the R. D. & O. did not dispose of the case on its merits, but only decided the initial issue whether Dempsey was a covered employee, Fluor Daniel's appeal is interlocutory. Because interlocutory appeals are disfavored, the Board ordered Fluor Daniel to show cause why the Board should not dismiss its petition for review and remand this case to the ALJ to complete the adjudication of this case. Subsequently, Fluor Daniel filed Respondent's Response to Order to Show Cause ("Response"), and Dempsey filed a Reply to Respondent's Response to Show Cause ("Reply").

DISCUSSION

In *Plumley*, *v. Federal Bureau of Prisons*, 86-CAA-6, slip op. at 2 (Sec'y April 29, 1987), the Secretary of Labor ("Secretary") described the procedure for obtaining review of an ALJ's interlocutory order. The Secretary acknowledged that 29 C.F.R. Part 24, which establishes the procedures for litigation and administrative review of whistleblower complaints under the environmental statutes at issue here, does not provide for interlocutory review by the Secretary of ALJ rulings on motions in the course of administrative hearings. *Id*. The Secretary concluded that "[t]o the extent any situation is not provided for in those regulations, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 . . . , and the Federal Rules of Civil Procedure apply." *Id.* Turning to 29 C.F.R. Part 18 for guidance, the Secretary noted that 29 C.F.R. § 18.29(a), which describes the authority of administrative law judges, authorizes such judges to "'take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . . .'" *Id.* The Secretary determined that where an administrative law judge has issued an order of which the party seeks interlocutory review, an appropriate action would be for the judge to follow the

procedure established in 28 U.S.C. §1292(b)[2/] for certifying interlocutory questions for appeal from federal district courts to appellate courts. *Id.* In *Plumley*, the Secretary ultimately concluded that because no judge had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C. §1292(b), "an appeal from an interlocutory order such as this may not be taken." (Citations omitted). As Dempsey asserts, technically, the ALJ has not certified the interlocutory appeal in this case. Reply at 4. Nevertheless, the ALJ agreed, although reluctantly, to bifurcate the hearing and appended to his decision a statement of the parties' appeal rights which indicated to the parties that if a petition for review was not timely filed with the Board, the ALJ's recommended decision (*i.e.*, his finding that Dempsey was a covered employee under the CAA) would "automatically become the final order of the Secretary." Thus in effect, the ALJ has certified the question for the Board's consideration, and we will consider it to be so certified.

The Secretary and the Board have held many times that interlocutory appeals are generally disfavored, and that there is a strong policy against piecemeal appeals. *See e.g.*, *OFCCP v. Interstate Brands Corp.,* ARB No. 00-071, ALJ No. 97-OFC-6 (ARB Sept. 29, 2000); *Amato v. Assured Transportation and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000); *Hasan v. Commonwealth Edison Co.,* ARB No. 99-097; ALJ No. 99-ERA-17 (ARB Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ No. 94-ERA-13 (Sec'y Sept. 28, 1994). Fluor Daniel, in support of its argument that the Board should consider its interlocutory appeal, states that the Board has permitted interlocutory appeals "to resolve threshold procedural and substantive issues in order to conserve judicial and administrative resources" citing, *OFCCP v. Honeywell, Inc,* No. 77-OFC-3 (Sec'y June 2, 1993). Response at 3.

As the Secretary described *Honeywell*:

> [It] was the unusual case in which the ALJ submitted a Recommended Interlocutory Decision and Order and I ruled on certain selected issues. That case involved many threshold procedural and substantive issues of interpretation of E.O. 11,246,

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[2/] This provision states,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be take from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. §1292(b) (1994).

> as well as numerous allegations of discrimination in many of the defendant's employment practices affecting hundreds of employees. In addition, neither party objected to the Secretary's review of the ALJ's order as an interlocutory appeal.

The Cleveland Clinic Foundation, 91-OFC-20, slip op. at 2 (Apr. 18, 1995). When the Secretary accepted the interlocutory appeal in *Honeywell*, the parties had been litigating the case for more than ten years. The Secretary considered the interlocutory appeal of specific limited threshold legal issues in the hope that such decision would encourage the parties to engage in voluntary mediation. *OFCCP v. Interstate Brands Corp.,* slip op. at 3.

This case involves neither the number of complainants and novel threshold issues, nor the length of litigation involved in *Honeywell.* Furthermore, Fluor Daniel has identified no threshold legal issues, the resolution of which, would encourage the parties to engage in voluntary mediation. Essentially Fluor Daniel argues that we should consider the appeal because if we reverse the ALJ's coverage finding, the case will be concluded.[3/] However, in most cases in which a party files an interlocutory appeal of a non-procedural issue, resolution of the issue appealed would resolve the case. Nevertheless, this fact alone has not been considered a sufficient basis upon which to depart from the general rule that interlocutory appeals are disfavored. *See e.g., OFCCP v. Interstate Brands Corp.*, ARB No. 00-071, ALJ No. 97-OFC-6, (ARB Sept. 29, 2000)(interlocutory appeal of ALJ's recommended merits decision denied, where ALJ had failed to consider remedy issues); *Sasse v. Department of Justice*, ARB No. 99-053, ALJ No. 98-CAA-7 (ARB Aug. 31, 2000)(interlocutory appeal of ALJ's recommended decision on coverage denied); *Amato v. Assured Transportation and Delivery, Inc.,* ARB No. 98-167, ALJ No. 98-TSC-6 (ARB Jan. 31, 2000)(interlocutory appeal of ALJ's recommended decision on timeliness of complaint denied); *Shelton v. Oak Ridge National Laboratory*, ARB No. 98-100, ALJ No. 95-CAA-19 (ARB June 22, 1998)(interlocutory appeal of ALJ's order on the timeliness of hearing request denied); *Brown v. Homes & Narver, Inc.,* No. 90-ERA-26 (Sec'y June 29, 1993)(interlocutory appeal of ALJ's recommended decision on jurisdiction denied). Accordingly, we find no sufficient reason in this case to depart from the general rule against acceptance of interlocutory appeals.

[3/] Fluor Daniel also asserts that the Administrative Review Board "has allowed interlocutory appeals in order to properly direct the course of the adjudicatory process. *Baroumes v. Eagle Marine Services,* 23 BRBS 80 (1988); *Murphy v. Honeywell, Inc.*, 8 BRBS 178, 180 (1978)" and "has also entertained interlocutory appeals in the interest of judicial economy. *Williams v. Whitting Turner Contracting Co.*, 19 BRBS 33 (1986)." Response at 3-4. However, Fluor Daniel's assertion that the Administrative Review Board decided these cases is mistaken. Rather, they were decided by the Department of Labor's Benefits Review Board, which decides appeals from administrative law judge decisions under the Black Lung Benefits amendments to the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 *et seq.* and the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq.*

ORDER

We **REMAND** this case to the ALJ to conduct further proceedings and to issue a recommended decision resolving this case in its entirety.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge