TOPIC 80 RIPENESS

80.1 GENERALLY

The **Ninth Circuit** has discussed the applicability of the doctrine of ripeness to proceedings under the LHWCA. Chavez v. Director, OWCP, 961 F.2d 1409 (**9th Cir**. 1992). The court first noted that, to the degree that they are applicable at all, ripeness concerns should be given less weight in agency adjudications than in judicial ones. See Central Freight Lines v. ICC, 899 F.2d 413, 417-19 (**5th Cir.** 1990).

In Chavez, the **Ninth Circuit** stated:

> The ripeness doctrine is, at least partially, derived from Article III, Limitations on federal judicial power, limitations obviously inapplicable to administrative agencies. ... It appears that no court has considered whether the doctrine of ripeness is applicable to LHWCA proceedings.

961 F.2d at 1414.

The Chavez opinion went on to state that nevertheless:

> It seems unlikely that the Courts will conclude that ripeness is completely inapplicable in LHWCA proceedings. Administrative adjudicators have an interest in avoiding many of the 'problems of prematurity and abstractness,' Socialist Labor Party v. Gilligan, 406 **U.S**. 583, 588, 92 S. Ct. 1716, 1719, (1972), presented by unripe claims.

961 F.2d at 1414.

The doctrine of ripeness is invoked by Courts "to prevent the Courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 **U.S**. 136, 148-49 (1967), overruled by Califano v. Sanders, 430 **U.S.** 99 (1977); Trustees for Alaska v. Hodel, 806 F.2d 1378, 1381 (**9th Cir**. 1986).

Ripeness demands an evaluation of the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 1381. "A claim is fit for decision if the issues raised are primarily legal and do not require further factual development and the challenged action is final." Id.

80.2 CHAVEZ V. DIRECTOR, OWCP

In Chavez, the claim under the LHWCA was for permanent total disability due to both asbestosis and hypertension. The judge awarded Chavez permanent total disability benefits, finding the combined causes to be hypertension and asbestosis. Chavez had also filed a civil suit against various asbestos manufacturers, suppliers, and distributors. His claims were consolidated with similar actions brought by others plaintiffs and his case, by chance, served as the eponymous action.

Subsequent to the first OALJ award of benefits, the parties had a second hearing before another judge to consider whether Chavez consummated any settlement of his tort action which would bar any further liability for benefits by the employer or Special Fund under Section 33(g); and to determine that in the event that there is no Section 33(g) bar, whether the claimant's request for apportionment of the causes of his disability (75% hypertension and 25% asbestosis) is ripe for a ruling; and finally, if such request is not premature, whether the employer should be allowed a full or partial lien on future third-party settlements based on the percentage that asbestosis contributed to the claimant's total disability.

The judge held that the claimant had not consummated any settlement of his tort action and therefore is not barred from further benefits under Section 33(g); that the request for apportionment of the causes of his disability is ripe for ruling so that claimant can go forward with any third-party settlement if he so chooses, and for which he needs a legal finding regarding his rights under Section 33(f); and finally that the application to limit the employer-Special Fund lien to the 25 percent attributable to asbestosis on any future third-party settlement was denied.

The Board in the underlying case of Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988), affirmed the judge's findings under Section 33(g), but held that the proper amount of the Section 33(f) setoff was not ripe for adjudication since no settlements were consummated, making the issue premature. Therefore, the Board did not rule on the apportionment issue and vacated the judge's findings in this regard.

On the appeal to the **Ninth Circuit**, the court held that the apportionment issue was "ripe" under the **traditional ripeness analysis**. The traditional analysis consists of **two prongs**:

(1) the fitness of the issue for review, and

(2) the hardship to the parties if review is withheld.

Chavez, 961 F.2d at 1414.

80.3 FITNESS OF THE ISSUE FOR REVIEW

Under the fitness-of-the-issue-for-review prong, the matter of apportionment presents a question of law. Once a claimant has established a right to benefits and has additionally chosen to seek legal redress (third-party case), the factual predicates to an apportionment determination have occurred. Although the amount of setoff to which the employer is entitled may not be calculable prior to an actual tort recovery, the issue of apportionment is nonetheless fit for review. Chavez, 961 F.2d at 1415.

80.4 HARDSHIP TO THE PARTIES

Under the traditional hardship prong, it must be shown that withholding review of the issue would result in direct and immediate hardship and would entail more than possible financial loss. Abbott Laboratories, 387 **U.S**. at 152. The **Ninth Circuit** in Chavez found that the parties in the third-party case were substantively hindered in reaching a settlement in the absence of a determination of the apportionment issue. The uncertainly of the apportionment question creates a practical hardship for both parties.

For the above reasons, the apportionment issue was found to have met the traditional ripeness standard. Enigmatically, the **Ninth Circuit** then stated "any ripeness test applicable to LHWCA proceedings would certainly contain less rigorous requirements." Chavez, 967 F.2d at 1415. After applying the traditional ripeness analysis to this LHWCA case, the court then suggests that an unspecified less rigorous test may be applicable to LHWCA cases.

Thus, the **Ninth Circuit** reversed the Board on the issue of ripeness and since the apportionment issue was not considered by the Board on the merits, the court declined to rule on the issue of apportionment until the Board first addressed the issue. The matter was therefore remanded to the Board for further proceedings consistent with the **Ninth Circuit** opinion.