SECTIONS 19, 23 and 27

Digests

The claim

The Board notes that the purpose behind the requirement in Section 13 that the claim be filed with the deputy commissioner is to ensure that employer will receive prompt notification of the claim through forwarding by the deputy commissioner of the written claim to employer. The Board did not strictly construe this reporting requirement in the instant case where its purpose was fulfilled. Employer received written notification of updated hearing loss at the formal hearing, and was given the opportunity post-hearing to submit evidence challenging the claim. *Downey v. General Dynamics Corp.,* 22 BRBS 203 (1989).

The Board limits Brown, 14 BRBS 460 (1981), to its specific facts, and holds that the administrative law judge did not abuse her discretion in dismissing the request for a hearing and the concurrent refusal to remand the case to the deputy commissioner resulted in a de facto dismissal of the claim, which was found to have been abandoned. The Board notes that Brown was decided prior to the promulgation of the 29 C.F.R. Part 18 regulations. *Taylor v. B. Frank Joy Co.,* 22 BRBS 408 (1989).

The administrative law judge has the authority to dismiss a claim with prejudice where claimant fails to prosecute his claim, given all the circumstances. Fed. R. Civ. P. 41(b) provides for the involuntary dismissal of a case for failure to prosecute or comply with the orders of the court only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful. The Board vacates the administrative law judge's dismissal and remands the case for the administrative law judge to consider whether less drastic sanctions, including those provided in Section 27 of the Act, are available and whether claimant's conduct was contumacious in light of the offered explanations as to why claimant did not attend depositions and medical examinations. The administrative law judge also must address whether claimant was represented by counsel and whether employer was prejudiced by the delay. *Twigg v. Maryland Shipbuilding & Dry Dock Co.,* 23 BRBS 118 (1989).

The Board vacates the dismissal of the claim and remands the case for a hearing on the merits. The Board notes that dismissal is an extreme sanction and the fact-finder must consider whether lesser sanctions would better serve the interests of justice. In this case, claimant missed only the last scheduled hearing and had been ready to proceed at prior scheduled hearings which were continued at employer's request and at claimant's request because of the unavailability of claimant's physician. *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989).

The right to disability compensation survives the employee's death and the widow has standing to file a lifetime claim under the Act on the decedent's behalf. *Maddon v. Western Asbestos Co.,* 23 BRBS 55 (1989).

On the unique facts of this case, claimant, the widow of a deceased employee, had the option of filing under Section 9 as it existed prior to the 1984 Amendments based on either her husband's death from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury. She filed a timely claim, based on her husband's death due to an asbestos-related condition, and almost three years after her husband's death, indicated in writing that she also sought death benefits based on decedent's having been permanently totally disabled at the time of his death. The Board affirmed the administrative law judge's determination that claimant's raising of a new theory of recovery under Section 9 constituted a timely amendment of her original claim, noting that the amendment's timeliness is determined by that of the original claim and that the U.S. Supreme Court has indicated that liberal amendment of pleadings is to be allowed. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Board affirms the administrative law judge's decision to grant claimant's request to withdraw his claim under the Act pursuant to 20 C.F.R. §702.225, claimant having elected to exclusively pursue his claim under the state workers' compensation statute. Claimant is entitled to pursue his claim under either applicable federal or state statue, or both, where federal and state jurisdiction run concurrently; it is claimant's decision as to where to pursue his remedy. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., concurring and dissenting).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's failure to forward the cases to the Office of Administrative Law Judges upon employer's request for a formal hearing is a ministerial and nondiscretionary duty. Once a party requests a hearing, the district director loses any authority to act on the claim. The court stated that after the claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996)*, vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996)(court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases), *rev'g Boone v. Ingalls Shipbuilding*, *Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993)*(en banc* (Brown, J., concurring).

A claim is not withdrawn unless the requirements of Section 20 C.F.R. §702.225(a) are met. An administrative law judge has the authority to enter an Order approving a withdrawal request but must determine, consistent with the regulatory criteria, whether the request for withdrawal is for a proper purpose and whether approval is in the claimant's best interest. *Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007).

As claimant timely filed a motion for modification, claimant's subsequent amending of that claim to assert entitlement to an additional period of benefits was permissible, as claimant may amend a pending claim. *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001).

The Fifth Circuit holds that a Aclaim@ does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits, arising out of a single injury. *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter asserted a claim "based on different facts" for an award of permanent total disability benefits. The Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would not accept employer's argument that it did not apply here because under FRCP 15(c), the relation back theory allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading. Here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Deputy Commissioner Proceedings

The Board held that the deputy commissioner did not have authority to issue a compensation order subsequent to November 26, 1972, the effective date of the 1972 Amendments to the Act, pursuant to 33 U.S.C. §919(d), and Neal, 1 BRBS 279 (1974). Thus, the Board held that the compensation order issued in 1973 by the deputy commissioner was not valid, and employer's compensation payments made under that order must therefore be considered voluntary. O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988), aff'd and modified on recon., 22 BRBS 430 (1989).

On reconsideration, the Board rejects the Director's contention that the deputy commissioner's 1973 compensation order was valid because it became final and binding when it was not appealed within thirty days. Unlike in Downs, 803 F.2d 193, 19 BRBS 36 (CRT) (5th Cir. 1986), the deputy commissioner had no authority to issue a compensation order in 1973, so it was void from its inception. In Downs, the administrative law judge's authority to approve settlements was valid at the time the action was taken. O'Berry v. Jacksonville Shipyards, Inc., 22 BRBS 430 (1989), aff'g and modifying on recon. 21 BRBS 355 (1988).

The deputy commissioner erred in modifying the administrative law judge's decision. The deputy commissioner does not have the power to modify the decisions of administrative law judges. The deputy commissioner performs only administrative and pre-hearing investigative matters. Thus, it was also error for the deputy commissioner to engage in factfinding regarding the responsible carrier issue. The deputy commissioner acted irrationally in assessing a Section 14(f) penalty against Hanover Insurance Company for failure to pay the administrative law judge's award within 10 days since Hanover was not even a party before the administrative law judge and was not found liable until the deputy commissioner's subsequent order. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

The Board viewed the deputy commissioner's letter purporting to alter language contained in an administrative law judge's Decision and Order as an impermissible modification, pursuant to Sans, 19 BRBS 24 (1986), and Penoyer, 9 BLR 1-12 (1986). Accordingly, reasoning that the deputy commissioner possessed no authority to issue this letter, the Board held that both the letter and the administrative law judge's second Decision and Order issued in response to it were of no legal effect, and that the period for filing an appeal with the Board thus began when the administrative law judge's first Decision and Order was filed. The Director's appeal, submitted some six months after this Decision and Order was filed in the deputy commissioner's office, was thus dismissed as untimely. Hernandez v. Bethlehem Steel Corp., 20 BRBS 49 (1987).

The deputy commissioner exceeded his authority by vacating the administrative law judge's Decision awarding permanent total disability benefits based on his apparent finding that claimant is not partially disabled. It was error for the deputy commissioner to engage in factfinding on the disability issue as no agreement had been reached between the parties. Carter v. Merritt Ship Repair, 19 BRBS 94 (1986).

The Board affirms the administrative law judge's finding that the deputy commissioner had no authority to issue a Notice of Modification of an administrative law judge award in a black lung case. The Board sets out history of modification proceedings, through the Longshore Act, and reiterates its holdings that a deputy commissioner can only modify a decision of a deputy commissioner. The Board further notes that when, as here, no appeal is pending before the Board and new evidence is discovered, the deputy commissioner investigates the grounds for modification and forwards evidence to the administrative law judge. In this case, the administrative law judge did not consider the new evidence, and the case is accordingly remanded. Yates v. Armco Steel Corp., 10 BLR 1-132 (1987) (black lung case).

This case arises under the D.C. Act, and claimant is entitled to the rights afforded under the Longshore Act as it existed prior to the 1984 Amendments. Under Section 8(d)(3), claimant, as decedent’s survivor, may be entitled to death benefits because decedent was receiving permanent partial disability benefits and died due to causes unrelated to his work injury. However, because there remain disputed factual issues, such as whether claimant filed a timely claim for compensation, it was improper for the district director to award claimant death benefits. The district director has no authority to issue a compensation order absent an agreement between the parties. Therefore, the Board vacated the district director’s award and remanded the case. *Durham v. Embassy Dairy*, 40 BRBS 15 (2006).

When a party requests that the case be transferred to the OALJ for a hearing, the district director has a clear, ministerial and non-discretionary duty to transfer the case for a hearing under Section 19(c). In this case, where employer repeatedly requested transfer and there was little likelihood that the cases would be resolved through informal means, the district court did not err in granting a writ of mandamus ordering the district director to transfer the cases. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994).

The Board noted that Section 19 specifically requires the district director to investigate claims and order hearings upon the request of a party, but the Act does not specify the time period for carrying out that duty or the consequences or effects of a delay by the district director's office. Relying on the Fifth Circuit's opinion in *Asbestos Health Claimants,* 17 F.3d 130, 28 BRBS 12 (CRT) as controlling, the Board determined that the district director's duty to transfer the case to the OALJ under Section 19 upon the request of a party is mandatory. Where the district director dismissed the case upon claimant's request for withdrawal three years after employer requested a hearing, the Board, relying on *Asbestos Health Claimants*, determined that the district director failed to perform her mandatory duty under Section 19 to transfer the case to the OALJ. However, despite the derogation of duty, and in the interest of judicial efficiency, the Board concluded that the failure to refer the case constituted harmless error, as claimant had no claim to pursue and could have withdrawn his case at any time subject to the regulations. *Boone v. Ingalls Shipbuilding, Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993) (*en banc*) Brown, J., concurring), *rev'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 31 BRBS 1 (CRT), *vacating on reh'g* 81 F.3d 501, 30 BRBS 39 (CRT)(5th Cir. 1996).

The Fifth Circuit reversed the Board's holding that the district director's granting claimant's motion to withdraw did not aggrieve employer, and the Board's consequent dismissal of employer's appeal. The district director's failure to forward the cases to the Office of Administrative Law Judges upon employer's request for a formal hearing is a ministerial and nondiscretionary duty. Once a party requests a hearing, the district director loses any authority to act on the claim. The court stated that after the claim was transferred, the administrative law judge could act on claimants' motions to withdraw their claims while safeguarding employer's procedural rights. *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996)*, vacating on reh'g* 81 F.3d 561, 30 BRBS 39(CRT) (5th Cir. 1996)(court reached the same result based on district director's failure to follow mandamus order, later determined to be inapplicable to this group of cases), *rev'g Boone v. Ingalls Shipbuilding*, *Inc.*, 28 BRBS 119 (1994) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 27 BRBS 250 (1993)*(en banc* (Brown, J., concurring).

In the instant case, claimant filed a claim in 1987 due to harmful exposure to asbestos, although no disability was alleged. In 1992, employer requested that the district director refer the case to the OALJ for a hearing. After the district director denied employer's request, employer appealed the district director's denial to the Board. Following the Fifth Circuit's holding in *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994), and its decision in *Black*, 16 BRBS 138 (1984), the Board held that Section 19(c) imposes a mandatory duty on the district director to order a hearing upon the application of any interested party. *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting).

Where the deputy commissioner had rendered a previous accounting of the amounts which employer still owed, the Board instructed employer to present any remaining issues pertaining to employer's alleged overpayments to the deputy commissioner, rather than to the Board. *Williams v. Halter Marine Service, Inc.,* 19 BRBS 248 (1987).

The Ninth Circuit held that not all decision-making by the district directors is subject to a hearing before the administrative law judge. Section 19 (d) does not establish an absolute right to a hearing before an administrative law judge; thus, purely legal disputes or those that do not require fact-finding are not within the jurisdiction of the OALJ. A district directors attorney's fee award is directly appealable to the Board if there are no disputed facts. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir. 2000), *cert. denied*, 531 U.S. 378 (2000).

The Board holds, in accord with the Director's position, that when a party files a petition for modification with OWCP, the district director is obliged to take some action in the processing of the claim. As it is incumbent upon the district director to set the informal conference and begin processing the claim, a claimant's failure to take action following the filing of a motion for modification is not controlling as to his intent to pursue the claim. Thus, in this case where claimant filed a timely motion in 1999 and took no other action until he filed an additional motion over one year later, the Board held that claimant's inaction did not establish abandonment or a lack of intent to pursue the 1999 claim. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

The Board rejected employer's assertion that it was denied due process because it was not permitted a hearing on the question of whether claimant was entitled to vocational rehabilitation. Contrary to employer's assertion, the district director did not err in not transferring the case to OALJ upon employer's request. Rather, because the Act gives the Secretary of Labor the authority to provide and direct vocational rehabilitation, the authority is wielded by the district directors and is discretionary. Thus, administrative law judges have no authority to determine the propriety of vocational rehabilitation, and it was appropriate for the district director to retain the case. Moreover, employer was not denied constitutional due process because, prior to assessing liability for total disability benefits during the period of rehabilitation, employer was afforded a full hearing on this issue. With regard to implementation of the vocational program, the Board notes that the employer has the right to appeal directly to the Board the district director's implementation of a plan. *Castro v. General Constr. Co.*, 37 BRBS 65 (2003), *aff'd,* 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied,* 126 S.Ct. 1023 (2006).

The Ninth Circuit rejected employer's assertion that it was denied due process because it was not permitted a hearing to determine the necessity of a vocational rehabilitation program for claimant. The court relied on its decision in *Healy Tibbitts*, 201 F.3d 1090, 33 BRBS 209(CRT), stating that Section 19(c) does not require an evidentiary hearing on all contested issues. The determination of the reasonableness of a rehabilitation program is left to the discretion of the district director and does not require any fact-finding by an administrative law judge. Moreover, the court stated that the implementation of the rehabilitation program itself did not deprive employer of property because the implementation did not trigger the payment of benefits; payments were required because of the administrative law judge's award after the hearing. The hearing constituted a sufficient pre-deprivation hearing and protected employer's due process rights. *General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *aff'g* 37 BRBS 65 (2003), *cert. denied,* 546 U.S. 1130 (2006).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. *L.D. v. Northrop Grumman Ship Systems, Inc.* 42 BRBS 1, *recon. denied,* 42 BRBS 46 (2008).

Administrative Law Judge Adjudication

Powers of the Administrative Law Judge in General

The Board remands the case for a hearing on the limited issue of whether employer was served with notice of the hearing by certified or registered mail as required by Section 19(c). Employer was not present at the hearing, and benefits were awarded based on claimant's evidence. The Board rejects claimant's contention that employer was obligated to inquire about any proceedings based on its knowledge that claimant was pursuing a claim under the Act. If employer did not receive notice as required by statute, the administrative law judge must vacate the award of benefits and hold a new hearing in which employer is allowed to participate. *Sullivan v. St. John's Shipping Co., Inc.*, 36 BRBS 127 (2002).

The Board initially held that the Act and its implementing regulations explicitly set out minimum time requirements, albeit at different intervals, in which the parties are to receive notice of a hearing. The Board thus held that the general regulation at 29 C.F.R. §18.42(e), relied upon by the administrative law judge in expediting the formal hearing, is not applicable. Nevertheless, the Board upheld the administrative law judge's decision to expedite the hearing in this case. Specifically, the Board held, on the facts in this case, that allowing employer less than the time specified by 20 C.F.R. §702.335 (not less than 30 days) is insufficient to warrant a conclusion that employer's right to procedural due process has been abridged. First, the administrative law judge's decision complies with the time limit of Section 19(c) of the Act (at least 10 days' notice). Second, and more importantly, employer has not provided any substance to its allegation of prejudice or any indication that the expedited hearing impeded its defense in this case. The record establishes that employer fully defended its case and was not adversely affected by the administrative law judge's decision to expedite the hearing. *Vinson v. Resolve Marine Services,* 37 BRBS 103 (2003).

The Board vacates the award of benefits, as the notice of hearing requirements of Section 19(c) were not followed. *Sullivan,* 36 BRBS 127, wherein the award of benefits was not vacated, is distinguished as the notices were patently deficient in this case. The parties are entitled to 10 days' notice, by certified mail, of the hearing. Claimant first filed a claim against the potentially liable corporate officers six days before the hearing. This document was improperly addressed. The administrative law judge's notice of the hearing was improperly addressed to employer and not served on the corporate officers; certified mail was not used. A subsequent show cause order was similarly deficient. The Board holds that the corporate officers are entitled to separate, proper notice of the hearing, as they are entitled to argue that Section 38(a) is not applicable. The Board also holds that a delivery system with tracking capability is required to satisfy Section 19(c)'s requirements. *J.T. v. American Logistics Services,* 41 BRBS 41 (2007).

The Board vacated the denial of benefits and remanded the case for the administrative law judge to conduct a hearing on claimant's motion for modification. The Board held that the administrative law judge erred in failing to grant claimant's request for a hearing where claimant asked for the opportunity to testify either via deposition or hearing regarding his foot condition. Although the administrative law judge stated why he believed claimant's testimony would not aid his case, the Board stated that only upon hearing the testimony and considering it in conjunction with any other evidence that might be admitted at the new hearing, as well as the originally-submitted evidence, would the administrative law judge be able to determine the relevance of claimant's testimony. Thus, although claimant made his request in the "eleventh hour," the request was timely and must be granted. *Jukic v. American Stevedoring, Inc.*, 39 BRBS 95 (2005).

The regulations provide that, prior to the transfer of a case to the Office of Administrative Law Judges for hearing, each party must file a pre-hearing statement. Section 702.317(e) allows the administrative law judge to consider a party's failure to file a pre-hearing statement with the deputy commissioner where this failure is relevant. Scott v. S.E.L. Maduro, Inc., 22 BRBS 259 (1989).

The Board holds the administrative law judge did not err in this case by considering updated evidence for hearing loss presented for the first time at the formal hearing, although the Act (Section 19(c) and regulations (Sections 702.301, 702.316) indicate that claims must first be referred to the deputy commissioner. Whether or not his new evidence constitutes a separate "claim," the administrative law judge did not prejudice employer's procedural and substantive rights, and the administrative law judge acted in the most judicially efficient manner in providing for claimant's interest in securing an award. Downey v. General Dynamics Corp., 22 BRBS 203 (1989).

The administrative law judge properly allowed intervention of pension fund, which had paid out medical and loss of time benefits to claimant under the mistaken belief that his injuries were not work-related, to recover amounts paid. MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986), aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board, 819 F.2d 1148 (11th Cir. 1987).

The Board declines to address the issue of whether the administrative law judge's failure to issue a decision within twenty days of the hearing, as required by 20 C.F.R. §702.349, constituted reversible error in light of the decision to remand the claim on other grounds. Leone v. Sealand Terminal Corp., 19 BRBS 100 (1986).

The Board rejected claimant's contention that the administrative law judge's failure to issue his decision within twenty days after the close of the record pursuant to §19(c) and 20 C.F.R. §702.349 requires that the decision be vacated and a new hearing held as claimant did not show prejudice as a result of the delay. *V. M. v. Cascade General, Inc.*, 42 BRBS 48 (2008).

The Board noted that the administrative law judge, in deciding a case on remand from the United States Court of Appeals, had not been bound by his previous findings, given that his earlier dispositions of the case had been reversed by the court. Geddes v. Washington Metropolitan Area Transit Authority, 19 BRBS 261 (1987), aff'd sub nom. Geddes v. Director, OWCP, 851 F.2d 440, 21 BRBS 103 (CRT)(D.C. Cir. 1988).

An administrative law judge may remand a case to the deputy commissioner for consideration of a new issue only when evidence not considered by the deputy commissioner is likely to resolve the case without a hearing. 20 C.F.R. §702.336. In this case, the administrative law judge abdicated his responsibility to resolve disputed issues of fact regarding the responsible carrier issue by remanding the case, as the administrative law judge is empowered to resolve any issue arising at the hearing. The administrative law judge should have notified a potentially liable carrier of the proceedings, added the carrier as a party, and held the record open for further evidence regarding the date of last exposure and the carrier on the risk at that time. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

While active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors, the Board reiterated that there are some medical issues which remain in the domain of the administrative law judge: specifically, those issues which involve factual disputes as opposed to those which are purely discretionary. In this case, the parties disputed claimant's entitlement to hearing aids for his non-ratable work-related hearing loss; however, the administrative law judge did not address the issue but instead remanded the case for the district director to do so. The Board vacated the administrative law judge's order of remand, and remanded the case to the administrative law judge for resolution of the issue of whether hearing aids are necessary and reasonable treatment for claimant's hearing loss, as such as factual issues for the administrative law judge. The Board rejected employer's assertion that claimant's alleged non-compliance with state law affects his entitlement under the Act. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The regulation at 29 C.F.R. §18.6(b) expressly provides ten days for a party to respond to a motion in administrative law judge proceedings before the Department of Labor. By issuing his Order to Compel prior to the expiration of the ten day period, the administrative law judge violated the due process rights of the petitioner. Niazy v. The Capitol Hilton Hotel, 19 BRBS 266 (1987).

The Board vacated the administrative law judge's instructions to claimant requiring claimant to file a second longshore case within 15 days of his denial of claimant's motion to withdraw the initial longshore claim. The Board stated that, as a claimant has one or two years from the date he becomes aware or should have become aware of a work-related injury or an occupational disease, it was improper for the administrative law judge to mandate how and when claimant should file a claim. *Stevens v. Matson Terminals, Inc.*, 32 BRBS 197 (1998).

The Sixth Circuit stated that adverse rulings in the proceedings are not by themselves sufficient to show bias on the part of the administrative law judge. Orange v. Island Creek Coal Co., 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986).

The Board held that claimant failed to show that the administrative law judge was biased. Adverse rulings, alone, are insufficient to show bias. Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988).

In order to avoid piecemeal review, the administrative law judge was instructed that, in the future, he should obtain the facts necessary to resolve all issues prior to deciding the issue of jurisdiction, so that a single compensation order may issue. Jackson v. Straus Systems, Inc., 21 BRBS 266 (1988).

The Board limits Brown, 14 BRBS 460 (1981), to its specific facts, and holds that the administrative law judge did not abuse her discretion in dismissing the request for a hearing and the concurrent refusal to remand the case to the deputy commissioner resulted in a de facto dismissal of the claim, which was found to have been abandoned. The Board notes that Brown was decided prior to the promulgation of the 29 C.F.R. Part 18 regulations. Taylor v. B. Frank Joy Co., 22 BRBS 408 (1989).

The administrative law judge has the authority to dismiss a claim with prejudice where claimant fails to prosecute his claim, given all the circumstances. Fed. R. Civ. P. 41(b) provides for the involuntary dismissal of a case for failure to prosecute or comply with the orders of the court only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful. The Board vacates the administrative law judge's dismissal and remands the case for the administrative law judge to consider whether less drastic sanctions are available, including those in Section 27 of the Act, and whether claimant's conduct was contumacious in light of the offered explanations as to why claimant did not attend depositions and medical examinations. The administrative law judge also must address whether claimant was represented by counsel and whether employer was prejudiced by the delay. Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118 (1989).

The Board vacates the dismissal of the claim and remands the case for a hearing on the merits. The Board notes that dismissal is an extreme sanction and the fact-finder must consider whether lesser sanctions would better serve the interests of justice. In this case, claimant missed only the last scheduled hearing and had been ready to proceed at prior scheduled hearings which were continued at employer's request and at claimant's request because of the unavailability of claimant's physician. The Board further holds that there is no provision in the Act or regulations requiring service on the parties before a document is considered filed. Thus, claimant's motion for reconsideration was timely filed with the administrative law judge even though it was not served on employer within the ten-day filing limit. Bogdis v. Marine Terminals Corp., 23 BRBS 136 (1989). *See also Hamilton v. Ingalls Shipbuilding, Inc.*, 30 BRBS 84 (1996)(time for filing motion for reconsideration with administrative law judge commences on the date district director certifies he filed the administrative law judge's decision. 33 U.S.C. §919(e); 20 C.F.R. §§702.349-350, 802.206).

The administrative law judge acquired jurisdiction over the claim following the Board's denial of claimant's motion for reconsideration. The administrative law judge did not abuse his discretion in dismissing claimant's' claims with prejudice pursuant to 29 C.F.R. §18.29(a) based on claimant's repeated and numerous abuses of the administrative process over the entire course of the case including claimant's refusal to comply with discovery requests and to submit to a medical examination. The case sets forth the back letter law regarding the standards to be considered before an administrative law judge may dismiss a claim with prejudice, specifically FRCP 37, 41. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers,* No. 92-1250 (D.C. Cir. March 19, 1993).

The Board held that the administrative law judge's dismissal of a claim by Permanente Medical Group/Kaiser Foundation Hospital an intervenor-petitioner, constituted an abuse of discretion. Initially, the Board indicated that the administrative law judge erred in failing to state the grounds upon which he based his dismissal of the claim. Moreover, there was no indication that the administrative law judge based his dismissal on Kaiser's alleged failure to comply with his pre-trial order. The Board further held that Kaiser's failure to appear at the hearing was not a sufficient ground on which to base the dismissal of its claim. The Board noted that dismissal for failing to appear at a hearing, deposition, or medical appointment is an extreme sanction, and stated that the administrative law judge must consider whether lesser sanctions would better serve the interests of justice. The Board also found that the administrative law judge erred in dismissing Kaiser's claim in view of the misleading language used by the administrative law judge in his decision. *French v. California Stevedore & Ballast*, 27 BRBS 1 (1993).

In this case, the Board held that the administrative law judge erred in declaring employer in default for failing to attend the hearing. Similar to those situations where the dismissal of a claimant's case was deemed to be an overly harsh sanction, the Board vacated the declaration of default against employer as employer attempted to postpone the hearing and confirmed it had no legal representative, due to the withdrawal of counsel's authority to act on behalf of the carrier in bankruptcy, two business days before the date of the hearing. The Board held that pursuant to Section 18.5(b) of the OALJ Rules, the administrative law judge should have addressed whether employer established "good cause" for not appearing before declaring it in default. Further, the Board held that the administrative law judge should have considered Rule 55(c) of the Federal Rules of Civil Procedure, which also applies a "good cause" standard, before summarily denying employer's motion for reconsideration. As it determined there could be only one result under the facts of this case, *i.e.,* good cause was shown, the Board vacated the declaration of default and remanded the case for a hearing on the merits, permitting employer's participation on remand. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

The Board affirms the administrative law judge's determination that 29 C.F.R. §18.36 grants him the authority to exclude a representative from appearing in a proceeding before him if that representative refuses to adhere to reasonable standards of ethical conduct. Furthermore, as claimant's counsel practices law in Washington state, and the rules at 29 C.F.R. Part 18 do not delineate what constitutes ethical conduct, the Board holds that the administrative law judge rationally relied on state rules of professional conduct to establish the ethical standard to be applied. However, the Board reverses the administrative law judge's decision to disqualify counsel, based upon the uncontradicted evidence of record that a "Chinese Wall" had been established to protect employer's confidences, and the administrative law judge's own findings that the record is devoid of evidence establishing that confidences were exchanged between employer's former counsel and claimant's counsel's firm. Baroumes v. Eagle Marine Services, 23 BRBS 80 (1989).

Where an attorney who represents claimant also represents employer's insurance plan administrator, a conflict exists even though the attorney did not represent the administrator in a dispute between claimant and employer. An administrative law judge has the authority to disqualify counsel because of conflict of interest. In this case, the administrative law judge was fully aware of the conflict, and he failed to disqualify counsel. As claimant appealed the conflict issue as well as whether counsel represented her competently, the court reversed the administrative law judge's finding of no permanent disability and remanded the case for further fact-finding. *Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993), *superseding* 973 F.2d 1463, 26 BRBS 37 (CRT) (9th Cir. 1992).

The Board rejects the argument that the administrative law judge erred by remanding this case to the deputy commissioner for calculating the amount of employer's Section 33(f) credit, and for entry of an award. The Board holds that in this case the administrative law judge made the necessary findings of fact and conclusions of law so that the deputy commissioner was charged with making purely ministerial calculations. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part,* 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

The Board holds that the administrative law judge was not bound by the "law of the case" doctrine from addressing the Director's Section 8(f)(3) contention inasmuch as the doctrine does not prevent review of the same tribunal's interlocutory order. As the administrative law judge clarified that he had not remanded the case to the deputy commissioner for dispositive findings on the Section 8(f)(3) bar, he properly addressed the issue in his second decision. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

An administrative law judge's denial of reconsideration is reviewed to determine if there was an abuse of discretion. In this case, the administrative law judge did not abuse his discretion to deny employer's motions for reconsideration and discovery. Due to its admitted negligence, employer failed to participate in the resolution of this claim for over three and one-half years and it failed to attend the formal hearing. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

The Board rejected employer's argument that, as Section 19(d) only vests in administrative law judges the authority contained in the Act, administrative law judges do not have the powers conferred on the district court by 28 U.S.C. §1961 and cannot award interest. The Board acknowledged that Section 1961 does not give the administrative law judge the authority to award interest, but it noted its previous reliance on Section 1961 was limited to using that section as a guide in setting the interest rate and not as authority to award interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994)(Dolder, C.J., concurring and dissenting).

The Board rejected contention of the borrowing employer that the administrative law judge lacked the authority to order it to reimburse the lending employer for claimant's compensation because claimant did not file a claim against borrowing employer. Pursuant to Rule 14(c) of the FRCP in maritime and admiralty claims a defendant may implead another party against whom the claimant has not asserted a claim and demand that that party be found liable to both the original defendant and to the claimant. Moreover, the Board noted that an administrative law judge has all powers, duties and responsibilities necessary to resolve claims under the Act and that claims for reimbursement of an employer or carrier raise questions in respect to compensation claims. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board holds that the administrative law judge erred in relying on *Busby,* 13 BRBS 222, and *Rodman*, 16 BRBS 123, to find that he did not have jurisdiction to determine whether Omega's carrier, INA, is entitled to reimbursement from the alleged borrowing employer, Elf, because claimant was no longer an active litigant, having settled a third-party suit and relinquishing any rights for compensation from Omega pursuant thereto. The Board holds that the administrative law judge erred in viewing this case as involving solely contractual issues between INA and Elf, when in fact it is a responsible employer case involving application of the borrowed employee principles. This is an issue arising under the Act which an administrative law judge is empowered to resolve; any contractual issues are ancillary issues raised by Elf in response to Omega's responsible employer claim. Moreover, the case is distinguishable from *Busby* and *Rodman,* as it involves a meritorious claim for benefits, as evidenced by the fact that claimant has been fully paid for his work-related injury to a scheduled member. *Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997).

The Board vacates as premature the administrative law judge's findings concerning the proper method of calculating the amount of employer's Section 33(f) setoff against any possible future third-party settlements, inasmuch as there have not yet been any settlements to credit. *Chavez v. Todd Shipyards Corp.,* 24 BRBS 71 (1990), *aff'd in part and rev'd in pert. part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992).

The Board rejected employer's contention that the administrative law judge erred in remanding a case to the district director without instructions to officially close or dismiss it. The Board held that a 1985 settlement constituted the final disposition of the only claim filed in this case and that employer's argument is one of semantics only, as, there is no pending claim to address and employer cannot be aggrieved unless or until claimant formally files a claim for medical benefits. Moreover, the Board held that as there are no issues to adjudicate, employer is not denied due process by the administrative law judge's denial of its request for a hearing. *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994).

The Board rejected employer's contention that the administrative law judge erred in

remanding a case to the district director without instructions to officially close or dismiss it. The Board held that a 1983 settlement constituted the final disposition of the only claim filed in this case and that employer's argument is one of semantics only, as, given the administrative law judge's finding that no future claims can be filed in this case due to claimant's death and to the failure of his survivors to file a timely claim for death benefits, there is no pending claim to address. *Deakle v. Ingalls Shipbuilding, Inc.*, 28 BRBS 343 (1994).

Although the claimant had not undergone the recommended surgery and thus had not experienced a period of disability as a result thereof, the court held that the issue of causation (which injury was the surgery related to) was ripe for adjudication because it does not depend on undeveloped facts for resolution and there is the prospect of hardship to claimant if the issue is left unresolved. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006).

The administrative law judge erred in advising the parties at the hearing that he would not resolve the issue of LIGA's liability, and then ruling on the issue in the decision. The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. The Board holds, however, that a new hearing on LIGA's liability is unnecessary in this case as state law mandates its liability. *Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990), *modified on other grounds on recon.*, 24 BRBS 169 (1991).

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act, but the administrative law judge's failure to do so in this case is harmless error, as the contract here provides for liability consistent with the exposure rule of *Cardillo*. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act, including issues ancillary to the responsible employer issue. The administrative law judge's failure to do so in the instant case is harmless error as he sufficiently reviewed the contractual provisions of record and made factual determinations by which the Board could modify his decision to hold one entity solely liable to claimant. *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997).

In this case in which no appeal of the Board's initial decision was taken, nor motion for reconsideration filed, the administrative law judge's award of an attorney's fee became final 60 days from the date of the Board's decision. Thus, as there is no authority in the Act or the regulations for reopening a case that has reached finality and is not subject to modification, the Board held that the administrative law judge properly found he did not have subject matter jurisdiction in this case. The Board rejects claimant's reliance on FRCP 60(b) as this provision states that a motion on the basis of fraud or misrepresentation, as claimant's was herein, must be made within one year from the date the ordered was entered; claimant's motion was untimely. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997).

The Board affirmed the administrative law judge's denial of the Director's motion seeking to

disqualify the administrative law judge from adjudicating this case and vacate his initial decision. Although the administrative law judge had represented employer as a private attorney in a previous claim filed by claimant in the instant case, the Board concluded that case law supported the administrative law judge's determination that rules governing the disqualification of federal judges do not apply to administrative law judges. Moreover, the Board affirmed the administrative law judge's finding that grounds for disqualification under the Administrative Procedure Act were lacking, as the Director never alleged any personal bias on the part of the administrative law judge and all other parties in the case opposed the Director's motion. The Board did note, however, that the administrative law judge exhibited questionable judgment in deciding to adjudicate the instant case. *Codd v. Stevedoring Services of America*, 32 BRBS 143 (1998).

The Fifth Circuit held that the administrative law judge erred when he remanded this case to the district director, with instructions that claimant provide sufficient evidence of his post-injury earnings. If the record does not provide evidence sufficient to establish claimant's post-injury earnings, then it is the administrative law judge's responsibility to obtain such information. The administrative law judge must, at a minimum, specify the amount of compensation due or provide a means of calculating the correct amount without resort to "extra-record facts" which are potentially subject to genuine dispute between the parties. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999)

In addressing the issue of whether an award of attorney's fees to employer based on an alleged breached of an insurer's duty to defend under the terms of its insurance policy with employer is a question "in respect of a claim" as is required to fall within the administrative law judge's jurisdiction under Section 19(a), the Board overrules *Gray & Co., Inc. v. Highland Ins. Co.*, 9 BRBS 424 (1978), and affirms the administrative law judge's finding that he lacked jurisdiction to address employer's request for a fee payable by its carriers. Whereas in each of the other insurance contract dispute cases where the Board found jurisdiction, the insurance contract right being adjudicated bore a relationship to an issue either necessary or related to the compensation award, the Board determined that in retrospect *Gray* stands out as an anomaly in that it is the only case in which the Board found that the administrative law judge had jurisdiction over an insurance contract dispute involving an issue which did not derive from, and was not directly related to any other issue necessary to resolution of the claim. Finally, neither Section 28 nor any other provision of the Act provides for an award of attorney's fee to an employer or addresses how the assessment of a reasonable fee is to be made. *Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998), *aff'd sub nom. Equitable Equipment Co. v. Director, OWCP,* 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

The Fifth Circuit held that Section 19(a) of the Act does not vest jurisdiction in the

administrative law judges to decide a contract dispute between an employer and its carriers when the cause of action is wholly unrelated to an underlying claim for compensation. In the instant case, employer's claim involves neither a determination of which carrier must pay compensation benefits or a dispute over potential coverage of a benefits claim, but rather involves employer's claim for attorney's fees. Thus, the court affirms the Board's holding that the administrative law judge lacks jurisdiction to adjudicate this claim. *Equitable Equipment Co. v. Director, OWCP*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), *aff'g* 32 BRBS 200 (1998).

Where claimant informed the administrative law judge of the fact that he is "no longer pursuing benefits" under the Act and requested that the case be remanded to the district director, the Board held that claimant's motions did not unambiguously declare claimant's intent to withdraw the claim. Consequently, the administrative law judge erred in granting withdrawal and remanding the case to the district director over employer's objections to the motions and its request for a hearing on the merits. The Board vacated the administrative law judge's orders and remanded the case for him to determine claimant's exact intentions and then either consider the motion for withdrawal in accordance with the regulations or hold a hearing on the merits. *Ridley v. Surface Technologies Corp.*, 32 BRBS 211 (1998).

The Board holds that the administrative law judge erred in finding that the claimants' motion to withdraw was not for a proper purpose as required by 20 C.F.R. §702.225(a)(3). The claimants are entitled to pursue a tort remedy in state court, as they have the right to choose the forum in which they will first litigate their cases. The Board declined to address claimants' contention that the administrative law judge erred in assessing the prejudice to employer under this prong of the regulation, noting however, that in a black lung case, the Board agreed with the Director that this factor need not be assessed. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

The Board affirms the administrative law judge's finding that claimants' motion to withdraw was not in their best interests pursuant to C.F.R. §702.225(a)(3). This inquiry is specifically given to the fact-finder. The administrative law judge rationally found that claimants' recovery in state court was speculative, both on a monetary basis and on the claims asserted. Moreover, depending on the success of employer's defenses in state court, claimants could lose the right to refile under the Act, pursuant to Section 13(d). The Board remanded the case to the administrative law judge for adjudication/ruling on employer's motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

In considering the applicable regulation governing the withdrawal of claims, the Board notes that procedural regulations in force at the time the administrative proceedings take place govern, not those in effect at the date of injury. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998), *aff'g on recon.* 32 BRBS 11 (1998).

The Ninth Circuit, citing case law interpreting the SSA, states that in a claim under the Act,

the treating physician's opinion is entitled to special weight because he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos v. Director, OWCP*, 153 F.3d 1051 (1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied,* 528 U.S. 809 (1999).

In this "borrowed employee" case arising in the Fifth Circuit, the Board initially rejected the Director's contention that the administrative law judge lacked jurisdiction to consider the relevant contractual provisions in determining the responsible employer. Pursuant to *Total Marine Services,* 87 F.3d 774, 30 BRBS 62(CRT)(5th Cir. 1996), a lending employer and its insurer may be liable to an injured employee under a contract indemnifying the borrowing employer. Thus, the Board held that the administrative law judge acted within his authority in resolving the responsible employer/carrier issue, based on his interpretation of the relevant contracts. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Fifth Circuit holds that the parties' claims regarding their indemnification contractual provisions are not "questions in respect of" a longshore claim pursuant to Section 19(a) of the Act, and therefore neither the administrative law judge nor the Board has jurisdiction to adjudicate these claims. Thus, the administrative law judge and the Board lacked authority to adjudicate the contractual dispute involving contractual indemnity and insurance issues among the lending employer, its insurer, and the borrowing employer in this case. The court stated that the parties' claims may be filed in a court of general jurisdiction. *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), *rev'g Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999).

The Board affirms the administrative law judge's denial of petitioners' motion to intervene, as their request for a finding of tort immunity under Section 33 is not an issue "in respect of" a compensation claim pursuant to Section 19(a) of the Act. Petitioners are corporate officers of employer. Claimant filed a state tort claim against the intervenors and then his motion to dismiss his claim under the Act pursuant to Section 33(g) was granted. As the claim of immunity is not an issue essential to resolving the rights and liabilities of the claimant and the employer regarding a compensation claim, the administrative law judge properly declined to address the immunity issue, pursuant to *Temporary Employment Services,* 261 F.3d 456, 35 BRBS 92(CRT), and *Equitable Equip. Co.*, 191 F.3d 630, 33 BRBS 167(CRT). *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel,* 104 Fed. Appx. 415 (5th Cir. 2004).

Claimant was injured in an office on a fixed platform off the coast of Louisiana. At the time of the injury, employer had two carriers on the risk for injuries occurring on the Outer Continental Shelf. For injuries occurring off the coast of Texas, Houston General was at risk. For injuries occurring off the coast of Louisiana, INA was at risk. After discussing the terms of the insurance contracts and rejecting INA's argument that claimant's presence on the platform was temporary such that liability lies with Houston General, the Board held that INA is liable for benefits as claimant's injury occurred off the coast of Louisiana. Because Houston General mistakenly paid benefits for 12 years, Houston General is entitled to reimbursement from INA. The Board held that the case is analogous to the Fifth Circuit's decision in *Total Marine*, 87 F.3d 884, 30 BRBS 62(CRT), and is distinguishable from *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT), as there is no contract dispute to resolve as between the two insurers, so the reimbursement would be similar to what might occur between a borrowing and lending employer. Consequently, although the Board affirmed the administrative law judge's finding that INA is liable for benefits, it held that he should have addressed the issue of reimbursement, and it remanded the case for him to do so. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

Where INA settled with claimant after the administrative law judge's decision on remand, the Board held that the post-adjudication settlement, resolving all issues pertaining to claimant, does not divest the administrative law judge or the Board of the authority to address the responsible carrier and reimbursement issues raised herein. The Board explained that this case does not involve a contract dispute and is not analogous to *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT). Rather, it involves the question of who is liable for claimant's benefits and, regardless of the fact that claimant has been paid in full, the issue is one which is "in respect of" claimant's claim. Failure to address the issue would be tantamount to holding two carriers liable for the same injury and that is not permitted under the Act. Accordingly, the Board affirmed the administrative law judge's determination that INA must reimburse Houston General for the benefits it paid claimant, as that decision is in accordance with the Board's decision which is the law of the case. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

The Board remands the case to the administrative law judge as he did not enter an award of benefits prior to addressing employer's entitlement to Section 8(f) relief. There was no agreement between claimant and employer as to claimant's entitlement to benefits at the time the case was referred to OALJ, and although the parties allegedly stipulated to entitlement subsequently, the administrative law judge neither received the alleged stipulations nor took evidence on the substantive issues. Rather, he remanded the case to the district director in abrogation of his responsibility. Moreover, he therefore was procedurally prevented from addressing Section 8(f) because it is unknown if the award was for permanent benefits of more than 104 weeks or if the Director agreed to the alleged stipulations. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999).

The Board remands the case to the administrative law judge as he did not enter an award of benefits prior to addressing employer's entitlement to Section 8(f) relief. The parties' stipulations concerning claimant's entitlement to benefits must be embodied in a compensation order. Nonetheless, the Board held that, unlike in *Gupton*, 33 BRBS 94, the appeal of the Section 8(f) issue need not be dismissed because the denial is based on the application of Section 8(f)(3), and resolution of the issue therefore is not contingent upon the extent of claimant's permanent disability. *Davis v. Delaware River Stevedores, Inc.*, 39 BRBS 5 (2005).

The Board rejected employer's contention that the administrative law judge erred in awarding benefits on a continuing basis beyond the date of the hearing. The Board held that the Act provides for such continuing awards and that, provided the record contains evidence to support such an award, the administrative law judge may properly award benefits into the future. Contrary to employer's assertion, Section 22 modification of such continuing awards provides appropriate relief upon the discovery of evidence of a change in conditions or a mistake in the determination of a fact when making such award. To hold that an administrative law judge cannot award continuing benefits is judicially inefficient and is tantamount to requiring perpetual re-opening of cases. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

The Fourth Circuit holds that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. The court further rejected employer's contention that its inability to recoup any overpayments that might occur between the date of maximum medical improvement and the date of any Section 22 modification decision would abridge employer's due process right to a hearing prior to being deprived of its property; the court held that the initial hearing and subsequent appeals provided employer with all the process that is constitutionally due. *Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

The Board rejects employer's argument that the administrative law judge committed reversible error by citing *Amos,* 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), for the principle that a treating physician is entitled to "special weight," as the court's opinion states this. The administrative law judge, however, did not summarily credit the treating physician's opinion, but fully discussed his opinion and its underlying rationale, as well as the other medical evidence of record. *Brown v. National Steel & Shipbuilding Co.,* 34 BRBS 195 (2001).

In this occupational disease case, the self-insured employer had sufficient notice, and was therefore not denied due process, after the responsible carrier for claimant's medical benefits upon issuance of the initial decision was allowed to raise the issue of the responsible insurer upon claimant's request for compensation benefits on modification. Employer had prior knowledge that the carrier sought to deny responsibility for compensation benefits based on additional harmful exposures after employer became self-insured. Employer received a transcript of claimant's deposition taken after issuance of the initial decision and it was able to cross-examine claimant at the modification hearing as to additional industrial exposure. Moreover, the administrative law judge expressed willingness to offer employer additional access to claimant before closing the record. *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

The Board affirms the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d), for the duration of the time claimant refuses to undergo a medical examination ordered by the administrative law judge. The Board notes that this action is not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The Board held that upon the referral of a case to the OALJ, the authority to suspend benefits as a result of an employee's failure to attend a medical examination scheduled by the Secretary rested with the administrative law judge and not the district director. Sections 7(f) and 19(h) of the Act are silent as to this issue, but 20 C.F.R. §702.410(b) gives this suspension authority to the district director or the administrative law judge. As neither the Act nor regulations allows for simultaneous jurisdiction over this issue, and in order to avoid the potential for administrative confusion, the Board held that only the entity before whom the case is pending may issue an order suspending compensation. The Board thus vacated the district director's suspension order, as the case had been transferred to the OALJ at the time he issued his order. *L.D. v. Northrop Grumman Ship Systems, Inc.,* 42 BRBS 1, *recon. denied,* 42 BRBS 46 (2008).

Issues at Hearings/Stipulations

The administrative law judge erred in failing to resolve the disputed responsible carrier issue and in remanding the case to the deputy commissioner for findings of fact and to modify his decision. When an issue is in dispute, only the administrative law judge can hold a formal hearing and make findings to resolve the dispute. The responsible carrier issue was unresolved before the administrative law judge and there was no agreement between the parties as to the issue; therefore, the administrative law judge abdicated his responsibility to resolve disputed questions of fact by remanding the case to the deputy commissioner rather than resolving this issue himself. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

The Board rejects claimant's argument that employer was precluded from raising Section 13 and Section 33(g) at the hearing before the administrative law judge, even though employer had not raised these issues before the deputy commissioner, on the rationale that both these issues were raised in employer's pre-hearing statement and at the hearing of the claim before the administrative law judge. See 20 C.F.R. §§702.317, 702.336. Lewis v. Norfolk Shipbuilding & Dry Dock Corp., 20 BRBS 126 (1987).

Where employer attempted to withdraw its controversion at the hearing, but the parties were not in agreement, the administrative law judge properly retained jurisdiction and made findings on the disputed issues. Falcone v. General Dynamics Corp., 21 BRBS 145 (1988).

The Board rejects employer’s contention that the administrative law judge erred in failing to remand the case to the district director pursuant to 20 C.F.R. §702.351 for the entry of a compensation order. The withdrawal of controversion regulation assumes that the parties are in agreement as to the disposal of the case, as it instructs the district director to issue a compensation order as in 20 C.F.R. §702.315. In this case, claimants opposed the issuance of a compensation order and the administrative law judge therefore properly retained jurisdiction over the cases. As the Board also affirmed the administrative law judge’s denial of claimants’ motion to withdraw, he should proceed to adjudicate the claims. If the claimants fail to raise issues requiring adjudication, the administrative law judge may address this in disposing of employer’s motion for summary decision. *Irby v. Blackwater Security Consulting, LLC*, 41 BRBS 21 (2007).

The Board holds that administrative law judge erred in addressing, sua sponte, the issue of D.C. Act jurisdiction, given that the parties had previously achieved a Section 8(i) settlement of the substantive aspects of the claim and that the settlement had previously been approved by a deputy commissioner. Because the deputy commissioner's approval of the settlement had become final, the administrative law judge was empowered only to decide, pursuant to Section 18 of the Act and Section 702.372(a) of the regulations, a factual issue pertaining to employer's liability for paying certain medical expenses. The Board accordingly reverses the administrative law judge's finding of no D.C. Act jurisdiction. Kelley v. Bureau of National Affairs, 20 BRBS 169 (1988).

Where employer's amended Form LS-18, listing Section 22 among the contested issues,

was filed more than one month prior to the hearing, claimant was provided with timely notice of the new issue. Thus, it was an abuse of discretion for the administrative law judge to refuse to consider employer's request for modification. Claimant, who had been awarded permanent partial disability benefits for a 1978 injury, was seeking permanent total disability benefits for a second injury. Thus, the issue of claimant's residual wage-earning capacity subsequent to the 1978 injury was implicitly raised at the hearing. Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

In a footnote, the Board upheld an administrative law judge's determination that 29 C.F.R. §18.20, which deems a matter addressed by a Request for Admissions conceded if a party fails to respond to the Request, did not divest the administrative law judge of authority to decide Section 8(f) issues in this case. The Board holds that the "law of the case" doctrine does not preclude an administrative law judge from reopening the previously-decided issue of Section 8(f) relief where the case is before him pursuant to a request for modification, even where Section 8(f) has not been specifically raised as an issue in the modification request, if the administrative law judge finds that a "mistake in fact" is contained in the previous Section 8(f) determination. Board nonetheless remands, since the administrative law judge did not afford the parties an adequate opportunity to present evidence and arguments relevant to Section 8(f) once he notified them that he would address this issue in his decision on modification. Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988).

The Board rejects claimant’s contention that the administrative law judge erred on remand in addressing rebuttal of the Section 20(a) presumption as the case had been remanded for disability and medical benefits issues. Employer submitted a new report on remand addressing causation. Thus, the underlying factual situation changed and the law of the case doctrine is inapplicable. Moreover, submission of the report and consideration of the causation issue is consistent with Section 22. *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

19-25a

The First Circuit vacates Board's determination that issue of Section 8(f) applicability was

improperly considered by the administrative law judge, reasoning that although the Section 8(f) issue was not raised by the parties, it was within the administrative law judge's discretion to consider this issue under 20 C.F.R. §702.336(b), which affords administrative law judges authority to raise issues on their own initiative. The court accordingly remands the case for reconsideration of the issue of Section 8(f) applicability, indicating that since the administrative law judge did not provide the parties with adequate notice that this issue would be addressed, the parties are entitled to submit evidence relevant to Section 8(f) on remand. Cornell University v. Velez, 856 F.2d 402, 21 BRBS 155 (CRT)(1st Cir. 1988).

It is within the administrative law judge's discretion to allow parties to raise new issues at the hearing, 20 C.F.R. §702.336. The administrative law judge in this case, however, did not abuse his discretion by refusing to allow employer to raise the issue of Section 8(f) given the absence of notice to the Director, the representative of the Special Fund. Moreover, employer was given an opportunity to raise the Section 8(f) issue in a post-hearing motion which would have given Director notice, but employer failed to take advantage of this opportunity. Scott v. S.E.L. Maduro, Inc., 22 BRBS 259 (1989).

An administrative law judge may expand the hearing to include new issues or new evidence provided the parties are provided with fair notice, under 20 C.F.R. §702.336. In this case, the parties were given adequate notice and the chance for a further evidentiary hearing on the issue of future medical benefits and thus due process rights were not violated. Cowart v. Nicklos Drilling Co., 23 BRBS 42 (1989), rev'd on other grounds, 907 F.2d 1552, 24 BRBS 1 (CRT) (5th Cir. 1990), aff'd, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (en banc), aff'd, 505 U.S. 469, 26 BRBS 49 (CRT) (1992).

In an occupational disease case before the Board for the second time, the Board held it was proper for the administrative law judge to reevaluate the issue of claimant's awareness of the relationship between his disease, disability, and employment for purposes of determining whether the claim was timely since the issue of whether the claim was untimely had not been explicitly considered in the original Decision and Order, although raised by employer. Although the administrative law judge previously had made an awareness finding pursuant to Aduddell, employer had no basis for filing a cross-appeal of this finding since it had no significance with respect to the timeliness of the claim until the enactment of the 1984 Amendments. Board notes that first awareness finding was not "final" since the Decision and Order containing it had been appealed. Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989).

The Board held that because the issues of nature and extent of claimant's disability were properly before the administrative law judge, the administrative law judge erred by failing to make a determination regarding claimant's right to an award of "continuing" temporary total disability benefits. The Act and its regulations mandate that an administrative law judge set forth findings of fact and conclusions of law in his compensation order, and that the order either make an award to the claimant or reject the claim. *See* 33 U.S.C. §919(c); 20 C.F.R. §702.348. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Although a deceased employee's claim for disability compensation had not yet been referred to the Office of Administrative Law Judges, and the only formal claim before the administrative law judge was for death benefits, the administrative law judge had jurisdiction to rule on the disability claim, since consideration of the extent of decedent's disability was integral to deciding the claim for death benefits pursuant to pre-amendment Section 9. The Board noted that declining to adjudicate the disability and death benefits claims together would have resulted in an unnecessary bifurcation of proceedings. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (1994).

Failure to contest coverage under the Act at the deputy commissioner level does not preclude employer's raising jurisdiction as an issue after referral to the Office of Administrative Law Judges, as 20 C.F.R. §702.336 provides for the raising of new issues before the administrative law judge. Moreover, employer's voluntary payment of benefits does not estop it from raising jurisdiction as an issue. *Hall v. Newport News Shipbuilding & Dry Dock Co.,* 24 BRBS 1 (1990).

The Board rejects claimant's contention that the administrative law judge erred in allowing LIGA to raise Section 33(g), inasmuch as LIGA was not notified of its potential liability until after the first hearing on this case. The administrative law judge thus afforded LIGA its first opportunity for a fair hearing on this issue. *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

Claimant was not denied due process when the Director raised post-hearing the affirmative defense that claimant failed to cooperate with OWCP's vocational rehabilitation efforts. Failure to cooperate is *per se* raised whenever termination of a vocational rehabilitation plan is contested. 20 C.F.R. §702.506(c). Claimant therefore should have been aware that his cooperation was at issue prior to the Director's post-hearing participation and he was afforded an opportunity to submit relevant evidence in response. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

It was within the administrative law judge's discretion to address whether claimant's disability is permanent, which was raised for the first time at the formal hearing. Employer was not entitled to further notice of the new issue because claimant raised temporary total disability in his pre-hearing statement and there is no significant difference in the burdens of proof required to challenge a claim for permanent rather than temporary total disability. Moreover, the administrative law judge was not obliged to address the issue of jurisdiction, which was raised by claimant in his pre-hearing statement. When employer failed to appear at the formal hearing without good cause, the administrative law judge was authorized under 29 C.F.R. §18.5(b) to find facts as alleged by claimant - the appearing party. Furthermore, as claimant sought an award of benefits, he *per se* did not contest jurisdiction under the Act. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

The Board concludes that the administrative law judge did not abuse his discretion in refusing to entertain claimant's post-hearing request for permanent total disability compensation based on claimant's failure to exercise diligence in developing this issue, which should have been anticipated prior to the hearing. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993).

The Board held that the administrative law judge acted within his discretion in refusing to address employer's request for Section 8(f) relief. In this case, employer timely raised the issue before the district director; however, it did not raise Section 8(f) as an issue before the administrative law judge until it filed a motion for reconsideration. Because the administrative law judge may refuse to entertain a post-hearing request to address an issue which should have been anticipated before the hearing, the Board affirmed the administrative law judge's decision. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

Where the administrative law judge accepts stipulations affecting the Special Fund's liability that were submitted by claimant and employer without Director's participation, the Board normally holds claimant and employer bound by their stipulations and remands for adjudication of the Special Fund's liability only. Under the circumstances of this case, however, where the stipulations affect the Special Fund's liability under Sections 8(f) and 10(h) and are based on the "last exposure" test of Dunn, which has been disapproved by Congress through the 1984 Amendments, the Board will permit a remand for readjudication of all issues, even those between claimant and employer. Truitt v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 79 (1987).

The administrative law judge was not precluded from awarding permanent partial disability by the fact that OWCP ordered employer to pay claimant temporary total disability pending claimant's completion of a vocational rehabilitation program. Because the deputy commissioner possesses no fact-finding authority, OWCP's implicit temporary total disability determination is not binding on an administrative law judge. Although the nature and extent issues were not explicitly raised before or at the hearing, the parties' stipulation regarding date of permanency and employer's request for Section 8(f) relief, suggested that the issue could permissibly be addressed. Price v. Dravo Corp., 20 BRBS 94 (1987).

Administrative Law Judge acted within his discretion in refusing to accept parties' stipulations agreed to at the informal conference where claimant was represented by a different attorney. 29 C.F.R. §18.51 provides that the stipulations are not binding on the parties until received in evidence. Warren v. National Steel & Shipbuilding Co., 21 BRBS 149 (1988).

The administrative law judge's error in rejecting the parties' stipulation without giving them notice was harmless since the Director did not participate, and the stipulation affected the Special Fund. However, since the date of maximum medical improvement agreed to by the parties was supported by the evidence of record, the Board modified the date of permanency to that date. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), vacated on other grounds, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (en banc).

Board held that where a stipulation entered into by the parties in a former claim, that claimant had no viable disability claim at that time, manifested no intention by the parties to be bound in future cases, the administrative law judge erred by finding that the parties were bound by the stipulation. Donnell v. Bath Iron Works Corp., 22 BRBS 136 (1989).

The Board held that the first administrative law judge's finding, in adjudicating the disability claim, that the employee was a "person entitled to compensation" under Section 33(g)(1) cannot be interpreted as a stipulation to decedent's coverage under the Act in the death claim, as employer's stipulation in the prior proceeding was expressly not binding in any other claims against employer. Moreover, the Board held that it is well settled that a claim for death benefits is a separate and distinct cause of action which does not arise until the death of the worker. The fact that the two claims may be linked with regard to the establishment of certain critical elements, such as the employee's coverage under the Act, does not alter the procedural requirements that the claimants in a disability and death claim separately establish their entitlement under Sections 8 and 9 respectively. *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd,* 418 F3d 138, 39 BRBS 47(CRT) (2^{d} Cir. 2005).

An administrative law judge may not reject stipulations without giving the parties prior notice that he will not automatically accept the stipulations. On remand, the administrative law judge must give the parties the opportunity to submit evidence in support of their positions on the average weekly wage issue. Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245 (1989).

The Board holds that the administrative law judge acted within his discretion in rejecting the parties' stipulation to Defense Base Act jurisdiction. Casey v. Chapman College, Pace Program, 23 BRBS 7 (1989).

An administrative law judge may discount an alleged agreement regarding claimant's average weekly wage at the informal hearing because it could merely have been a factor in attempting to negotiate a settlement at the informal level. McCullough v. Marathon Letourneau Co., 22 BRBS 359 (1989).

The Board permitted Director to challenge stipulations agreed to by claimant and employer because a) stipulations are non-binding where they evince an incorrect application of law; b) the stipulations potentially violated Section 15(b) because they constituted an agreement under which claimant was effectively waiving his right to compensation by accepting less compensation than that to which he was entitled; c) the issue contained in the stipulations, the proper maximum compensation rate, was a legal one and could therefore be raised at any time. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

The administrative law judge acted within his discretion in holding employer bound to its stipulation of claimant's annual earnings in the year prior to the injury for purposes of calculating average weekly wage. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

Stipulations are offered in lieu of evidence and therefore may be relied on to establish an element of the claim. The parties' stipulation that claimant is totally disabled establishes his inability to perform his usual work, and employer may attempt to show, through modification proceedings, that claimant is at most partially disabled by offering evidence of a change in condition. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999).

The Board reverses the administrative law judge's rejection of the parties' stipulation that decedent was exposed to injurious stimuli during the course of non-covered employment with NASA subsequent to his covered employment in sufficient quantities and of sufficient duration to cause mesothelioma, and that the mesothelioma was caused, at least in part by this exposure. The Board held that this stipulation cannot be binding on NASA, as it is not, and cannot, be a party to the longshore claim, nor can the stipulation be given collateral estoppel effect in any other proceeding. Moreover, the stipulation gives employer an element of its defense to the claim, and the administrative law judge therefore should have accepted it. *Justice v. Newport New Shipbuilding & Dry Dock Co.,* 34 BRBS 97 (2000).

The Fifth Circuit held that the administrative law judge is free to not accept one of claimant's concessions, that he is not claiming benefits for a certain period, as a binding judicial admission, but considerations of equity require that he state that he is not accepting the concession and give employer notice and opportunity to be heard on the issue before making a contrary finding. *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

At the hearing regarding claimant's death benefits case, employer conceded that claimant's failure obtain written approval of third-party settlements she entered into with decedent did not bar claimant's claim for death benefits under Section 33(g)(1). Subsequent to the hearing, and prior to the issuance of the administrative law judge's decision, the Ninth Circuit issued *Cretan*, 1 F.3d 843, 27 BRBS 93(CRT), wherein the court held that potential widows are subject to the provisions of Sections 33(f) and (g) of the Act. Thereafter, in a letter to the administrative law judge, employer stated that it had changed its position with regard to Section 33(g) and requested that the administrative law judge consider Section 33(g) as a new issue, pursuant to 20 C.F.R. §702.336(b). The administrative law judge denied employer's request. The Board held that it was reasonable for employer to raise the issue of Section 33(g) post-hearing based on the holding in *Cretan*, and that the administrative law judge's failure to consider the Section 33(g) issue post-hearing constituted an abuse of discretion under Section 702.336(b). Thus, the Board remanded the case for further findings. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 94 (1996).

The administrative law judge acted within his discretion under 20 C.F.R. §702.336(b), when he refused to consider the Section 33(g) issue raised by employer after the administrative law judge's adverse decision, where employer waited more than three months after the issuance of the applicable Supreme Court case, even though the decision was published prior to the issuance of the administrative law judge's decision. Moreover, the administrative law judge rationally found that as there were different interpretations of the section at issue by the courts at the time of the hearing and a Supreme Court decision was imminent, employer's failure to preserve the Section 33(g) defense for appeal was not excusable, justifiable or understandable. This case is thus distinguishable from *Taylor*, 30 BRBS 90 (1996). *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 157 (1992).

If, during the course of a hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. 20 C.F.R. §702.366(a). In this case, the administrative law judge properly considered the issue of coverage inasmuch as employer listed this issue in its pre-hearing statement that was submitted to the administrative law judge and raised this issue at the formal hearing. *Nelson v. American Dredging Co.,* 30 BRBS 205, 206 (1996), *aff'd in part and rev'd in part on other grounds,* 143 F.3d 789, 32 BRBS 115 (CRT)(3d Cir. 1998).

The Board rejected employer's contention that the administrative law judge improperly allowed claimant and the Director to raise a new issue at the hearing on remand. Initially, the administrative law judge found that claimant was not "a person entitled to compensation" under Section 33(g)(1), and therefore, his claim was not barred. Subsequently, the Supreme Court issued *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). Based on the change of law, claimant and the Director advanced a different theory before the Board as to why claimant's claim should not barred: that since claimant suffered two distinct injuries, asbestosis, contracted while employed at Electric Boat, and chronic obstructive pulmonary disease while working for employer, employer's written approval of the third-party settlements concerning his asbestosis was not required. Since the administrative law judge had not addressed this theory, the Board had specifically directed him to address this theory on remand, and the administrative law judge committed no error by doing so. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

The Board held that the administrative law judge properly addressed the responsible carrier issue although the carrier first raised it before him on remand as it is an issue which is fundamental to the administration of justice. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP,* 186 F.3d 232, 33 BRBS 114(CRT)(2d Cir. 1999).

Prior to the formal hearing, the administrative law judge denied two motions to dismiss by individuals identified by the Director as having been corporate officers of the employer. Fourteen months later, at the formal hearing, the administrative law judge entertained a renewal of these two motions and, following the hearing, the administrative law judge granted the motions to dismiss. The Board held that since the administrative law judge had previously ruled on the motions to dismiss, the parties were entitled to reasonable notice pursuant to 20 C.F.R. §702.336 that he intended to reconsider the named individuals' status as parties to the claim. Therefore, as the administrative law judge erred by failing to notify the parties that he would not be bound by his prior orders denying the motions to dismiss, the Board vacated the administrative law judge's dismissal of the named alleged corporate officers and remanded the case for reconsideration of this issue. *E.B. v. Atlantico, Inc.,* 42 BRBS 40 (2008).

The administrative law judge's refusal to consider employer's argument that claimant's injury was a scheduled arm injury under Section 8(c)(1), rather than an unscheduled shoulder injury under Section 8(c)(21), was a proper exercise of her discretionary authority where employer raised the issue for the first time in its post-hearing brief, as under 20 C.F.R. §702.336(b) the administrative law judge has discretion to consider a new issue any time prior to filing of compensation order and in this case the issue was raised after the issuance of the administrative law judge's order. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

The Board holds that the administrative law judge erred in awarding claimant total disability benefits on the present record, as the record is replete with indications that claimant, at no point prior to the time of issuance of the decision, sought a determination regarding his entitlement to any total disability benefits beyond what had already been paid by employer. However, inasmuch as the administrative law judge determined subsequent to the hearing that total disability is at issue in this case, a determination which is within his discretion pursuant to Section 702.336(b), the parties were entitled to reasonable notice and an opportunity to submit evidence and to address that issue. Consequently, the Board held that the administrative law judge erred, in his order on reconsideration, by denying employer's motion to submit additional evidence on the issue of total disability in this case. The administrative law judge's finding of permanent total disability benefits was therefore vacated and the case remanded for reconsideration of this issue. *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999).

In an order issued subsequent to his initial decision, the administrative law judge granted employer's motion for reconsideration and vacated his earlier award of medical benefits, finding that claimant failed to comply with Section 7(d). On appeal, the Board vacated the administrative law judge's order, holding that Section 7(d) concerns issues of fact and law that are separate and distinct from the request for medical benefits itself, and thus, the issue of Section 7(d) compliance is not raised automatically by a claim for medical benefits. As employer did not raise the issue of Section 7(d) compliance at the hearing below, the Board held that the administrative law judge erred in considering the issue after issuing his initial decision without providing claimant the opportunity to submit evidence. Thus, the Board remanded the case for the administrative law judge to re-open the record in order to reconsider the issue of Section 7(d) compliance. *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000).

The Board reversed the administrative law judge's finding that the Director's failure to raise the Section 8(f)(2)(A) issue prior to a second motion for reconsideration precluded consideration of the issue, as the Board further holds that Section 8(f)(2)(A) may be raised at any time due to its mandatory nature. This is in spite of the administrative law judge's finding that the Director's failure to raise the issue was the result of a lack of diligence in presenting his case. *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57 (2000).

Administrative Procedure Act, Section 23 and Section 27

If claimant cannot be located because he has failed to notify the Office of Administrative Law Judges or his attorney of his whereabouts, it is not a violation of claimant's right to testify in his own behalf or to confront witnesses, 5 U.S.C. §556(d), for the administrative law judge to close the record more than five months after the second hearing without such testimony; claimant has waived his rights. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986).

The administrative law judge's mere statement that each medical exhibit "although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration," does not satisfy the requirements of the APA. The administrative law judge must independently analyze and discuss the medical evidence; the administrative law judge's failure to explicitly accept or reject the medical evidence of record makes it impossible for the Board to apply its standard of review. Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988).

Although employer allegedly discharged claimant for falsifying information on his pre-employment application, the administrative law judge's failure to consider that employer discharged claimant only a few weeks after he filed his workers compensation claim (possible violation of Section 49) violates the Administrative Procedure Act and requires remand. Jaros v. Nat'l Steel & Shipbuilding Co., 21 BRBS 26 (1988).

Where administrative law judge provided only a cursory discussion of his determination that employer was not entitled to Section 8(f) relief, Board remanded for additional findings pertaining to the Section 8(f) issue. Dugas v. Durwood Dunn, Inc., 21 BRBS 277 (1988).

Because the record contained conflicting evidence as to the cause of claimant's back problems and his chronic pain syndrome, which the administrative law judge failed to consider in concluding that these conditions were not work-related, the Board remanded for the administrative law judge to reconsider this evidence in light of the Section 20(a) presumption and the Administrative Procedure Act. Frye v. Potomac Electric Power Co., 21 BRBS 194 (1988).

Where administrative law judge denied claimant medical benefits under the Longshore Act because he found no evidence upon which to determine whether the medical expenses paid under the state act were reasonable, and where it was not apparent from the administrative law judge's Decision and Order what evidence he considered and relied upon in reaching this determination, the Board remanded for reconsideration on Administrative Procedure Act grounds. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd and modified sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

The Board holds that the administrative law judge erred in failing to address all of the medical evidence of record, as well as the post-hearing motions made by both parties. Such an omission violates the Administrative Procedure Act. McCurley v. Kiewest Co., 22 BRBS 115 (1989).

The administrative law judge's disposition of a petition for modification must comport with the requirements of the Administrative Procedure Act. Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989).

The Board remands the case for the administrative law judge to render new findings consistent with the APA where he summarily concluded that employer presented substantial evidence to rebut the Section 20(a) presumption. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

The administrative law judge violated the APA by failing to discuss voluminous and relevant medical evidence relating to claimant's physical and mental conditions. Instead, the administrative law judge relied on the reports of two doctors whom he, without adequate discussion, found to be independent experts under Section 7(e). *Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, where administrative law judge found that claimant's continued exposure to asbestos at the workplace resulted in further impairment, but failed to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion, he violated the APA, 5 U.S.C. §557(c)(3)(A), and case must be remanded. *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting).

The Board remands the case to the administrative law judge to address applicable average weekly wage for claimant's permanent benefits. Without explanation, in violation of the APA, the administrative law judge awarded permanent total disability for a 1986 knee injury on the average weekly wage applicable to a temporarily disabling 1988 ankle injury. *Hawthorne v. Ingalls Shipbuilding, Inc.,* 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The Board vacates the summary denial of Section 8(f) relief and remands the case for findings on all elements consistent with the requirements of the APA. *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting).

The Board vacates the administrative law judge's responsible employer determination because of his inconclusive weighing of the evidence, and his failure to address whether employer established that decedent was not exposed to potentially injurious asbestos during the course of his employment for the employer the administrative law judge found responsible. The case is remanded for definitive findings of fact. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.,* 40 BRBS 1 (2005).

The Board vacates administrative law judge's findings with respect to the extent of claimant's disability because his failure to resolve conflicts in the record and to explain what evidence he weighed and why on this issue violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). The Board is unable to conclude on this record whether the administrative law judge simply "disregarded significant probative evidence or reasonably failed to credit it" where he did not explain whether claimant was unable to return to his former longshore work or how employer failed to meet its burden of demonstrating the availability of suitable alternate employment. *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

The Fifth Circuit rejected employer's contention that the administrative law judge's failure to explain why he rejected certain evidence violates the APA, noting that the Fifth Circuit has expressly declined to adopt the rule that an administrative law judge must explain why evidence contradicting his conclusion was rejected. Because the evidence in question was not material to the outcome of the case, the administrative law judge was not required to address the contradictory evidence. *H.B. Zachery Co. v. Quinones,* 206 F.3d 474, 34 BRBS 23(CRT)(5th Cir. 2000), *rev'g on other grounds* 32 BRBS 6 (1998).

The Board rejected employer's contention that the administrative law judge's decision violated the APA, as the administrative law judge set forth the evidence with regard to causation, weighed the evidence, and provided reasons for his findings based on the evidence. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Board holds that the administrative law judge erred in remanding the case to the deputy commissioner so that a direct appeal to the Board on the issue of Section 8(f) relief could be taken. The administrative law judge abdicated his responsibility to resolve disputed issues by remanding the case without making the required factual findings regarding claimant's entitlement as well as the applicability of Section 8(f) and liability of the Special Fund. Champagne v. Main Iron Works, Inc., 20 BRBS 84 (1987).

The First Circuit rejected employer's contention that the Board erred in remanding the case after the first appeal, as the administrative law judge had not made the findings with regard to whether the Section 20(a) presumption was invoked and rebutted. Moreover, the First Circuit rejected employer's assertion that the administrative law judge's second decision should be vacated because it was based on what employer called "coerced findings of fact," as (1) the Board did not order the administrative law judge to find that claimant experienced stress and harassment in the workplace, but rather ordered him to find whether they occurred; (2) to the extent that the administrative law judge read the Board's decision as requiring him to find in favor of claimant, he misread the Board's decision; and because (3) most importantly, there was substantial evidence in the record to support the administrative law judge's findings in favor of claimant. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges do not apply to the extent they are inconsistent with a rule of special application as provided by statute or regulation. Adams v. Newport News Shipbuilding and Dry Dock Co., 22 BRBS 78 (1989).

The Board affirms the administrative law judge's denial of claimant's request for reimbursement for expenses related to pain management treatment pursuant to 29 C.F.R. §18.6(d), for the duration of the time claimant refuses to undergo a medical examination ordered by the administrative law judge. The Board notes that this action is not inconsistent with Section 7(d)(4), which addresses only the suspension of compensation, or Section 27(b) dealing with sanctionable conduct. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

Section 23(a) of the Act and the regulations at 20 C.F.R. §§702.338, 702.339, provide that the administrative law judge is not bound by formal or technical rules of procedure except for those provided for in the Act. In this case, the administrative law judge did not abuse her discretion in using 29 C.F.R. Part 18 and Fed. R. Civ. P. 41(b) to, in effect, dismiss a case for failure to pursue the claim, as use of these provisions is not inconsistent with the Act. Taylor v. B. Frank Joy Co., 22 BRBS 408 (1989).

The administrative law judge may rely on the Federal Rules where they do not conflict with the Act or regulations to dismiss a case where warranted by the specific circumstances. However, Rule 81(a)(6) of the Fed. R. Civ. P., which states that the Federal Rules are applicable, does not apply in this case as its application is limited to a proceeding for review or enforcement of compensation orders under the Act. As no compensation order was issued in this case because the case was dismissed, Rule 81(a)(6) does not apply. Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118 (1989).

The administrative law judge is not bound by formal rules of procedure except those provided for in the Act, and under certain circumstances, the administrative law judge may rely on the Federal Rules in taking an action. However, in this case, the Board reverses the administrative law judge's reliance on Rule 59(e) to find a motion for reconsideration untimely because it was not served on employer because use of the Federal Rules to provide for an additional requirement not required under the Act is inconsistent with Section 23, particularly where claimant is not represented by counsel. The Board also notes that Rule 81(a)(6) is inapplicable. Bogdis v. Marine Terminals Corp., 23 BRBS 136 (1989).

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Subtitle A, Part 18, §18.40(a), Motion for Summary Decision, are analogous to Rule 56 of the Federal Rules of Civil Procedure. The administrative law judge did not act prematurely in deciding the status issue in a summary decision. There was no dispute as to the nature of claimant's work duties, only as to the legal significance of those duties. Thus, as there was no genuine issue as to any material fact, the administrative law judge could rule on employer's motion for summary decision. *Hall v. Newport News Shipbuilding & Dry Dock Co.,* 24 BRBS 1 (1990).

The Eleventh Circuit grants the employer's motion for summary judgment under FRCP 56(c); the movant has established the absence of genuine issues of material fact when all reasonable inferences are made in favor of the nonmovant. In this case, the employer has established that the employee's connection with maritime employment was *de minimis* such that there is not coverage under the Longshore Act. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

The Board held that the administrative law judges erred in granting summary decisions in favor of the employers since the cases presented contested issues of material fact which affected the application of Section 33(g). *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, J.J., concurring and dissenting).

The Board affirmed the administrative law judge's denial of employer's motion for summary judgment. In this case, the compensation claims were settled under Section 8(i), and employer is contesting claimants' right to medical benefits in view of alleged third-party settlements entered into without employer's approval. As the administrative law judge found that there is no evidence in the case from which he could determine whether the claimants were entitled to medical benefits under the Act, a material issue of fact, or the amount of the third-party settlements, he properly denied the motion for summary judgment. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995).

The Board holds that the administrative law judge erred in dismissing the issue of '49 discrimination from the case in a summary decision. First, the administrative law judge did not address claimant's contentions that employer's motion for summary judgment exceeded the scope agreed upon at the pre-hearing conference and that claimant was deprived of the opportunity to complete discovery. Second, the administrative law judge's summary decision does not satisfy the requirement at 29 C.F.R. §18.41 that a summary decision contain findings of fact and conclusions of law and the reasons therefor. Lastly, the administrative law judge did not make the requisite determination that there was no genuine issue as to any material fact with respect to the '49 issue. *Dunn v. Lockheed Martin Corp.,* 33 BRBS 204 (1999).

The Board affirms the administrative law judges' grants of summary decision in employer's favor on the status issue presented in these cases. Employer moved for summary decision with supporting affidavits, and claimants responded only that they disputed the allegations. This is insufficient to raise the existence of material and genuine issues of fact as mere denial of the assertions cannot defeat a motion supported by affidavits, pursuant to 29 C.F.R. §18.40(c). Thus, the administrative law judges were not required to hold evidentiary hearings. *Buck v. General Dynamics Corp./Electric Boat Div.,* 37 BRBS 53 (2003).

The Board holds that the administrative law judge erred in granting summary decision in employer's favor on the issue of the timeliness of the widow's claim for benefits, pursuant to Section 13(a). In opposing employer's motion, claimant submitted to the administrative law judge evidence raising a material issue of fact concerning her date of awareness of the work-relatedness of her husband's death. The administrative law judge erred in relying on employer's evidence under such circumstances, without holding an evidentiary hearing. It is improper, as the administrative law judge did, to draw inferences against the non-moving party when ruling on a motion for summary decision. The Board notes, however, that claimant did not sufficiently raise before the administrative law judge an issue of fact concerning employer's compliance with Section 30(a). The Board remands the case for a hearing. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision in this case where claimant did not satisfy the Section 2(3) status requirement. The facts were undisputed: claimant was a janitor who cleaned bathrooms, offices, and the cafeteria. She did not clean shipbuilding equipment or production areas around the equipment, and her job thus is distinguishable from those in *Schwalb, Sumler, Ruffin,* and *Watkins*. The Board affirmed the administrative law judge's reliance on *Gonzalez*, 33 BRBS 146, and held that the undisputed facts lead to but one legal conclusion – claimant's janitorial job is not integral to employer's shipbuilding operation. Thus, employer was entitled to summary decision as a matter of law. *B.E. v. Electric Boat Corp.*, 42 BRBS 35 (2008).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision where claimant failed to meet the Section 3(a) status requirement. The facts concerning the area in which claimant was working were undisputed and the administrative law judge's finding that no loading, unloading, repairing, dismantling, or building of vessels occurred in the area is supported by substantial evidence. Moreover, the bulkhead area where claimant worked the day before his accident is not an enumerated situs (pier) on the facts of this case. Thus, employer was entitled to summary decision as a matter of law. *R.V. v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008).

The Board holds that the administrative law judge did not violate the APA where he discussed only the relevant parts of vocational testimony in determining whether employer established suitable alternate employment. Similarly, the administrative law judge did not err in not discussing certain medical testimony as part of this Section 8(f) findings, since the substance of the testimony actually supported his denial of Section 8(f) relief, and the testimony was irrelevant towards determining whether the pre-existing disability was manifest, because the physician did not treat claimant until after the work injury. *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990), *rev'd on other grounds,* 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991).

In this case, before the Board after remand from the Supreme Court's decision in *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Board held that, as the administrative law judge discussed the only two pertinent medical opinions of record, he did not violate the APA by not discussing every medical opinion of record. Moreover, the Board determined that it was within the administrative law judge's discretion to credit Dr. Derby's opinion over that of Dr. Yazdan, and it was rational for him to conclude that decedent's condition and death were not work-related. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The Fifth Circuit affirmed administrative law judge's determination that claimant was temporarily totally disabled during two specified periods of time based on substantial evidence supporting the administrative law judge's factual findings. The court noted that it has not adopted the Third Circuit rule that the administrative law judge must articulate the specific evidence supporting his decision and discuss the evidence that was rejected. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Fourth Circuit holds that the administrative law judge's award of temporary partial disability benefits beyond the date of the hearing did not violate the APA requirement that all findings and conclusions be supported by the record evidence. Rejecting employer's contention that as there is "no evidence" of claimant's disability having continued beyond the date of the hearing, the court noted that Section 8(e) specifically authorizes continuing awards in such a situation and, further, that courts routinely award future damages based on extrapolations that may be made from evidence of the status quo. The court further rejected employer's contention that its inability to recoup any overpayments that might occur between the date of maximum medical improvement and the date of any Section 22 modification decision would abridge employer's due process right to a hearing prior to being deprived of its property; the court held that the initial hearing and subsequent appeals provided employer with all the process that is constitutionally due. *Admiralty Coatings Corp. v. Emery,* 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000).

Because claimant, who was employed to perform work under a contract between employer and Saudi Arabia, to service Saudi aircraft including C-130s, must prove that he was injured while performing services under a subcontract or subordinate contract entered into by the U.S. in order to establish Defense Base Act jurisdiction and because production of the sales contracts could conclusively establish the extent of U.S. Government involvement in the sales of C-130s, the administrative law judge's failure to compel production of this highly relevant evidence was so prejudicial as to result in a denial of due process by depriving him of the opportunity for a fair hearing. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

In this case, the administrative law judge declared employer in default for failing to attend the hearing, and he awarded claimant permanent total disability benefits on this basis. The Board vacated the administrative law judge’s award because the decision was not supported by substantial evidence. Although claimant and the Director were in attendance at the hearing, the administrative law judge did not hear any testimony or admit any documentary evidence; thus, there was no evidence to support an award of permanent total disability benefits. Accordingly, the Board remanded the case for admission of evidence. Moreover, as employer established good cause for its failure to appear at the hearing, the Board held that employer must be allowed to participate in the proceedings on remand. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002).

The administrative law judge’s decision must be based on the evidence of record. The administrative law judge purported to rely on the “testimony” of claimant’s counsel at the hearing to find that claimant’s chosen physician treats spinal injuries. Claimant’s counsel was a not a witness, and his statements at the hearing or in briefs are not part of the evidentiary record. The Board therefore vacates the administrative law judge’s finding that claimant’s chosen physician was an appropriate spine specialist as it is not supported by substantial evidence. As claimant had ample opportunity to put in evidence on this issue, the Board does not remand the case to the administrative law judge. The case is remanded to the district director to issue an order addressing and resolving the parties’ contentions regarding claimant’s chosen physician consistent with the Act and regulations governing medical issues. *Lynch v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 29 (2005).

The Board notes that the administrative law judge should fully instruct the deputy commissioner as to which rates should be utilized when calculating compensation rate adjustments pursuant to Sections 6 and 10(f) in order to avoid confusion and possibly default orders. The APA requires that the administrative law judge resolve all factual and legal issues necessary to an award. This insures that a deputy commissioner's actions are purely ministerial. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Board, citing *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990) and *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), held that the term "injury" as it is used in Section 23(a) of the Act refers to the harm manifested as the result of an occupational disease rather than to the exposure to the injurious stimuli which allegedly caused the disease. The Board therefore rejected employer's arguments that decedent's exposure to asbestos constituted his injury, and that pursuant to Section 23(a), the declaration of a decedent alone was insufficient to establish that he was exposed to asbestos in the course of his covered employment. Because the "injury" means the lung cancer that resulted from the exposure, and there is ample corroboration that decedent suffered from cancer, Section 23(a) does not defeat the claim. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(Dolder, J., concurring in the result only).

In this case where decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death, there are statements from decedent to his doctor concerning his exposure to asbestos at the shipyards. As the Board held that the administrative law judge should consider all the evidence of record in addressing claimant's *prima facie* case, including decedent's statements, the Board advised the administrative law judge concerning the applicability of Section 23(a). Specifically, the Board held that Section 23(a) assists in proving both the "working conditions" and the "harm" elements of Section 20(a), noting that *Martin*, 24 BRBS 112, is incorrect in stating Section 23(a) applies only to the "harm" element. If the decedent's statements are corroborated, then they shall be sufficient to establish the "injury," that is, the elements for invoking the Section 20(a) presumption. If they are not corroborated, then Section 23(a) does not apply, and the statements may be sufficient to establish the injury only if they are otherwise credible and probative. The Board remanded the case for the administrative law judge to reconsider decedent's statements in light of Section 23(a). *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

The Board rejected claimant's assertion that the statements of her deceased husband, as to his exposure to asbestos at work and his injury, served to conclusively establish that he suffered from a work-related disease. Rather, the Board held that, pursuant to Section 23(a), decedent's statements, which are corroborated by other evidence, are sufficient to establish elements of a *prima facie* case. After invoking the Section 20(a) presumption and finding it rebutted, the administrative law judge is not required to credit decedent's statements in his review of the record as a whole. The evidence on the record as a whole supported the administrative law judge's determination that decedent's disease was not work-related. Therefore, the Board affirmed the denial of benefits. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence in admitting and considering evidence in cases arising under the Act. Thus, the administrative law judge in this case had greater latitude to admit evidence than did the district court, which denied the testimony of claimant's expert pursuant to *Daubert* and Rules 702 and 703 of the Federal Rules of Evidence. As the administrative law judge thus had different evidence before him, the district court's decision on the issue of causation need not be given collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

The Board grants reconsideration regarding LIGA's right to a new hearing on the merits of the claim. The Board holds that the administrative law judge's actions at the hearing deprived LIGA of the opportunity to contest claimant's entitlement to benefits and accordingly remands the case to the administrative law judge to allow LIGA the opportunity to participate in a new hearing limited solely to consideration of issues regarding claimant's entitlement to benefits under the Act. *Abbott v. Universal Iron Works, Inc.*, 24 BRBS 169 (1991), *modifying in part on recon.* 23 BRBS 196 (1990).

The administrative law judge properly declined to recuse himself after he characterized claimant's letters to the Office of Administrative Law Judges criticizing him as "possibly defamatory." Written remarks regarding a judge's conduct are insufficient to establish judicial bias towards the author, as are adverse rulings. Moreover, the administrative law judge did not err by declining to advise claimant how to respond to the Director's post-hearing brief. The Act does not require the administrative law judge to provide legal advice to a *pro se* claimant. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter asserted a claim "based on different facts" for an award of permanent total disability benefits. The Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would not accept employer's argument that it did not apply here because under FRCP 15(c), the relation back theory allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading. Here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

Admission of Evidence

Since Hanover Insurance Company was not a party before the administrative law judge, none of the administrative law judge's findings is binding on Hanover. Hanover must have the opportunity for a rehearing to present its own evidence on the issue of date of last exposure. Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

The Board holds that the administrative law judge abused his discretion in denying employer's motion to reopen the record where the court of appeals, in remanding the case, specifically stated the administrative law judge could admit evidence relating to the applicability of Section 8(f), but not to the issue of causation. Without reopening the record, the administrative law judge could not realistically consider the Section 8(f) issue. *Champion v. S & M Traylor Bros.*, 19 BRBS 36 (1986).

The administrative law judge's hearing is de novo, and he is not bound by the deputy commissioner's opinion or recommendation. Moreover, the administrative law judge has great discretion concerning the admission of evidence and his refusal to admit certain exhibits does not demonstrate prejudice or hostility. Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988).

The administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. Here, the administrative law judge misapplied the terms of his own Pre-Hearing Order; the Board therefore vacated the administrative law judge's decision to exclude employer's videotapes and reports and remanded the case for the administrative law judge to consider the admissibility of this evidence. The administrative law judge also erred in utilizing an assistant deputy commissioner's compensation rate recommendation which was erroneously transferred to the Office of Administrative Law Judge in violation of 20 C.F.R. §702.317(c). McCurley v. Kiewest Co., 22 BRBS 115 (1989).

The administrative law judge has discretion to exclude even relevant and material testimony for failure to comply with terms of pre-hearing order warning that failure to exchange names of witnesses at least 10 days before the hearing could result in their exclusion. This is true despite 20 C.F.R. §702.338, requiring the administrative law judge to receive relevant and material evidence. Durham v. Embassy Dairy, 19 BRBS 105 (1986).

The Board affirms the administrative law judge's decision to admit evidence offered in violation of a pre-hearing discovery order. The order stated that evidence offered in violation of the order may be excluded. The administrative law judge therefore did not abuse his discretion in admitting the evidence. Administrative law judge's decision is further supported by 20 C.F.R. §702.338 which provides that administrative law judge has a duty to inquire fully into matters at issue and to receive all relevant evidence. Picinich v. Seattle Stevedore Co., 19 BRBS 63 (1986).

The Board held that the administrative law judge abused his discretion and violated Section 702.338 by excluding the labor market survey offered by employer as it was in direct response to Dr. Cavazos's deposition regarding claimant's ability to perform light duty work which raised, essentially for the first time, the issue of suitable alternate employment only four days before the pre-hearing time limitation for submission of evidence. The Board observed that, given the importance of the excluded evidence in this case (the administrative law judge explicitly determined that "no evidence is available in the record to show that suitable alternate employment was available to claimant"), and the administrative law judge's use of permissive rather than mandatory language in his per-hearing order, employer's pre-hearing submission of its labor market survey to claimant does not warrant the extreme sanction of exclusion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

The Board affirmed the administrative law judge's decision to exclude a physician's report offered by employer in violation of the pre-hearing order. The opinion of claimant's physician on the cause of claimant's injury remained unchanged since his initial report, and the administrative law judge rationally determined that employer could have obtained its doctor's opinion at an earlier date. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002).

Where employer has failed to exercise due diligence in obtaining evidence prior to the hearing, the Board held that the administrative law judge acted within his discretion in declining to hold the record open after the hearing for the receipt of that evidence. Sam v. Loffland Bros. Co., 19 BRBS 228 (1987).

The Board holds that since Section 702.338 indicates that an administrative law judge may reopen a record at any time prior to issuing a compensation order, the administrative law judge in this case acted within his discretion in ordering claimant to submit new evidence. Although the extent of the discussion in the order suggests that the administrative law judge could have concluded his consideration of the claim at that time, his decision to instead supplement the existing record did not constitute reversible error. The Board also notes that 29 C.F.R. §18.54, which is more restrictive than 20 C.F.R. §§702.338, 702.339, is not applicable in reviewing the administrative law judge's determination pertaining to admission of evidence in this case, given that they are inconsistent with the more specialized regulatory provisions. Wayland v. Moore Dry Dock, 21 BRBS 177 (1988).

The administrative law judge did not abuse his discretion by refusing admission of post-hearing evidence when counsel waited 2 1/2 months before requesting an extension of time in which to make its post-hearing submission. Brown v. Bethlehem Steel Corp., 19 BRBS 200, aff'd on recon., 20 BRBS 26 (1987), aff'd and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

The Board held that the administrative law judge did not abuse his discretion by admitting evidence that was not offered in compliance with the pre-hearing order. The Director provided verbal notice to employer the day before the hearing of his objection to employer's request for Section 8(f) relief, and he faxed employer a copy of Dr. Chun's report the same day. The Director subsequently attached the report as an exhibit to his closing brief. The administrative law judge granted employer's request to file a reply brief. Moreover, the administrative law judge rationally found that employer had actual or constructive notice of Dr. Chun's report approximately 18 months prior to the hearing. *G.K. v. Matson Terminals, Inc.*, 42 BRBS 15 (2008).

Although the administrative law judge may hold the record open after the hearing for the receipt of additional evidence, the party seeking to admit evidence must exercise diligence in developing the claim prior to the hearing. The administrative law judge did not abuse his discretion by refusing to reopen the record for the submission of evidence regarding the extent of claimant's disability as he had previously held the record open and had granted two extensions of time for the submission of such evidence. Smith v. Ingalls Shipbuilding Div., Litton Systems Inc., 22 BRBS 46 (1989).

The administrative law judge erroneously determined that he did not retain jurisdiction to admit or consider relevant evidence on reconsideration. While the Board would ordinarily remand to consider admitting this evidence, to avoid further delay, the Board interpreted submission of new evidence as a post-decision Motion for Modification and instructed the administrative law judge to consider all post-hearing evidence. Williams v. Nicole Enterprises, Inc., 19 BRBS 66 (1986).

An administrative law judge may draw an adverse inference against a party, concluding that where a party does not submit evidence within his control, that evidence is unfavorable. In this case, the administrative law judge declined to draw such an inference regarding claimant's refusal to only partially waive the attorney-client privilege with regard to the attorney who handled her separation proceeding. The Board affirms the administrative law judge's finding that even if an adverse inference was drawn, there was substantial evidence that claimant and decedent were husband and wife at the time of his death. Denton v. Northrop Corp., 21 BRBS 37 (1988).

It is well-established that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to it. The administrative law judge's denial of claimant's request for an adverse inference because it was not made at the beginning of the hearing as a preliminary matter is harmless error since claimant failed to establish facts which would indicate that the evidence requested provided relevant information to assist in the disposition of the issues in the case. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989).

The administrative law judge has the discretion to order counsel at the formal hearing to cease questioning a witness on a subject which is not relevant to the matter at issue. Newby v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 155 (1988).

Administrative law judge may rely on hearsay testimony, as he is not bound by formal rules of evidence. Thus, the Board rejects the contention that the administrative law judge erred in awarding claimant back pay for a Section 49 violation for a number of days unsubstantiated by records submitted into evidence. Powell v. Nacirema Operating Co., Inc., 19 BRBS 124 (1986).

Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence in admitting and considering evidence in cases arising under the Act. Thus, the administrative law judge in this case had greater latitude to admit evidence than did the district court, which denied the testimony of claimant's expert pursuant to Rules 702 and 703 of the Federal Rules of Evidence. As the administrative law judge thus had different evidence before him, the district court's decision on the issue of causation need not be given collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

In this case where decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death, and where there is no dispute that Lockheed was, chronologically, his last maritime employer, the administrative law judge invoked the Section 20(a) presumption based solely on deposition testimony taken in an unrelated tort case, wherein the deponent testified that asbestos was present at Lockheed's facility during the period decedent worked there. The Board held that, although the deposition in question is hearsay, it is admissible in this administrative proceeding, as the administrative law judge found it to be reliable, probative and relevant, and as circumstantial evidence is permissible. Nevertheless, the testimony serves only to support the finding that asbestos was present at Lockheed's facility, it does not establish that decedent was exposed to asbestos. Accordingly, the deposition, alone, is insufficient to invoke the Section 20(a) presumption, and the Board vacated the invocation of the Section 20(a) presumption and the award of benefits. The Board instructed the administrative law judge to reconsider this issue in light of all the evidence of record and not just one piece of evidence standing alone, as there exists other evidence, which, if credited and considered in conjunction with the deposition, could support a finding that decedent was exposed to asbestos. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005).

The parol evidence rule provides that when the parties to a contract put their agreement in writing in a manner so that the terms of the agreement are certain, those terms cannot be varied on the basis of extrinsic evidence, unless the agreement is only partially integrated or is ambiguous. Then additional terms not inconsistent with the written terms or the construction of the terms may be established by extrinsic evidence. In this case, the Board affirmed the administrative law judge's resort to extrinsic evidence to determine if employer waived its Section 33(f) lien, as he rationally found that the third-party settlements were not fully integrated and were ambiguous. *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990), *aff'd in part and rev'd in part,* 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *modified in part on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993).

The Board holds that it was within the administrative law judge's discretion to allow hearing testimony and declarations which were not offered in compliance with a pre-trial order requiring prior notice of proposed witnesses and documents, in that he properly found good cause for noncompliance based on the hearing witness's status as a rebuttal witness, and in that an opportunity to take post-hearing depositions of the declarant was provided. The Board further holds that the administrative law judge could properly rely on these declarations and testimony, which constituted parol evidence, to determine whether third-party settlements involving claimant had actually occurred. The parol evidence was used not to attack the legal effect of a state court judgment but, rather, to construe the effect of any settlement agreement for purposes of the Longshore Act. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in part and rev'd in part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992).

The Board affirmed the administrative law judge's admission of employer's evidence where three of the exhibits objected to were records of the Department of Labor which were regularly kept in the course of its dealings with claimant, the author of a fourth exhibit was subject to cross-examination due to his presence at the hearing, and a fifth exhibit was not inconsistent on its face or authored by anyone with an interest in the case. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

While the Board has recognized that parol evidence may be used in construing settlements under Section 33, *see, e.g., Chavez,* 24 BRBS 71 (1990), the use of parol evidence appears to be proscribed under Section 702.242(a) in the case of Section 8(i) settlements applications. The administrative law judge violated 20 C.F.R. §702.242(a) by considering an affidavit submitted to him by an attorney from employer's legal department and relying on it to find that employer was represented by counsel. *McPherson v. National Steel & Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992).

In this “borrowed employee” case, the Board held that the administrative law judge acted within his discretion in determining that the indemnity clause contained in the contract between the lending and borrowing employers was ambiguous, and in considering parol evidence in interpreting this contract. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev’d sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.,* 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The administrative law judge has the duty to fully inquire into matters at issue and receive into evidence all relevant and material testimony and documents, and he may reopen the hearing to accomplish this duty. Accordingly, the administrative law judge did not abridge claimant's due process rights by seeking post-hearing the Director's participation and submission of exhibits. The Director submitted relevant evidence, and claimant was afforded the opportunity to respond. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

The Board held that the administrative law judge abused his discretion and violated 20 C.F.R. §702.338 by refusing to reopen the record at the close of the hearing and to formally consider evidence offered by employer -- a labor market survey compiled by its vocational counselor -- and by refusing to allow the counselor to testify regarding his survey. The Board stated that the administrative law judge's denial precluded his consideration of relevant evidence concerning the salient issue in this case, post-injury wage-earning capacity, consisting of evidence of suitable alternate employment; in addition, the administrative law judge denial violated notions of fundamental fairness because he had previously allowed claimant to depose Dr. Cox post-hearing regarding new restrictions placed on claimant. *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

The Board held that the administrative law judge erred in refusing to admit into the record employer's evidence of claimant's acceptance and performance of a post-hearing security guard job in Tanzania. As this evidence was relevant and material to the issue of suitable alternate employment, which was before the administrative law judge for resolution, and as it was not available under after the close of the record but was submitted prior to the issuance of the administrative law judge's decision, it was admissible under 29 C.F.R. §18.54 and 20 C.F.R. §§702.338, 702.339. *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

In the context of discussing mistake in fact pursuant to Section 22, the Board holds that the administrative law judge violated 20 C.F.R. §§702.336, 702.338 when he failed to resolve the issue of responsible carrier. In the initial proceedings the administrative law judge dismissed Wausau, finding that decedent was not exposed to asbestos while it was on the risk. He thereafter did not resolve the issue, despite that employer was at all relevant times insured, and he held employer liable. The Board notes the similarity between this case and *Sans*, 19 BRBS 24 (1986), and, for this reason, and several others the Board remands the case to the administrative law judge for a new hearing on employer's petition for modification. *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting).

The Ninth Circuit rejected employer's contention that the administrative law judge erred in rejecting its offer of additional evidence on remand, as it held that the administrative law judge properly restricted the scope of the remand proceedings to the terms of the Board's remand order. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

Where employer's vocational witness had been properly identified and the proffered report timely served under the pre-trial order, the administrative law judge's granting claimant's motion to deny admission of employer's evidence because employer failed to respond to claimant's interrogatories was an extreme sanction unwarranted by the facts of this case, given that suitable alternate employment is a central issue in the case. On remand, the administrative law judge must admit the report and determine the extent of claimant's disability. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Pursuant to 29 C.F.R. §18.103, error predicted on the exclusion of evidence requires that the substance of the evidence was made known to the administrative law judge by offer or was apparent from the context within which questions were asked. In this case, employer sought to admit a surveillance videotape that was not on its pre-hearing list of exhibits. The videotape was not marked for identification, nor did employer make a proffer of its contents. Accordingly, there was no record from which the court could discern the nature of the evidence excluded. Thus, based on the record before the court, the court found no abuse of discretion by the administrative law judge in excluding the videotape from evidence. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

As the administrative law judge has directly addressed employer's objections to the admission of claimant's evidence and provided employer with every opportunity to submit additional evidence in rebuttal to the evidence submitted by claimant, employer has not been denied its right to procedural due process. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

The Board rejected employer's contention that the administrative law judge abused his discretion in declining to admit new vocational evidence on remand regarding claimant's post-hearing job search, as this evidence went beyond the scope of the Board's remand order. *Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998).

The Board affirmed the administrative law judge ruling which excluded from evidence

medical reports claimant submitted at the deposition of a vocational counselor, as the reports were untimely and beyond the scope of the deposition. The Board further affirmed the administrative law judge's exclusion of post-hearing medical reports, as claimant failed to meet his burden of establishing that the administrative law judge's decision was arbitrary, capricious or an abuse of discretion. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The Board affirmed the administrative law judge's exclusion from evidence of three deposition transcripts of three of employer's employees taken with respect to another claim. As claimant's counsel, who had attended these depositions, was unaware that they would be used in claimant's case and thus did not cross-examine the witnesses in furtherance of the instant case. Moreover, assuming the testimony of the employees would be relevant to issues in the instant case, nothing prevented employer from taking their depositions in the instant case or calling them as witnesses at the hearing. Thus, the Board held that the exclusion of the deposition transcripts was not arbitrary, capricious or an abuse of discretion. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

The Board affirmed the administrative law judge's denial of employer's request to reopen the record to submit evidence regarding the noise levels claimant was exposed to while working on steam winch vessels. Claimant's Form LS-203 generally alleged that he was exposed to loud noise while working for employer, and claimant's pre-hearing statement did not assert entitlement to benefits based solely on his last year of employment. Moreover, claimant testified about the various types of noise he was exposed to during his entire employment with employer. Thus, the Board held that employer's argument that it was caught off guard with regard to allegations of noise exposure other than during the last year of claimant's employment was unconvincing. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999).

The Board rejected claimant's assertion that it was improper for the administrative law judge to base his decision on circumstantial evidence. Provided the evidence is reasonably probative, it is admissible and the administrative law judge may rely on it in making his decision. Further, the Board may affirm a decision based on circumstantial evidence if that evidence meets the definition of substantial evidence. In this case, the administrative law judge's determinations of witness credibility were reasonable, and it was rational for him to rely on the testimony of those credible witnesses; thus, substantial evidence supports his conclusion that claimant's purpose for venturing into the depths of the darkened vessel was to smoke a marijuana cigarette in private. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

In a case where claimant submitted portions of a former co-worker's hearing transcript in support of his position that he is a covered employee, rather than having that person testify at claimant's hearing, the Board rejected employer's argument that the transcript was

inadmissible. As the administrative law judge is not bound by formal rules of evidence, there was no need for claimant to establish that the transcript satisfied an exception to the hearsay rule. Further, as the evidence was relevant to the issue of claimant's status, the administrative law judge's decision to admit it was rational. *Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

The Board held that the administrative law judge acted within his discretion in rejecting evidence and arguments which were first presented to him in claimant's post-hearing brief. Although the insurance issue with which they dealt was listed on claimant's pre-hearing statement, it was not addressed at the hearing and claimant did not request the opportunity to submit post-hearing evidence on the matter. Therefore, the Board affirmed the administrative law judge's decision to reject the post-hearing submission of evidence. *Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting on other grounds).

The Board held that the administrative law judge erred in granting two parties' motions to dismiss without giving notice that he would re-open his previous denials of the same motions. The administrative law judge erred in denying claimant's post-hearing motions to re-open the record for the re-submission of previously provided documentation demonstrating that the administrative law judge's initial rulings were correct. The Board, citing 20 C.F.R. §§702.338, 339, held that the administrative law judge abused his discretion since he effectively prohibited claimant from presenting evidence specifically addressing an issue which, although previously adjudicated, was being re-opened by the administrative law judge without notice to the parties. *E.B. v. Atlantico, Inc.,* 42 BRBS 40 (2008).

Where claimant contended that the administrative law judge erred in allowing drug and alcohol treatment records into the record, the Board held that the administrative law judge did not commit error by not holding a hearing to determine whether provisions of the Drug Abuse Office and Treatment Act were violated, as these provisions do not provide for a private right of action, and jurisdiction for investigation and prosecution of alleged violations is solely within the province of the United States Attorney's office. The Board further held that the administrative law judge did not commit reversible error by not expunging from the record references to claimant's drug and alcohol treatment and bipolar condition, as claimant did not object to this evidence being admitted into the record, and the administrative law judge did not consider this evidence in deciding the case. *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.,* 32 Fed. Appx. 126 (5th Cir. 2002)(table).

Discovery

The D.C. Circuit holds that the administrative law judge did not abuse his discretion in denying a motion to produce certain reports, where the reports would have been of only limited probative value. Stark v. Washington Star Co., 833 F.2d 1025, 20 BRBS 40 (CRT)(D.C. Cir. 1987).

Section 27(a) provides that a motion to compel maybe issued where a party refuses to be deposed or to answer interrogatories. If the order is resisted, Section 27(b) provides that the matter shall be referred to the appropriate U.S. district court for the imposition of sanctions. As this sanction is less drastic than the dismissal of the claim pursuant to Fed. R. Civ. P. 41(b), the administrative law judge erred in dismissing the claim without considering the availability of less drastic sanctions. Twigg v. Maryland Shipbuilding & Dry Dock Co., 23 BRBS 118 (1989).

The Board states that a discovery ruling will constitute reversible error only if it is so prejudicial as to result in a denial of due process. In this case, the administrative law judge acted within his discretion in denying employer's motion to remand the case for claimant to undergo a second impartial medical examination where he found the report of the first such exam to be unambiguous, contrary to employer's contention. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Claimant was employed to work under a contract between employer and the Kingdom of Saudi Arabia to service and maintain various aircraft of the Royal Saudi Air Force, including C-130s. Board hold that the administrative law judge erred in denying claimant's motion to compel production of the contracts of sale of the C-130s, in this case in which claimant sought to establish that his claim is covered under the Defense Base Act because he was injured while performing services under a subcontract or subordinate contract entered into by the United States. The administrative law judge's reliance on the testimony of employer's experts does not justify his denial of claimant's motion because neither expert was familiar with the sale of all of the C-130s. *Cornell v. Lockheed Aircraft Int'l*, 23 BRBS 253 (1990).

The administrative law judge acted within his discretion when he declined to schedule a formal hearing because claimant had repeatedly refused to comply with outstanding discovery requests. The administrative law judge also acted within his discretion to dismiss claimant's claims with prejudice due to claimant's repeated and numerous abuses of the administrative process, including claimant's failure to comply with discovery. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993).

The Board affirms the administrative law judge's finding that employer did not withhold relevant material from claimant where two of the four persons claimant subpoenaed could not be located, a third person verified compliance, there was no evidence to establish non-compliance on employer's part and employer's counsel offered to allow claimant to inspect the entire file in employer's office, but claimant declined the offer. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

The Board affirmed the administrative law judge's decision to issue a protective order preventing claimant from inspecting employer's premises, as claimant did not sustain any prejudice in the prosecution of his claim as a result of the administrative law judge's denial of access to employer's facility. The Board observed that the administrative law judge did not abuse his discretion and claimant admitted that employer's eventual production of a number of photographs into the record" obviate[d] the need for the inspection." *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003).

The administrative law judge's broad discretion to direct and authorize discovery includes the limiting of document requests and testimony based on relevance. The administrative law judge did not therefore abuse his discretion by limiting post-hearing discovery to evidence relevant to the sole issue in dispute. Furthermore, the administrative law judge acted within his discretion and did not violate claimant's due process rights by prohibiting claimant from testifying post-hearing, since the administrative law judge admitted claimant's post-hearing sworn affidavits, which addressed the relevant issue. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

The Board affirms the administrative law judge's finding that employer's motion to compel the release of claimant's INS records was timely where the deadline for discovery was established as September 25, 2001, and employer's initial request for the release of the was received by claimant's counsel on September 14, 2001. The administrative law judge rationally determined that in not signing the release, claimant made it impossible to know whether the INS would have timely replied to the request. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

The Board remands the case to the administrative law judge, as he did not adequately explain his conclusion that that claimant's INS records are relevant to claimant's credibility, or how claimant's credibility affects the disability issue presented, as the degree of scheduled impairment is at issue. Moreover, with regard to whether the INS records are relevant to rehabilitation efforts under the Act, Section 39(c)(1), (2) of the Act, and its implementing regulations, 20 C.F.R. §§702.501 *et seq.*, authorize the Secretary of Labor and her designees, the district directors, to provide for the vocational rehabilitation of permanently disabled employees; thus, whether claimant's vocational rehabilitation plan is reasonable or necessary is a discretionary one afforded the district director, and the administrative law judge cannot review the plan or deny claimant rehabilitation services. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

Where the administrative law judge denied claimant's request for a protective order with regard to the release of claimant's entire INS file, the Board agreed that the administrative law judge should have considered whether less intrusive means of employer's obtaining the relevant information existed due to allegations that claimant's family was in danger. The administrative law judge should have addressed alternative methods, such as releasing only part of the records, holding a telephone conference to discuss a limitation of use of claimant's records solely to this claim, or determining whether it would be in the best interest of both parties to have an *in camera* review of those records. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

Claimant's Motion for Certification to the district court under Section 27(b) of the Act, based on employer's refusal to comply with the administrative law judge's discovery order is premature, as employer has appealed the order to the Board and, therefore, has not yet resisted a lawful order. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

The Board held that as employer's complaint was not an action to enforce compliance with a direct order of the administrative law judge, and claimant did not disobey a lawful process, as he did not resist the administrative law judge's jurisdiction or a discovery order, employer's attempt to recoup benefits allegedly obtained by fraud must fail. Section 31(a) provides the sole remedy for allegations of fraud. The Board therefore reversed the administrative law judge's finding that Section 27(b) is applicable and vacated his certification of facts to the district court and the recommendation that claimant be made to repay employer. *Phillips v. A-Z Int'l*, 30 BRBS 215 (1996), *vacated,* 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999).

The Ninth Circuit held that the Board lacked jurisdiction to review the administrative law judge's certification of facts to the district court and the recommendation that claimant be made to repay employer. The court held that the express grant of fact finding and contempt power to the district pursuant to Section 27(b) implicitly removes review power from the Board. In the absence of a clear statutory directive or interpretive regulations setting forth the procedural mechanism by which an administrative law judge must "certify the facts to the district court," the court held that the administrative law judge's issuance of his Supplemental Decision and Amended Supplemental Decision, which certified his finding that claimant filed a fraudulent claim and recommended sanctions, was a sufficient method of certification to the district court. *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), *vacating* 30 BRBS 215 (1996).

The Board holds that the administrative law judge erred in relying upon the Federal Rules of Civil Procedure to dismiss claimant's claim with prejudice due to claimant's failure to comply with the administrative law judge's discovery orders, due to the applicability of Section 27(b) of the Act. Under Section 27(b), the administrative law judge may certify the facts surrounding a party's sanctionable conduct to the district court for action. Where the Act specifically provides the manner in which conduct like that of claimant is to be dealt with, neither the general Rules of Practice and Procedure for the OALJ, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure, apply. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).

The Board held that employer has no direct remedy for reimbursement against Brad Valdez under the Act in this case. Specifically, employer is not entitled to relief against the fraud committed by Brad Valdez in this case under Sections 19, 27, and 31 of the Act. The Board noted that the Act provides only for a credit of excess payments against unpaid compensation due; no further compensation is due in this case to this claimant. Moreover, Section 31(a) provides the sole remedy against a claimant who has allegedly filed a false claim, and thus, employer's only remedy is to file a complaint with the appropriate United States Attorney. *Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.,* 34 BRBS 185 (2000).

In light of the holding in *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), the Board declines to review the administrative law judge's certification of facts to the federal district court regarding claimant's alleged misrepresentations, pursuant to Section 27(b). *Floyd v. Penn Terminals, Inc.,* 37 BRBS 141 (2003).

The filing by claimant of a fraudulent claim for benefits under the Act does not constitute disobeying or resisting any "lawful order or process" within the meaning of Section 27(b), as the term "lawful process" in the context of the contempt power generally refers to the use of summons, writs, warrants or mandates issuing from a court in order to obtain jurisdiction over a person, and claimant in this case did not refuse to comply in this manner. Moreover, the Act expressly provides mechanisms other than contempt sanctions, under Sections 31(a) and 48, for the filing of a fraudulent claim, demonstrating that Congress did not intend to permit an employer to seek a contempt citation in order to recover damages resulting from filing of fraudulent claims. Therefore, the Ninth Circuit affirmed the district court's dismissal of employer's complaint with prejudice, without addressing employer's arguments on the merits, on the ground that the district court lacked subject matter jurisdiction to impose sanctions on claimant. *A-Z Int'l v. Phillips*, 323 F.3d 1141, 37 BRBS 1(CRT) (9th Cir. 2003).