BRB No. 95-1600

BETSY TIGNOR (Widow of HUNTER TIGNOR) Claimant v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Order Granting Employer's Motion to Compel of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Granting Employer's Motion to Compel (92-LHC-3185) of Administrative Law Judge Fletcher E. Campbell, Jr., ordering the Director to make Mr. Voultsides, the district director, and Ms. Gallagher, a claims examiner, available for depositions in a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith,*

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The Director filed a motion before the administrative law judge to dismiss employer's request for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), contending the application for relief is barred pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3).[1] In response to the Director's motion, employer contended that the district director acted arbitrarily and capriciously in setting a three-day deadline for submission of a revised Section 8(f) application, and it filed a motion to compel discovery. The administrative law judge granted employer's motion for an order permitting it to depose Mr. Voultsides and Ms. Gallagher regarding past and present practices of the Office of Workers' Compensation Programs (OWCP) concerning the acceptance of Section 8(f) applications.

On appeal, the Director contends that the administrative law judge's order compelling discovery should be vacated inasmuch as there are no discoverable, relevant facts in this case. Employer has filed a Motion to Expedite and a Motion to Strike the Director's appeal, contending there is nothing exceptional about this discovery order to require interlocutory review of the administrative law judge's order. The Director responds, urging the Board to accept the appeal in order to direct the course of litigation.

A review of the procedural history reveals that the original claimant, Hunter Tignor, filed a disability claim on October 24, 1991. By letter dated January 27, 1992, claimant requested an informal conference which was held on July 23, 1992 on the issues of permanent total disability and employer's entitlement to Section 8(f) relief. The claims examiner denied the claim for permanent total disability benefits as presented and also concluded that the Section 8(f) application was deficient as presented. The claim was transferred to the Office of Administrative Law Judges on August 11, 1992. The claimant died on August 19, 1992.

Claimant's widow filed a claim for death benefits on January 8, 1993. The death claim and employer's request for Section 8(f) relief on the death claim were consolidated with the disability claim and Section 8(f) application before the administrative law judge on February 23, 1993.[2] A

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[1]Section 8(f)(3) states that any request for Section 8(f) relief made subsequent to September 28, 1984, must first be presented to the district director unless the Special Fund's liability could not have been reasonably anticipated while the case was before the district director. The regulation implementing Section 8(f)(3), 20 C.F.R. §702.321, requires that employer also submit a fully documented application in support of its claim for Section 8(f) relief, and provides that the district director may set a deadline for this filing. *See generally Cajun Tubing Testors Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT) (5th Cir. 1992); *see also Bath Iron Works Corp. v. Director, OWCP [Bailey]*, 950 F.2d 56, 24 BRBS 229 (CRT) (1st Cir. 1991); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991).

[2]It is not disputed by the parties that employer filed a timely request for Section 8(f) relief on the death claim. The issue before the administrative law judge was timeliness of the completed application.

hearing on both claims and the applications for Section 8(f) relief was scheduled for April 26, 1993. However, prior to the hearing, the widow and employer entered into stipulations on the disability and death claims, and requested that the case be remanded to the district director for consideration of the Section 8(f) issues.

By order dated April 20, 1993, the administrative law judge remanded the case to the district director. Because no Section 8(f) application regarding the death claim was filed, the district director notified employer by letter dated May 10, 1993, that it was required to submit a Section 8(f) application on the disability and death claims by May 20, 1993 if it was still requesting such relief.[3] Employer claims to have received the letter on May 17, 1993, and it submitted an application on May 26, 1993. The district director denied the application on the death claim as it was not timely submitted.

The case was referred again to the Office of Administrative Law Judges. The Director filed a motion to dismiss with the administrative law judge based on employer's untimely submission of the Section 8(f) application on the death claim. Employer filed a Motion to Compel Discovery in order to discover OWCP's past and present practices regarding the acceptance of Section 8(f) applications.

The administrative law judge noted that the Director sought to assert the absolute defense of Section 8(f)(3) against employer's request for Section 8(f) relief and that it was employer's position that the district director acted arbitrarily and capriciously in refusing to consider its application six days "after the expiration of a non-statutory non-regulatory OWCP-imposed deadline."[4] Order at 2. The administrative law judge found that the parties' contentions raise the issue of whether OWCP's rejection of employer's application was arbitrary and capricious and not in accordance with law or regulations. Accordingly,

the administrative law judge granted employer's Motion to Compel on May 18, 1995, and ordered the requested depositions. The Director filed this appeal from the administrative law judge's order on May 26, 1995.

Initially, we will address employer's Motion to Strike the Director's appeal inasmuch as the appeal is of an interlocutory order. Employer contends that there is nothing exceptional about this discovery order; rather, employer maintains that the Director merely questions the relevancy of the

[3]The Director concedes that the Section 8(f) application regarding the disability claim was properly filed before the district director prior to the initial informal conference and thus is not at issue in this case.

[4]In addition, the administrative law judge noted that the shipyard case manager, Mr. Van Arsdale, alleged in his affidavit that, based on his past experience with OWCP, a Section 8(f) application was not due until the shipyard requested an informal conference on the death claim.

discovery information being sought. The Director responds, contending that the unique circumstances of this case justify an exception to the general rule against acceptance of interlocutory appeals inasmuch as there are no discoverable relevant facts in this case as the sole issue is a legal question. The Director alleges that no bifurcated hearing would ensue nor would there be a delay in the resolution of the underlying compensation claim as claimant's widow is currently receiving compensation.

Federal courts ordinarily will not grant interlocutory review of an incomplete decision. *See* 28 U.S.C.A. §1291. Such review is permissible, however, in that "small class [of cases] which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949)(the collateral order doctrine);[5] *see also United States v. 101.88 Acres of Land, Etc.*, 616 F.2d 762, 765 (5th Cir. 1980). Similarly, the Board generally does not accept interlocutory appeals so as to avoid piecemeal review. *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85 (1974). The Board will undertake interlocutory review nonetheless if, in its discretion, it is necessary to properly direct the course of the adjudicatory process, *see Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1988); *Murphy v. Honeywell, Inc.*, 8 BRBS 178 (1978); *Holmes & Narver*, 1 BRBS at 87, or if the order does not involve the merits of the case and will be unreviewable on appeal from final judgment. *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986).

The Board has accepted interlocutory review of a discovery order only when extraordinary circumstances are present. In *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266, 268-69 (1987), the Board accepted the appeal of an intervenor, The George Washington University Hospital (the hospital), of an Order by the administrative law judge compelling responses to requests for production of documents and interrogatories. The hospital alleged that it had not had an opportunity to respond to employer's motion to compel. The Board held that the hospital's right to due process of law is separable from and collateral to the rights asserted in the action, which relate to the necessity of claimant's medical care and employer's liability therefor. *Niazy*, 19 BRBS at 269. The Board accepted the interlocutory appeal holding that "it would be difficult to conceive of a more important right or one more independent of the merits of the case." *Id.*; *see also Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982)(taking interlocutory appeal to determine if deputy commissioner has authority to order deposition); *Lopes v. George Hyman Construction Co.*, 13 BRBS 314 (1981)(to

[5]Under the collateral order doctrine, review of an interlocutory order will be undertaken if the following three criteria are satisfied: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue that is completely separate from the merits of the action; and (3) the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994).

determine if Act permits taking of depositions).

In the present case, the Director does not allege that there has been a due process violation or that the information sought is privileged, nor does she raise a jurisdictional obstacle to the depositions. Rather, the Director contends that the administrative law judge improperly granted the employer's motion to compel discovery when there are no relevant, discoverable facts at issue in the case. The Director urges the Board to accept the interlocutory appeal in order to direct the course of litigation.

After consideration of the issues in this case, we grant employer's motion to strike the Director's appeal inasmuch as it does not fall within an exception to the general rule against accepting interlocutory appeals. In a similar case, an administrative law judge ordered employer to produce documents in connection with a billing dispute and employer urged the Board to accept an interlocutory appeal of this discovery order "in order to direct the course of litigation." *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994). The Board held that the order did not resolve an important issue totally separate from the merits of the action and that on final review the Board could address the question of whether the administrative law judge abused his discretion in issuing his discovery ruling and whether it was so prejudicial as to result in a denial of due process at that time. *Id.* In addition, the Board held that the employer had not demonstrated a need to direct the course of litigation. *Id.*

In the present case, as in *Butler*, the administrative law judge's order is not collateral as it does not resolve an issue totally separate from the merits of the action. *See Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). The Director has raised the Section 8(f)(3) defense that the application was untimely. Employer alleges it was granted only three days to submit its application and contends that the district director acted arbitrarily and capriciously in setting such a short deadline. The administrative law judge's order grants employer an opportunity to discover facts underlying the rejection of the application, which may bear on the issue of the applicability of the absolute defense of Section 8(f)(3). *See id*. Moreover, the order will not be "effectively unreviewable on appeal from a final judgment." Once discovery is completed as directed by the administrative law judge, and the decision regarding employer's entitlement to Section 8(f) relief is entered, any party remaining aggrieved may appeal the administrative law judge's decision. While the deposition cannot be "undone," if the Decision and Order is appealed, the Board can address the question of whether the administrative law judge abused his discretion in issuing his discovery ruling and/or assigning any weight to the matters discussed at the deposition in the later appeal. *See Green*, 29 BRBS at 83; *Butler*, 28 BRBS at 118.

Section 702.338 of the regulations states that an administrative law judge has the duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. *See* 20 C.F.R. §702.338; *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). Moreover, an administrative law judge has broad discretion to direct and authorize discovery; a discovery ruling by an administrative law judge will constitute reversible error only if it is so prejudicial as to result

in a denial of due process. *Olsen*, 25 BRBS at 45; *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). Consequently, the issue remains whether employer's claim for Section 8(f) relief is barred by its failure to comply with Section 702.321, and the relevancy of the material to be discovered goes to the weight to be accorded it and not to whether the depositions should be taken. Moreover, we note that the Director does not contend that the evidence sought is privileged information or that the administrative law judge's order violates due process. Therefore, we hold that the administrative law judge's discovery order is not a "collateral order," nor is it necessary that we direct the course of litigation inasmuch as the Director's contentions relate to the relevancy of the information to be discovered and not to its admissibility. Thus, we refuse to accept the interlocutory appeal inasmuch as the administrative law judge did not act outside his authority in compelling discovery.[6]

Accordingly, we grant the employer's Motion to Dismiss the Director's appeal as interlocutory. The appeal is dismissed, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]As we grant employer's motion to strike the Director's appeal as it is interlocutory, we need not address the Director's motion to stay the proceedings before the administrative law judge.