



BRB No. 15-0394
Case Nos. 2014-LHC-01469, 01470, 01471
OWCP Nos. 18-097594, 18-101268, 18-102490

SANTOS ALVAREZ)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: <u>Oct. 29, 2015</u>
)	
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	ORDER

On July 14, 2015, employer filed a timely notice of appeal of the Order Denying Summary Decision of Administrative Law Judge Christopher Larsen dated June 24, 2015. 33 U.S.C. §921(a); 20 C.F.R. §802.205. Employer’s appeal is assigned the Board’s docket number 15-0394. 20 C.F.R. §802.210. All correspondence pertaining to this appeal must bear this number. The Board also is in receipt of employer’s Petition for Review and brief. 20 C.F.R. §802.211. Employer, inter alia, asks that the Board review now its appeal of the administrative law judge’s interlocutory order denying employer’s res judicata defense. For the reasons that follow, we dismiss employer’s appeal.

The administrative law judge’s Order Denying Summary Decision is interlocutory, as it neither awards nor denies benefits to claimant. See 33 U.S.C. §919(c), (d). Rather, the administrative law judge denied employer’s motion for summary decision on the ground that employer’s assertion of certain legal defenses was not valid. The merits of claimant’s claims have yet to be adjudicated. The Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable under 28 U.S.C. §1291. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue

which is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (collateral order doctrine); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); see *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). If the order fails to satisfy any one of these requirements, it is not appealable.

While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, see 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. See generally *Sprague v. Director, OWCP*, 688 F.2d 862 n.16, 15 BRBS 11 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process or because the issue is of significance to the industry. See *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, recon. denied, 42 BRBS 46 (2008); *Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The Supreme Court has rejected the contention that a party may raise doctrines of claim preclusion on an interlocutory basis. *Will v. Hallock*, 546 U.S. 345 (2006). The Court stated that the “rule of respecting a prior judgment by giving a defense against relitigation has not been thought to protect values so great that only immediate appeal can effectively vindicate them . . . a defense of claim preclusion is fairly subordinated to the general policy of deferring appellate review to the moment of final judgment.” *Id.* at 355 (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994) (rejecting interlocutory appeal of finding that claim is not precluded by a settlement agreement)). Thus, the “right not to stand trial” asserted by a res judicata defense is not appealable under the collateral order doctrine. *Will*, 546 U.S. at 345; see also *Asociacion de Subscripcion v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007); *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm’n*, 273 F.3d 337 (3d Cir. 2001); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1200 (10th Cir. 2002).

The Supreme Court has acknowledged the contention employer raises herein -- that the denial of immediate review will require the litigation of claims that later may be found barred by res judicata. *Digital Equip.*, 511 U.S. at 872. The Court stated, however, “that the mere identification of some interest that would be ‘irretrievably lost’ has never sufficed to meet the third [] requirement [of the collateral order doctrine].” *Id.* Thus, as case precedent establishes that the issue employer raises is not subject to interlocutory review, and as it is not necessary for the Board to direct the course of the adjudicatory process, we dismiss employer’s appeal. Employer may appeal, consistent with the provisions of 33 U.S.C. §921(b)(3) and 20 C.F.R. §802.205(a), (b), the

administrative law judge's adverse interlocutory findings after the administrative law judge issues a final decision and order. *See, e.g., Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

Accordingly, employer's appeal is dismissed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge