

No. 

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**In the**  
**Supreme Court of the United States**

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THE DUTRA GROUP, INC. AND ENSTAR (US) INC.,  
D/B/A ENSTAR ADMINISTRATORS  
FOR SEABRIGHT INSURANCE CO.,

*Petitioners,*

v.

KELLY ZARADNIK AND DIRECTOR, OFFICE OF  
WORKERS' COMPENSATION PROGRAMS,  
UNITED STATES DEPARTMENT OF LABOR,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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April 19, 2023

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## **QUESTIONS PRESENTED**

1. Whether appellate courts can restrict the limited jurisdiction of the Benefits Review Board under 33 U.S.C. § 921(b)(3), in accord with its implementing regulations (*see* 20 C.F.R. §§ 802.205, 802.207, 802.208(b)), by imposing on parties notice of appeal requirements not otherwise required by statute or Board rules.
2. Whether appellate courts can expand their own limited jurisdiction under 33 U.S.C. § 921(c) by allowing parties under the Longshore and Harbor Workers' Compensation Act and its extensions (*see* 20 C.F.R. § 802.101(b)(1)-(6)) to bypass agency review of the Benefits Review Board (*see* 20 U.S.C. § 921(b)(3)) and proceed on direct appeal to the appellate court.

## **PARTIES TO THE PETITION**

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### **Petitioners and Employer/Carrier-Petitioners, Cross-Respondents Below**

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- The Dutra Group, Incorporated
- Enstar (US) Inc., d/b/a Enstar Administrators  
for Seabright Insurance Company

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### **Respondent and Claimant-Respondent, Cross-Petitioner Below**

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- Kelly Zaradnik

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### **Respondent and Party-in-Interest Below**

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- Director, Office of Workers' Compensation  
Programs, U.S. Department of Labor

**CORPORATE DISCLOSURE STATEMENT**

Petitioner Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock. Petitioner Enstar (US) Inc. is a subsidiary of Enstar Group, Limited, a publicly traded company on the NASDAQ exchange (NASD: ESGR) which owns 20% of SeaBright Insurance Company.

## LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit  
No. 21-71411

The Dutra Group, Inc.; Enstar (US) Inc., dba Enstar  
Administrators for Seabright Insurance Company,  
*Petitioners*, v. Kelly Zaradnik; Director, Office of  
Workers' Compensation Programs, *Respondents*

Date of Final Opinion: January 20, 2023

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Benefits Review Board, U.S. Department of Labor  
BRB Nos. 16-0128 and 16-0128A

Kelly Zaradnik, *Claimant-Respondent, Cross-Petitioner*,  
v. The Dutra Group, Incorporated and Seabright  
Insurance Company, *Employer/Carrier-Petitioners, Cross-Respondents*

Date of Final Order: July 27, 2021

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## **PETITION FOR A WRIT OF CERTIORARI**

The Dutra Group respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.



## **OPINIONS BELOW**

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, dated January 20, 2023 is included at App.1a-5a. The Order of the Benefits Review Board (“BRB” or “Board”) dismissing petitioner’s motion for lack of jurisdiction is included at App.6a-10a. These opinions were not designated for publication.



## **JURISDICTION**

The court of appeals had federal jurisdiction under 33 U.S.C. § 921(c) and issued its opinion on January 20, 2023. App.1a-5a. This Court has jurisdiction under 28 U.S.C. § 1254(1).



## **STATUTORY AND REGULATORY PROVISIONS INVOLVED**

The following statutory and regulatory provisions are included in the appendix.

- 33 U.S.C. § 921 (App.191a)
- 20 C.F.R. § 802.205 (App.195a)
- 20 C.F.R. § 802.207 (App.196a)
- 20 C.F.R. § 802.208 (App.197a)



## **INTRODUCTION**

This case presents two issues of considerable importance in Federal law, which call for a grant of review to answer whether Congress through 33 United States Code (“U.S.C.”) Section 921, or the Courts of Appeal, on their own accord, set the bounds of limited jurisdiction in Agency cases, including under the Longshore and Harbor Workers’ Compensation Act (LHWCA or “the Act”) and its statutory extensions.

The Ninth Circuit issued two novel findings on limited jurisdiction, both of which conflict with statutory and regulatory authority and one which also conflicts with precedent in other Circuits. On the one hand, the Court constricted the jurisdiction of the Board by imposing a technical requirement for a notice of appeal to the Board that does not exist within the governing regulations. On the other hand, the Court expanded its own otherwise limited jurisdiction over matters

arising under the LHWCA, by bypassing agency review by the Board and sanctioning direct appeals to the Court following Administrative Law Judge (“ALJ”) decisions post-remand. Circumvention of Board review under these circumstances is not permitted by 33 U.S.C. § 921(b) and direct appeal from the ALJ to the Ninth Circuit is not permitted by 33 U.S.C. § 921(c) and is in direct conflict with decisions arising in the Third, Eighth, and Eleventh Circuit Courts of Appeal. These two acts: the constriction of Board jurisdiction by the Court, and the expansion of the Court’s own jurisdiction, threaten the core of the appellate process under the LHWCA. For the review process to be fair and navigable by all litigants, limited jurisdiction must be understood, consistent, and uniform. That is not the case when Courts treat limited jurisdiction as a malleable principle-subject to contraction or expansion beyond the authority extended by Congress.<sup>1</sup>

The implications of the Court opinion from which this Petition arises are significant. In 2022, 35,948

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<sup>1</sup> Only within the Ninth Circuit has a Court granted themselves the extended jurisdiction to review direct appeals from the OALJ after remand. This procedure is beyond the bounds of 33 U.S.C. § 921(c), and has been rejected by the Third, Eighth, and Eleventh Circuits. The Ninth Circuit has thus laid the ground for future litigants to seek to bypass Board review in favor of direct appeals to the Court. The Court herein has illustrated its openness to expand versus limit its jurisdiction. Review and uniformity across circuits is needed.

new claims were filed under the LHWCA and its statutory extension.<sup>2</sup> In 2021, that figure was 39,414.<sup>3</sup> In each litigated claim, there are multiple stakeholders: Workers, employers, insurers, counsel, and the Department of Labor agencies themselves. To these stakeholders, clarity and confidence in appellate rules is a matter of right and law. The Secretary of Labor was called upon to adopt appellate rules before the Board so that all parties could proceed with certainty. These rules sometimes require the weighing of the “interest of justice” to avoid harm. *See* 20 U.S.C. § 802.207(a)(2). This is not particularly different from analogous notice of appeal procedures before the Courts of Appeal, which are likewise to be construed liberally to ensure “mere technicalities” do not stand in the way of review of a case on its merits. For these multiple reasons, this Petition for Writ of Review of Certiorari should be granted.

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<sup>2</sup> Christopher Godfrey, et. al., Office of Workers’ Compensation Programs, *Administration of Claims before the Office of Workers’ Compensation Programs* at the 2023 Annual Longshore Conference, Slide 14, (Mar. 23, 2023), available at <https://www.dol.gov/sites/dolgov/files/OWCP/dlhwc/ALC2023final.pdf>.

<sup>3</sup> Christopher Godfrey, et. al., Office of Workers’ Compensation Programs, *Administration of Claims before the Office of Workers’ Compensation Programs* at the 2022 Annual Longshore Conference, Slide 75, (Mar. 24, 2022), available at [https://www.dol.gov/sites/dolgov/files/OWCP/dlhwc/Final\\_ALC2022IV3-23-2022.pdf](https://www.dol.gov/sites/dolgov/files/OWCP/dlhwc/Final_ALC2022IV3-23-2022.pdf).



## STATEMENT OF THE CASE

Respondent Zaradnik filed a claim for benefits under the LHWCA, alleging injuries arising from her employment with Petitioner/Employer Dutra. Petitioner disputed the claim for lack of causation (no industrial injury) and the case proceeded to Trial before the Office of Administrative Law Judges (“OALJ”). An administrative law judge (“ALJ”) found causation and granted benefits to Respondent. App.59a-159a. Petitioner and Respondent appealed to the Benefits Review Board (“Board”), which affirmed the ALJ’s finding on causation, but remanded an issue of disability. App.31a-57a. The Board denied Petitioner’s motion for reconsideration. App.162a-171a. Petitioner appealed to United States Court of Appeals for Ninth Circuit for review of the Board’s orders on the disputed issue of causation and briefed the issue in its Petition for Review. App.202a-259a. On a motion from the Director, Office of Workers’ Compensation Programs (“OWCP”), the Ninth Circuit dismissed Petitioner’s appeal on causation for lack of jurisdiction, noting the Board’s order was not final considering remand of the disability issue. App.202a-259a.

The case pended before the OALJ on remand for almost three (3) years, at which point Petitioner and Respondent voluntarily entered Joint Stipulations resolving the remanded disability issue, along with additional issues (including maximum medical improvement date and the intent for the case to proceed on appeal on the causation issue). App.23a-28a. The Joint Stipulations identify by case number the underlying ALJ Trial decision on causation by the

OALJ (2012-LHC-00988) and the underlying Board Orders denying Petitioner’s appeal and reconsideration of causation (BRB 2016-0128/A). App.23a-28a. The Joint Stipulations identify the parties affected by the underlying decision, *i.e.* Petitioner and Respondent. App.23a-28a. The Joint Stipulations identify the issue of notice of appeal to be taken on the causation issue, as follows:

- “[Dutra] appealed the causation issue to the 9th Circuit, who found the issue premature, as the [Board] had remanded the issues back to the Trial level. It is the parties’ understanding that the Trial level issues need to be resolved before the 9th Circuit can take up the causation appeal. The parties’ come forth and stipulate as to the pending Trial level issues.” App.24a.
- “The parties acknowledge that [Dutra] may now proceed on the causation issue to the 9th Circuit.” App.24a
- “With the conclusion of remand issues, the Trial level issues are complete such that the previously filed appeals can proceed.” App.25a.

Counsel for Petitioner and Respondent signed the Joint Stipulations and filed and served them on the OALJ and Office of the Solicitor, both agencies of the United States Department of Labor, on March 12, 2021. App.23a-28a. That same day, the ALJ incorporated the Joint Stipulations by reference into an Order and approved the Stipulations. App.21a-22a. The Order identifies OALJ Case No. 2012-LHC-00988 from the original Trial decision on causation. App.21a-22a. The approved Stipulations and Order were filed with the

District Director of the OWCP, a third agency of the Department of Labor. App.14a-20a. No known action was taken by any of the three agencies to advance the appeal on causation as referenced in the Stipulations.

As the three Department of Labor agencies did not take the action to advance the appeal, Petitioner then filed an unopposed motion with the Board, dated June 1, 2021, requesting a ministerial act be taken to render the Board's December 9, 2016 order on causation "final" as a precursor to pursue the agreed upon appeal on causation with the Ninth Circuit.

The Board denied Petitioner's motion for lack of jurisdiction, citing Petitioner failure to file a timely notice of appeal under 33 U.S.C. § 921(a) and 20 C.F.R. § 802.205(a). App.6a-10a. The Board found, "Employer did not file a timely notice of appeal or any document that could be perceived as a timely notice of appeal." App.9a. Petitioner's unopposed motion for reconsideration was denied by the Board. App.160a-161a.

Petitioner sought review of the Board's orders in the United States Court of Appeals for Ninth Circuit. Petitioner contends the Joint Stipulations addressing an intent to appeal and filed with three agencies of the Department of Labor, constitute notice of appeal under 20 C.F.R. § 802.208(b) and 20 C.F.R. § 802.207(a)(2). App.1a-5a. The Court acknowledged that the Board regulations "allow 'any written communication which reasonably permits identification of the decision from which an appeal is sought' to satisfy the requirement of a notice of appeal to the Board, 20 C.F.R. § 802.208(b), even where the notice is filed with the wrong entity, 20 C.F.R. § 802.207(a)(2)." App.4a. However, the Court did not find that the Joint Stipulation constituted notice of appeal. App.4a-5a. The Court stated, " . . .

[a]lthough the joint stipulation discussed Dutra’s intent to proceed to the Ninth Circuit, it said nothing about any intent to appeal to the Board. *See Porter v. Kwajalein Servs., Inc.*, 31 Ben. Rev. Bd. Serv. 112 (1997).” (citations in original). App.5a.

Additionally, the Court addressed its jurisdiction by finding that Petitioner could have filed a direct Petition for Review (bypassing the BRB) from the ALJ’s order on remand, per *Nat'l Steel & Shipbuilding Co., Inc. v. Dir., Off. of Workers' Comp. Programs* (“*McGregor*”), 703 F.2d 417, at 418-419 (9th Cir. 1983). App.4a. The Court stated, “A party aggrieved by an earlier Board order after remand to an ALJ may bypass Board review and file a petition for review in the courts of appeals within 60 days from the ALJ’s final order on remand.” *See McGregor*, 703 F.2d 417, at 418-419; 33 U.S.C. § 921(c).” (citations in original). App.5a.

Petitioner seeks review of the Court’s construction (and application) of the Regulations governing appellate procedure before the Board (20 C.F.R. §§ 802.207, 802.208) and of its own statutorily limited jurisdiction (33 U.S.C. § 921(c)).



## **REASONS FOR GRANTING THE PETITION**

There are two primary and important bases to grant this Petition. First, by its Decision, the Ninth Circuit simultaneously constricted the Congressionally enacted agency (Board) jurisdiction and expanded their own Ninth Circuit jurisdiction in agency matters beyond statutory prescription. Second, by its Decision, the Ninth Circuit has sanctioned direct appeals from an Administrative Law Judge to the Circuit Court of Appeal, bypassing the agency review level (Board), placing the Ninth Circuit in direct conflict with decisions from the Third, Eighth and Eleventh Circuits.

### **I. THE IMPORTANCE OF THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW**

Clarity and definition by this Court of the policies and procedures governing the LHWCA (and related acts) is necessary for the many stakeholders subject to its protections. The rules of practice and procedure governing the operation of the Board apply to virtually all appeals taken by any party from decisions or orders with respect to claims for compensation or benefits under the Act and its statutory extensions<sup>4</sup>.

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<sup>4</sup> Unless excepted, the rules promulgated in 20 C.F.R. Part 802 apply to all appeals taken by any party from decisions or orders with respect to claims for compensation or benefits under the Act, the Defense Base Act, the District of Columbia Workmen's Compensation Act, the Outer Continental Shelf Lands Act, the Nonappropriated Fund Instrumentalities Act, Title IV, Section 415 and Part C of the Federal Mine Safety and Health Act. 20 C.F.R. § 802.201(b)(1)-(6). As used hereinafter, reference to "the Act" includes "the Act and its statutory extensions."

Despite the breadth of their application, there is often a dearth of legal authority interpreting many of these regulations.<sup>5</sup> Thus, on those rare occasions when the Courts of Appeal are called upon to examine the Board's appellate procedure, the resulting opinion reaches a broad and invested audience with profound long-lasting impact. Any court of appeals opinion weighing on the Board's appellate procedure can endure untouched for decades.

This Ninth Circuit opinion addresses an issue of first impression interpreting 20 C.F.R. § 802.208(b). By simultaneously restricting jurisdiction of the Board and expanding its own limited jurisdiction, the opinion will have immediate, serious, adverse, and enduring consequences for any party navigating appellate procedure before the Board. Review by this Court will provide much needed clarity on the conflicting Board appellate procedures and jurisdiction. Absent review, parties cannot be assured compliance with Board rules is sufficient on jurisdictional matters. When the harsh consequence is dismissal of an appeal for lack of jurisdiction (even when appeal was agreed to), uniformity and transparency of the appellate pathway are a bare minimum for due process.

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<sup>5</sup> As an example, a Lexis search of 20 C.F.R. § 802.208 in all federal courts returns three (3) results other than the case at hand. A Lexis Shepard's search of Federal Rules of Appellate Procedure 3 returns 5,487 citation results. Both provisions involve notices of appeal and implicate the potential for a harsh jurisdictional bar if not followed. To litigants, they are of equivalent importance. When there are so few cases interpreting the Board's appellate procedure on the notice of appeal issue, it is essential that those few opinions align with the regulatory construct and intent.

**A. When the Board’s Appellate Jurisdiction Turns on the meaning of 20 C.F.R. § 802.208(b), Construction of That Regulatory Subsection Is of Importance to Parties, Practitioners, and the Board Under the Act**

The Board was created by Congress to “hear and determine appeals . . . with respect to claims of employees under [the Act].” 33 U.S.C. § 921(b)(3) App.195a. Under the Act, an aggrieved party has a thirty-day period within which an appeal may be taken from an ALJ’s order to the Board. 33 U.S.C. § 921(a) App.194a-198a. Section 39(a) of the Act, 33 U.S.C. § 939(a), authorizes the Secretary of Labor to prescribe all rules and regulations necessary for the administration and enforcement of the Act. The rules of practice and procedure governing the operation of the Board, and appellate process in particular, are set forth in Title 20 Code of Federal Regulations, Part 802. 20 C.F.R. § 802.101(a)-(b).

Within Part 802, the Secretary of Labor prescribed regulations governing the content (20 C.F.R. § 802.208 (App.200a-201a), filing (20 C.F.R. §§ 802.204, 802.207 (App.199a)), and timing (20 C.F.R. § 802.205 (App.198a) of a notice of appeal from an ALJ order. Though separate and distinct regulations, they are commonly lumped together under a general concept that a party must “file a timely notice of appeal” (App.8a) or a “timely-filed appeal” (App.2a). As plain meaning and chronology dictate, each regulatory element is separate and distinct, and one necessarily precedes or follows the other. First, there is the content of a notice of appeal. Second, there is the filing of the notice of appeal. Finally, there is the timing of the filing of the

notice of appeal. As this case illustrates, undue harm can come from intermingling or bypassing elements of appellate procedure.

Here, the Board stated, “Employer did not file a timely notice of appeal, or any document that could be perceived as a timely notice of appeal.” App.9a. The Board made this finding in a vacuum with no application, interpretation, or even mention of what constitutes a notice of appeal per 20 C.F.R. § 802.208. Had they done so, they would have determined that a timely notice of appeal did in fact exist in this record. Affirming the Board’s finding that it lacks jurisdiction, the court of appeals stated:

Nor could the Board appropriately have treated the joint stipulation the parties filed with the ALJ as a notice of appeal to the Board. Dutra relies on Board regulations that allow ‘any written communication which reasonably permits identification of the decision from which an appeal is sought’ to satisfy the requirement of a notice of appeal to the Board, 20 C.F.R. § 802.208(b), even where the notice is filed with the wrong entity, 20 C.F.R. § 802.207(a)(2). But although the joint stipulation discussed Dutra’s intent to proceed to the Ninth Circuit, it said nothing about any intent to appeal to the Board. *See Porter v. Kwajalein Servs., Inc.*, 31 Ben. Rev. Bd. Serv. 112 (1997). (Emphasis added) App. 4a-5a.

In so doing, the court of appeals imposed a requirement that a notice of appeal identify the agency to which an appeal is being taken—a requirement is that is not

contained within 20 C.F.R. § 802.208 of the Board's appellate rules or regulations. (See App.200a-201a).

20 C.F.R. § 802.208(a) enumerates eight (8) specific requirements for a notice of appeal, including: (1) The full name and address of the petitioner; (2) The full name of the injured, disabled, or deceased employee; (3) The full names and addresses of all other parties, including, among others, beneficiaries, employers, coal mine operators, and insurance carriers where appropriate; (4) The case file number which appears on the decision or order of the administrative law judge; (5) The claimant's OWCP file number; (6) The date of filing of the decision or order being appealed; (7) Whether a motion for reconsideration of the decision or order of the administrative law judge has been filed by any party, the date such motion was filed, and whether the administrative law judge has acted on such motion for reconsideration (*see* § 802.206); (8) The name and address of the attorney or other person, if any, who is representing the petitioner. App.200a. Absent from this detailed list is any requirement that a party state "any intent to appeal to the Board" or otherwise identify the Board as the agency to which an appeal is being taken.

Such a mandate is also absent in 20 C.F.R. § 802.208(b) which states in full:

(b) Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.

App.200a.

Though empowered to do so, the Secretary of Labor did not include within 20 C.F.R. § 802.208(a) or (b) the need to identify the Board as the agency to which an appeal is being taken. This is not an oversight. There is no need to identify the Board as the agency to which an appeal is being taken when, per 33 U.S.C. § 921(b)(3), only the Board is authorized to hear appeals from decisions under the Act. App.194a-195a. The regulations and statute are in harmony. It would be a grievous error for the courts to impose a notice requirement<sup>6</sup> out of sync with statutory authority and Board rules which contracts the Board's jurisdiction and deprives parties of appellate review.

## **B. The Plain Meaning of 20 C.F.R. § 802.208(b)**

By not giving plain meaning to 20 C.F.R. 802.208(b), the Ninth Circuit constricted the Board's authority to exercise jurisdiction by imposing a requirement for a notice of appeal not specified by the Secretary of Labor in Section 802.208(b). 20 C.F.R. § 802.208(b) either means what it says and applies, or it is an impotent rule that the Board can ignore, and the courts can alter. Which way that pendulum swings depends upon this Court's construction of the regulation. Left unreviewed and opaque, substantial,

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<sup>6</sup> Unlike 20 C.F.R. § 802.208(a) and (b), Federal Rules of Appellate Procedure, Rule 3(a)(C) does require a notice of appeal to contain the "name of the court to which the appeal is taken." Though the court was silent on the source of authority for its judicially imposed notice requirement under the Act, it may be derived from the rules governing procedure in the United States courts of appeals. Fed. R. App. Proc. Rule 1(a)(1). This would explain why the court's finding was out of sync with the Board's rules and the Act.

and irreparable harm will come to stakeholders under the Act.

Under 20 C.F.R. § 802.208(b), “any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.” App.200a-201a. Here, the Board did not address the issue and the Ninth Circuit addressed it only to the extent that it altered the requirement of the rule and restricted the Board’s jurisdiction, as noted above. If either the Board or the court were compelled by this Court to apply the plain meaning of 20 C.F.R. § 802.208(b) to this case, the pendulum would swing from a dismissal of appeal to the required Board’s exercise of jurisdiction over the appeal.

There was a single ALJ trial decision in this case, assigned case number OALJ (2012-LHC-00988), and after appeals and remand, Petitioner and Respondent entered Joint Stipulations in the same and only case (OALJ (2012-LHC-00988)). App.23a-28a. The Joint Stipulations as signed and served identify by name, counsel and/or address the parties affected and identify the only underlying the trial decision by case number and disputed issue for appeal (causation). The parties explicitly agreed to move the matter through the appellate process to the Ninth Circuit Court of Appeal.

Neither the Board nor Court applied the plain meaning of 20 C.F.R. § 802.208(b) to the facts. Doing so compels the conclusion that the parties’ joint stipulation setting forth the agreement to move the disputed issue of causation in OALJ (2012-LHC-00988) forward on appeal is sufficient notice of appeal.

First, it is “written communication”. Second, it “reasonably permits identification of the decision from which an appeal is sought” by repeatedly referencing the only ALJ trial decision by both issue (causation) and case number (OALJ (2012-LHC-00988)). Third, it “reasonably permits identification of . . . the parties affected or aggrieved thereby” in that it is a joint stipulation between those parties. Absent judicial reconstruction of 20 C.F.R. § 802.208(b), nothing more is required for sufficient notice of appeal.<sup>7</sup>

Yet, more exists. For example, the joint stipulation and proof of service check off elements of 20 C.F.R. § 802.208(a), although this is not required.<sup>8</sup> Further, there is no claim of lack of notice or prejudice to Respondent, who was party to the written communication and who raised no opposition to Petitioner’s motion and reconsideration before the Board seeking to move the case on causation through to appeal. The Ninth Circuit erred in not applying 20 C.F.R. § 802.208(b) on its face, and as adopted by the Secretary of Labor.

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<sup>7</sup> Respecting that this Court is “not a court of error correction”, summary reversal at this point would resolve the portion of this case involving the court’s construction and application of 20 C.F.R. § 802.208(b) and its constriction of the Board’s jurisdiction resulting in dismissal of Petitioner’s appeal. *See Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting the denial of certiorari). It would not, however, resolve the court’s expansion of its statutorily limited jurisdiction to include jurisdiction on direct appeals from ALJ decisions. On this split amongst the circuits, plenary grant of review is prudent.

<sup>8</sup> For example, the written communication contains names and/or addresses of the injured employee, petitioner, attorneys, as well as the case number on OALJ decision and OWCP file number. 20 C.F.R. § 802.208(a)(1)-(4), (8). App. 200a-201a.

### C. “Liberal” Rules and “The Interest of Justice”

The third prong for perfecting a notice of appeal is its timing. Per 33 U.S.C. § 921(a), absent proceedings to suspend or set aside a compensation order of the ALJ, it “shall become final at the expiration of the thirtieth day thereafter.” 33 U.S.C. § 921. App.194a-198a. Failure to file a timely notice of appeal within thirty days of the ALJ decision on appeal “shall foreclose all rights to review by the Board” and “[a]ny untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.” 20 C.F.R. § 802.205(c). App.198a. The timing requirement for notice of appeal has often been reviewed in the appellate courts and even this Court. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-22 (1988). As a tenet of jurisdiction, the statutes and rules on timing can be harsh and unwavering. *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 664 (7th Cir. 1989). In contrast, rules governing the first two prongs of a notice of appeal (content and filing) are forgiving, favor substance over form, are in concert with procedure before the Board under the Act. Specifically, the “Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter.” 33 U.S.C. § 923(a). Thus, procedural regulations applicable to notice and filing are understandably less technical and formal than, for example, a jurisdictional time limit.

Rules as to the form and content of a notice of appeal, however, have been described as “liberal rules”. *Aetna Cas. & Sur. Co. v. Dir. OWCP*, 97 F.3d 815, at 820 (5th Cir., 1996). This is illustrated by the breadth

and general language of the content of notice requirement in 20 C.F.R. § 802.208(b) (App.200a-201a); which arguably swallows 20 C.F.R. § 802.208(a) (App.200a) and its form specific eight-step mandate. It is also illustrated within the filing requirements of a notice of appeal. One rule instructs mailing a notice of appeal to the Board or otherwise presenting it to the Clerk of the Board. 20 C.F.R. § 802.204. Another rule recognizes filings with entities other than the Board. A notice of appeal submitted to any other agency of the Department of Labor “shall be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.” 20 C.F.R. § 802.207(a)(2). App.199a.

In discussing the requirements for filing a notice of appeal after reconsideration by an ALJ 20 C.F.R. § 802.206(f), the Court in *Aetna Cas. & Sur. Co.*, *supra*, stated, “We speculate that, given the liberal rules governing what will suffice to constitute an effective notice of appeal to the BRB, minor alterations of an earlier notice—or perhaps even changes of the date of an attached cover letter or certificate of service—might well be treated as a ‘new’ notice of appeal within the meaning of section 802.206(f).” *Aetna Cas. & Sur. Co.*, *supra*, 97 F.3d at 820. Albeit speculation, this aligns with the “liberal rules” as to notice and filing.

The potential harsh consequences upon injured workers from the restriction of Board jurisdiction is a bona fide concern, but one that also applies to employers. While certain regulations promulgated by the Secretary of Labor favor workers (See 20 C.F.R. § 718.301-718.306), solicitude toward claimants or unrepresented parties is not reflected in the rules of appellate

procedure before the Board. Unlike specific presumptions codified by statute or adopted via regulation, appellate rules do not distinguish between claimants and employers or unrepresented and represented parties. The Secretary of Labor did not carve represented employers out of broad (and intentionally forgiving) notice (20 C.F.R. § 802.208(b)) or filing (20 C.F.R. 802.208(b)) regulations. The same set of rules for appellate procedure before the Board apply across the board. Efforts to extend the solicitude toward claimants beyond that already within the Act and its regulations have been rejected by this Court. In *Dir., Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the “true doubt” rule was being applied by ALJs under the Act to shift the burden of persuasion to the party opposing the claim so that when the evidence was evenly balanced, the benefits claimant won. *Greenwich Collieries*, 512 U.S. at 269. Distinguishing this practice from recognized statutory or regulatory presumptions, this Court noted that the Department of Labor “attempts to go one step further” and “runs afoul” of § 7(c) of the Administrative Procedures Act (“APA”). *See id.* at 280. This Court rejected the “true doubt” rule and workers and employers were returned to a level playing field in relation to the burden of persuasion under the APA. Neither Congress nor the Secretary of Labor has excluded employers or represented parties from the “liberal rules” for notice (20 C.F.R. § 802.208(b) and filing (20 C.F.R. § 802.807(a)(2)). In the instant matter, the BRB and the Ninth Circuit incorrectly excluded the “liberal rules” of notice and filing.

In particular, the joint “written communication” repeatedly evincing Petitioner’s intent to appeal the

ALJ's causation decision was filed with three separate entities (OALJ, OWCP, Office of Solicitor General) within the Department of Labor. App.11a-28a. Under the filing requirement of 20 C.F.R. § 802.207(a)(2), "the interest of justice" must be weighed. All parties were party to the "written communication". App.11a-28a. All parties were on simultaneous notice of the intent to appeal and stipulated to the same. App.11a-28a. No opposition was raised to the notice of appeal before the Board. Petitioner's appellate brief on the causation issue was previously filed with the Ninth Circuit (App.6a-10a) and served on Respondent before the remand. App.259a. The "interest of justice" is overwhelmingly served by considering the joint "written communication" a timely appeal filed with the Clerk of the Board as of the date filed with each, every, and any of the three agencies within the Department of Labor. *See* 20 C.F.R. § 802.208(b); 20 C.F.R. § 802.207 (a)(2). App.199a-201a. This is consistent with this Court treatment of a notice of appeal under an analogous scenario arising from the Federal Rules of Appellate Procedure.

#### **D. Federal Rules of Appellate Procedure, Rule 3**

Though not applicable to appellate procedure before the Board, it appears the Ninth Circuit nevertheless pulled from Federal Rules of Appellate Procedure, Rule 3(c)(1)(C) to impose upon Petitioner the extra-regulatory requirement that it identify the agency (BRB) to which its appeal is being taken. App.4a-5a. Thus, how this Court has interpreted portions of Federal Rules of Appellate Procedure, Rule 3(c) is relevant through analogy. For example, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314, 108 S.Ct. 2405, 101

L.Ed.2d 285 (1988), this Court interpreted Federal Rules of Appellate Procedure, Rule 3(c)(1)(A), which required a notice of appeal to specify the party or parties taking the appeal. Interpreting the rule narrowly, it held that the appellate court lacked jurisdiction over a party whose name had inadvertently been omitted from a notice of appeal. *See id.* at 317. Noting that the “purpose of the specificity requirement in Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants.” *See id.* at 318. The “failure to name a party in a notice of appeal is more than excusable ‘informality,’ but rather, “it constitutes a failure of that party to appeal.” *See id.* at 314. The court concluded that “the specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.” *See id.* at 318.

*Torres* is noteworthy on two fronts. First, even though Petitioner’s notice is governed by the broader construct of 20 C.F.R. § 802.208(b), it still meets the strict *Torres*’ requirements. The written communication is a joint stipulation between both parties, naming both parties, and signed by both parties. There is no colorable claim by Respondent or finding by the Court that Respondent was not on notice as to the identity of Petitioner or otherwise failed to receive sufficient notice of appeal. Actual notice was conveyed. Second, the uncompromising *Torres* construction was not embraced by Congress or this Court via the 1993 amendments to the Federal Rules of Appellate Procedure 3(c), which states “[a]n appeal will not be dismissed for informality of form or title of the notice of appeal or for failure to name a party whose intent to appeal is otherwise clear from the notice.” (1993) (emphasis

added). Fed. R. App. P. Rule 3(c). The legislative changes embody the intent to allow for some flexibility to mitigate the harsh consequences of dismissal. *See* Fed. R. App. P. 3(c) advisory committee's note to 1993 amendment.

As a further example, this Court rejected a literal interpretation of Federal Rule of Appellate Procedure, Rule 3(c)(1)(B), which requires the notice of appeal to “designate the judgment, order, or part thereof being appealed.” In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), a plaintiff filed a notice of appeal from the denial of a motion to vacate the judgment, instead of from the judgment itself. *See id.* at 179. This Court held that the notice of appeal was sufficient under Rule 3(c) as “an effective, although inept, attempt to appeal from the judgment sought to be vacated.” *See id.* at 181. When contrasting this holding with *Torres, supra*, this Court explained “the important principle for which *Foman* stands” is “that the requirements of the rules of procedure should be liberally construed and that ‘mere technicalities’ should not stand in the way of consideration of a case on its merits.” *Torres, supra*, 487 U.S. at 316 (explaining *Foman*). This Court concluded that “if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant’s action is the functional equivalent of what the rule requires.” *See id.* at 316-16.

Refusing to allow technicalities to “stand in the way of consideration of a case on its merits” and evaluating whether a “litigant’s action is the functional equivalent of what the rule requires” echo the “liberal rules” of appellate procedure before the Board and the

regulatory allowance for the “interest of justice” to bear on whether a notice shall be considered filed with the Board under 20 C.F.R. § 802.207(a)(2). Whether the joint written communication conveying an intent to appeal was imperfect in form does not answer the question of whether it was nevertheless the “functional equivalent” of notice required under 20 C.F.R. § 802.208 (b). Where, as here, all parties and three agencies within the Department of Labor were on notice of the intent to appeal<sup>9</sup> and briefing on the issue on appeal had previously been filed and served in the court, technicalities “should not stand in the way of consideration of a case on its merits.” *See id.* at 316.

## **II. THE COURT’S DECISION EXPANDING ITS LIMITED JURISDICTION OVER AGENCY DECISIONS CONFLICT WITH MULTIPLE FEDERAL APPELLATE DECISIONS**

The Court of Appeals is a court of limited jurisdiction, and “may review decisions of the BRB only when appeals are brought under the conditions within the time specified in by statute.” *Adkins v. Dir. Office of Workers’ Compensation Programs*, 889 F.2d 1360, 1361 (4th Cir. 1989). The statute governing appeals

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<sup>9</sup> In rejecting the joint stipulation as notice of appeal, the court said the stipulation “said nothing about any intent to appeal to the Board.” App. 5a. As previously noted, this is not a regulatory requirement under 20 C.F.R. § 802.208(b), but additionally the Board case cited by the court, *Porter v. Kwajalein Servs., Inc.*, 31 Ben. Rev. Bd. Serv. 112 (1997), is distinct to the point of being irrelevant. *Porter* involved a motion to the ALJ to rescind a settlement and obtain a new formal hearing before the ALJ. *Porter*, at 114, fn.4. No action or appeal at a level other than the ALJ was sought. By contrast, the Joint Stipulations provide express and repeat notice that the issue of causation is to be taken up on appeal—a clear call for appellate review, which is absent in *Porter*.

under the Act is 33 U.S.C. § 921. App.194a-198a. Review of compensation orders under the Act is provided by 33 U.S.C. § 921. App.194a-198a. Per subsections (a) and (b), a party may appeal an ALJ's order to the Board. App.194a-196a. The Board is statutorily empowered to hear and determine appeals raising a substantial question of law or fact from decisions of the ALJ. App.194a-196a. Under 33 U.S.C. § 921(c), a party may obtain review of a "final order of the Board" in the "United States court of appeals for the circuit in which an injury occurred" 33 U.S.C. § 921(c). App.196a-197a. The law and statutory authority do not allow parties to bypass the Board and appeal a compensation order directly to the Circuit Courts of Appeal. The Court of Appeals in the Ninth Circuit, however, has expanded its own limited statutory jurisdiction beyond that provided for in 33 U.S.C. § 921 and in conflict with courts of appeal in the Third Circuit, Eighth Circuit, and Eleventh Circuit. This split decision between the Ninth Circuit, the plain language of 33 U.S.C. § 921 and decisions in the Third, Eighth, and Eleventh Circuit is reason for this Court to grant review.

### **A. Ninth Circuit**

While finding the Board lacked jurisdiction, the Court simultaneously found that its jurisdiction was expansive enough to take up review had Petitioner followed appellate procedure approved within the Ninth Circuit, but not otherwise set forth in the appellate rules or regulations or adopted by any other Circuit Court. The Court found Petitioner "could have filed a timely petition for review in this court directly from the ALJ's order". App.3a. This conclusion defies the jurisdictional scope and constraint of 33 U.S.C. § 921, as well as the plain language of the statute.

In addressing the Board's jurisdiction under Section 921(a), the court explained after remand to the ALJ, "an aggrieved party may file a petition for review in the court of appeals after the Board issues a final order following the ALJ's resolution of the remanded issues. *See Rhine v. Stevedoring Servs. Of Am.*, 596 F.3d 1161, 1165 (9th Cir. 2012); *see also Nat'l Steel & Shipbuilding Co., Inc. v. Dir., Off. of Workers' Comp. Programs* ("*McGregor*"), 703 F.2d 417 n.3 (9th Cir. 1983)" (citations in original). (emphasis added) App.3a. Although the court did not cite Section 921(a), its statement of the Board's jurisdiction aligns with statute. When discussing its own jurisdiction, the court cited Section 921(c), but then exceeded its limited jurisdiction therein.

The court preliminarily acknowledged that the Act, 33 U.S.C. § 921(c), specifies that the court of appeals has jurisdiction to review "final order[s] of the Board." The court then stated, "a party seeking judicial review under the Longshore Act ordinarily must first file a timely appeal to the Board." (emphasis added). App.2a-3a. This conveys that under inordinate circumstances, inordinate authority permits judicial review under the Act in a manner or method outside of Section 921(c). The Court is not referring to a codified appellate pathway, but rather a "procedure [it] approved in *McGregor*" (App.4a) to "bypass Board review" (App.3a) and assert jurisdiction over direct appeal from ALJ decisions. The court states,

A party aggrieved by an earlier Board order after remand to an ALJ may bypass Board review and file a petition for review in the court of appeals within 60 days from the ALJ's final order on remand. *See McGregor*, 703

F.2d at 418-19; 33 U.S.C. § 921(c).” Where the Board has already determined the contested issue in an earlier decision, “requiring an appeal to the [Board]” after the ALJ’s remand order “would [be] futile; a summary affirmance adhering to a previous ruling in the same case may properly be viewed as a purely ministerial act.’ *McGregor*, 703 F.2d at 418. In such circumstances—which are those here—we have jurisdiction where a party timely petitions for review directly from the ALJ’s order on remand. *See id.* at 418-19. (citations in original) App.3a-4a.

The Ninth Circuit cites Section 921(c), but a plain reading of the statute does not support the Court’s conclusion that Petitioner could have bypassed the Board and filed a direct petition for review in the court from ALJ’s order approving the parties’ Joint Stipulations. Factually, the Joint Stipulations addressed issues other than the remanded issue of disability, such that the Court can only speculate that the Board would have rubberstamped it on appeal. Legally, the Court promulgated appellate procedure is not grounded in the Act nor in its implementing regulations. The *McGregor* procedure is an outlier that no other circuit court has adopted.

In *McGregor, supra*, the employer appealed an ALJ’s award of benefits to the Board, which the Board affirmed in part and remanded as to temporary partial disability (“TPD”). *McGregor*, 703 F.2d at 418. Prior to remand, the employer petitioned the court for review. In their briefs, both parties agreed there was “little or no chance” on the remanded TPD issue and the claimant did not intend to pursue it. *id.* “Nonetheless, [the

Ninth Circuit] held that because the BRB had ordered the case remanded, no final order had issued and the petition was premature.” (internal citations omitted) *id.* The matter was remanded and following an evidentiary hearing, the ALJ found no TPD. Without seeking further Board action, the employer petitioned the Court for review. *id.* The Court was the first to take up the issue of jurisdiction following remand. *id.* at 418, fn.1.

The Director, OWCP raised concerns, which were rejected, about bypassing the Board, and taking a direct appeal from the ALJ’s decision on remand to the court. *id.* at 419, fn.2. The Court concluded review was appropriate. “On these facts, requiring an appeal to the BRB would have been futile; a summary affirmance adhering to a previous ruling in the same case may properly be viewed as a purely ministerial act.” *id.* The “uncertainties” of remand that caused the court to dismiss the prior appeal had “been permanently laid to rest” since the time for Board review under Section 921(a) had passed. *id.* Neither party appealed to the Board and there was no threat of confusion arising from concurrent jurisdiction. *id.* at 418-419. Thus, the Court held it had jurisdiction over the employer’s petition for reasons not set forth in Section 921(c). *id.* at 419.

A similar result was reached in *SSA Marine v. Lopez*, 377 Fed. Appx. 640 (9th Cir. 2010). The parties settled their differences on remanded issues and the ALJ entered a decision and order in accord with the parties’ stipulations. *SSA Marine*, 377 Fed. Appx. At 641. The employer bypassed appeal of the ALJ decision to the Board and filed a direct petition with the court of appeals. *id.* Claimant argued that the court

lacked jurisdiction. *id.* at 641, fn.1. Citing *McGregor, supra*, the court rejected the challenge to its jurisdiction. The court explained, “None of the issues before this court are affected by the ALJ’s decision on remand, and the BRB would have had no basis for altering its first decision if Petitioners had appealed the ALJ’s second decision to the BRB.” *id.*

Not all cases within or before the Ninth Circuit endorse a similar exercise of jurisdiction or adoption of procedures which exceed statutory authority. In the context of an appeal to determine the meaning of “issuance” as used in Section 921(c), the Ninth Circuit wrote, “Section 921(c) controls appeal of the Board’s decisions to the federal courts of appeals.” *Stevedoring Servs. of Am. v. Director, OWCP (Mattera)*, 29 F.3d 513, at 516 (9th Cir. 1994). The court explained,

This is a court of limited jurisdiction, exercising only those powers delegated to us by Congress. We can review decisions of the Benefits Review Board only when they are brought before us under the conditions and within the time specified by statute. *Clay v. Director, OWCP*, 748 F.2d 501, at 503. (citation in original) *Mattera*, 29 F.3d at 516.

*Mattera*’s plain reading and construction of Section 921(c) is more representative of how other circuits perceive and exercise their jurisdiction over claims arising under the Act.

### **B. Decisions in the Third, Eighth, and Eleventh Circuits**

The Ninth’s Circuit’s finding allowing direct appeal from an administrative law judge (ALJ) to a

Circuit Court of Appeal, bypassing the agency (BRB) review level, conflicts with the Third, Eighth and Eleventh Circuits and calls out for clarification from this Court.

33 U.S.C. § 921(c) is a jurisdictional requirement. Except for the Ninth Circuit, courts interpreting this jurisdictional requirement have consistently held that the plain meaning of Section 921(c) requires final review by the Board before a party may appeal to a court of appeals, even when the BRB has previously remanded the case to the ALJ for further action. *See, e.g., Elliot Coal Mining Co., Inc. v. Director, OWCP*, 956 F.2d 448, 450 (3d Cir. 1992); *Aubrey v. Director, OWCP*, 916 F.2d 451, 452-53 (8th Cir. 1990); *RMK-BRJ v. Brittain*, 32 F.2d 565, 566 (11th Cir. 1987).

*Elliot Coal Mining*, *supra*, arose from a claim for medical benefits under the Black Lung Act (“BLA”). *See Elliot Coal Mining*, 956 F.2d at 449.<sup>10</sup> The ALJ entered a decision and order on remand from which the claimant appealed to the Board, and the following day petitioned the court for appellate review. *Elliot Coal Mining*, 956 F.2d at 449. The District Director’s motion to dismiss for lack of jurisdiction was granted. *id.* The court held 33 U.S.C. § 921(c) did not grant the court jurisdiction to review an order of an ALJ upon which the Board had not yet issued a final order. *id.* at 450.

The court in *Elliot Coal Mining*, *supra* explicitly considered the Ninth Circuit’s finding in *McGregor* and declined to follow it for several reasons. Although

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<sup>10</sup> The BLA is an extension of the LHWCA or “the Act” per 20 C.F.R. § 802.101(b)(6). 33 U.S.C. § 921(c) is incorporated into the BLA by 30 U.S.C. § 932(a).

*McGregor, supra*, was factually distinct, the court found that the “proper procedure” is to appeal to the Board.<sup>11</sup> *id.* The court reasoned,

Even if [*McGregor*] were not distinguishable, we would decline to follow it. As noted above, the authority of this court to review administrative decisions under the Black Lung Benefits Act stems from 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), which allows this court to review a “final order of the Board.” [*Sun Shipbuilding & Dry Dock Co. v. Ben. Rev. Bd.*, 535 F.2d 758, 760 (3d Cir. 1976) (per curiam)]. That provision is jurisdictional. *Shendock v. Director, OWCP*, 893 F.2d 1458 (3d Cir. 1990). This court may not expand its own jurisdiction on the ground that to do so would be expeditious.

We hold that 33 U.S.C. § 921(c), which allows this court to review a “final order of the Board,” does not grant this court jurisdiction to review an order of an administrative law judge upon which the Board has not yet passed. *id.* at 450.

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<sup>11</sup> Under the expanded jurisdiction of *McGregor*, parties can bypass Board review and pursue file a direct appeal with the court from ALJ post-remand decisions. The foreseeable results are increased litigation over jurisdiction (whether an ALJ appeal proceed to or bypass the Board) and increased dismissal of appeals if a litigate guesses wrong. *McGregor* fails to mitigate these risks by stating in a footnote parties “would be well advised to appeal again to the Board and only then petition for review in this court” *McGregor, supra*, at p. 419 n. 3. Appellate procedure should not be left to chance.

In the Eleventh Circuit, as stated in *RMK-BRJ v. Brittain, supra*, 32 F.2d 565, 566 (11th Cir. 1987), “The law does not provide for a direct appeal from an ALJ’s order to the court of appeals.” In *RMK-BRJ*, appellants did not appeal the compensation order to the Board and there was no “final order of the Board”. *id.* at 566. The issue before the court was whether it had jurisdiction over a direct appeal from the ALJ. The court rejected appellants’ claim that appeal to the Board “would have been futile” and simply called for the Board to “reconsider its prior decision and to ‘rubber stamp’ the award. *id.* The court, unpersuaded, held that it was without jurisdiction over the appeal:

We are unable to determine how the Board would have ruled or what issues it might have considered on appeal. Moreover, the statute does not provide this court with the authority to engage in such speculation; rather, it states that this court may only review final orders of the Board. We believe that the statute means what it says. *id.*

The 9th Circuit has adhered to the section 921 jurisdiction rule “subject to an exception for appeal of an ALJ order on remand from the BRB in the limited circumstance that ‘requiring an appeal to the BRB would [be] futile’ and ‘a summary affirmance adhering to a previous ruling in the same case may properly be viewed as a purely ministerial act.’ *Stevedoring Services of America v. Huffman*, 1999 U.S. App. LEXIS 8693) (9th Cir. 1999), quoting *McGregor*. “This limited exception applies only if the ALJ’s decision

on remand was ‘truly final in disposing of the issues to be reviewed.’” *id.*

In the Eighth Circuit, in a claim arising under the BLA, the ALJ issued a decision on remand denying benefits to a pro se claimant. *Aubrey, supra*, 916 F.2d at 452. The claimant did not appeal the ALJ’s decision to the Board; rather he filed a notice of appeal with the circuit court. *id.* The Director filed a motion to dismiss for lack of jurisdiction on the basis that the court is without authority to review directly an ALJ’s decision. *id.*

After setting forth the court’s limited jurisdiction under 33 U.S.C. § 921(c), the court addressed, but refused to adopt the Ninth Circuit’s position in *McGregor*. *id.* at 452-453. The court noted that even if it had adopted the position, the circumstances of the case did not render a second appeal to the Board futile based on the fact the ALJ was authorized to make new findings of fact and conclusions of law on remand.<sup>12</sup> The court found that it lacked jurisdiction and claimant’s appellate pathway was from the ALJ decision on remand to the Board prior to seeking review of the court. *id.* at 453. Ameliorating the harsh impact of finding a lack of jurisdiction and dismissing the pro se

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<sup>12</sup> The parties’ joint stipulation on remand addressed issues other than the remanded TPD issue. The parties intended to resolve the date of maximum medical improvement date, issues related to Special Fund relief, and give notice of appeal on the causation issue. App. 23a-28a. As in *Aubrey*, here the potential existed for the Board to do more on appeal than “rubber stamp” the ALJ’s order incorporating the parties’ stipulation; especially where the rights of the Special Fund were implicated at the same time intent and agreement to proceed to appeal on causation was evinced.

claimant's appeal, the court cited 20 C.F.R. § 802.207 (a)(2) (notice of appeal timely submitted to other government agency shall be considered filed with Board if in interest of justice) and expressed its confidence that the Board would find it is in the interest of justice to consider the notice of appeal to be timely filed with the Board. *id.* at 452. Every circuit outside of the Ninth which has addressed the scope of jurisdiction under Section 921(c) and, specifically, the procedure on appeal after remand to the ALJ, has rejected the court born *McGregor* procedure. For reduction of confusion and consistent application of the law for all parties under the Act and its extension, a review and finality of the split Circuit issue is needed.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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