

REPLY BRIEF
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**RESPONDENT DUTRA GROUP ET AL.
MOTION FOR BRB ORDER RENDERING
DECISION “FINAL” FOR PURPOSES OF
APPEAL TO THE NINTH CIRCUIT
(MAY 28, 2021)**

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U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

KELLY ZARADNIK,

Claimant,

v.

THE DUTRA GROUP; ENSTAR (US) INC., DBA
ENSTAR ADMINISTRATORS FOR SEABRIGHT
INSURANCE COMPANY,

Respondent.

OWCP No.: 18-099601
OALJ No.: 2012-LHC-00988

BRB Docket No. 16-0128; 16-0128A
Ninth Cir. No.:17-73093

**REPONDENT'S [sic] MOTION FOR BRB
ORDER RENDERING ITS DECEMBER 9, 2016
DECISION AND ORDER "FINAL" FOR
PURPOSES OF APPEAL TO THE NINTH
CIRCUIT**

[20 C.F.R. § 802.219; 20 C.F.R. § 802.406;
20 C.F.R. § 802.410]

Comes Now RESPONDENT THE DUTRA GROUP; ENSTAR (US) INC., dba ENSTAR ADMINISTRATIONS [sic] for SEABRIGHT INSURANCE COMPANY (hereinafter "Respondent") and moves the Clerk of the Benefits Review Board ("BRB") to enter an Order finding the BRB's Decision and Order, dated December 9, 2016 ("BRB Decision & Order") and the BRB's Order on Motion for Reconsideration En Banc, dated September 22, 2017 ("BRB Order On Reconsideration), to be "final"; thereby allowing Respondent to proceed with its appeal from the BRB Decision and Order to the Ninth Circuit Court of Appeals.

PROCEDURAL POSTURE

This matter proceeded to Trial before the Office of Administrative Law Judges ("OALJ") on December 14, 2012 and January 25, 2013. The OALJ issued a Decision and Order Granting Benefits, dated August 25, 2015. Both parties appealed to the BRB. Respondent appealed the OALJ's finding on various issues arising from its finding of industrial causation, including but

not limited to the substantiality of the evidence supporting the finding, the OALJ's application of *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse (Price)* 339 F.3d 1102 (9th Cir. 2003), and the finding as to a subsequent intervening trauma. On appeal, the BRB issued a split decision affirming the OALJ's findings on all issues except one. The BRB vacated the finding that Claimant's disability was temporary in nature and remanded the case for further consideration. (*BRB Decision & Order*, p.13-14). Respondent sought reconsideration by the BRB en banc, which was denied. (*BRB Order On Reconsideration*). Respondent/Appellant filed a Notice of Appeal with the Ninth Circuit and Petition for Review, dated March 1, 2018. Claimant/Appellee moved to have Respondent/Appellants's petition dismissed on the grounds that the matter was not final because of the single issue which had been remanded by the BRB to the OALJ. On May 22, 2018, the Ninth Circuit issued an Order granting Claimant/Appellee's motion and finding that the court lacks jurisdiction over appeal of a BRB order remanding to the administrative law judge for further proceedings. (*Ninth Circuit Order, dated 05/22/18*). Respondent/Appellant's petition was dismissed and the parties returned to the OALJ level for further proceedings.

Following several years at the OALJ level, the parties entered into Stipulations of Claimant and Request For Order, signed March 11, 2021. (*See Stipulations of Claimant and Respondent and Request for Order, dated 03/11/21, attached hereto as Exhibit A*). Amongst the stipulations, the parties resolved the issue which had been remanded by the BRB to the OALJ. (*Id.*, at p.1). The parties further stipulated, "The parties acknowledge that the Respondent may now proceed

on the causation issue to the 9th Circuit.” (*Id., at p.2*). ALJ Christopher Larsen issued an Order Approving Stipulations and Vacating Hearing wherein he specifically noted, “Claimant and Employer/Carrier have filed written stipulations executed by counsel on their behalf on March 11, 2021. Those stipulations are approved, and incorporated by this reference into this Order.” (*Order Approving Stipulations and Vacating Hearing, dated 03/12/21, p.1*).

ARGUMENT

Title 20 Code of Federal Regulations Section 802.219 grants the Clerk of the BRB authority to issue Orders on motions in procedural matters. Here, the sole issue for which the BRB remanded the matter to the OALJ has now been resolved by stipulations approved by the OALJ. (*Exhibit A and B*). Having resolved all issues on remand, Respondent seeks an Order stating that the BRB’s Decision & Order, dated December 9, 2016 is now final. This Order evidencing the finality of all issues before the OALJ and BRB levels will allow Respondent to proceed with its appeal on causation to the Ninth Circuit per the stipulations approved by the OALJ. As the stipulation evidences, both parties are aware of and are anticipating the appeal to the Ninth Circuit, such that there are no issues of any potential prejudice. Respondent simply requires a procedural bridge in the form of an Order from the BRB advising the Ninth Circuit that finality has been achieved below and establishing jurisdiction at the appellate level.

CONCLUSION

Wherefore, Respondent respectfully requests and Order from the Clerk noting that the December 9, 2016 Order is now final and appealable.

ENGLAND, PONTICELLO & ST.CLAIR

By: /s/ Barry W. Ponticello
Renee C. St. Clair
Attorney for Respondent

Dated: May 28, 2021

EXHIBIT A
STIPULATIONS OF CLAIMANT AND
RESPONDENT AND REQUEST FOR ORDER
(MARCH 11, 2021)

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

KELLY ZARADNIK,

Claimant,

v.

THE DUTRA GROUP; ENSTAR (US) INC., DBA
ENSTAR ADMINISTRATORS FOR SEABRIGHT
INSURANCE COMPANY,

Respondent.

OALJ NO.: 2012-LHC-00988

OWCP NO.: 18-099601
BRB Docket No. 2016-0128; 2016-0128A
NINTH CIR. No.:18-72307
SE000801715

Comes Now CLAIMANT ZARADNIK and RESPONDENT THE DUTRA GROUP/ENSTAR (“The parties”) and STIPULATE as follows, and REQUEST and ORDER consistent with these STIPULATIONS:

PROCEDURAL POSTURE

This matter proceeded to Trial, at which time the assigned ALJ made a finding of industrial injury. The matter was appealed to the BRB on a number of issues, with the BRB affirming the industrial injury finding. RESPONDENT appealed the causation issue to the 9th Circuit, who found the issue premature, as the BRB had remanded 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.

STIPULATIONS

1. CLAIMANT ZARADNIK is permanently and totally disabled.
2. CLAIMANT ZARADNIK was MMI (maximum medical improvement) on January 28, 2012 (01/28/2012).
3. The parties have both discussed the Special Fund issue with the Solicitor and Director, and the Solicitor has advised (including via email of 03/03/2021) that the Director would NOT oppose Special Fund relief if the parties stipulated to permanent and total disability and an MMI date of 1/28/12. The parties have considered this representation as to Special Fund relief in reaching these stipulations.
4. The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit.

REQUESTED ORDER

The Parties request an Order as follows:

I. CLAIMANT ZARADNIK is permanently and totally disabled.

II. CLAIMANT ZARADNIK was MMI (maximum medical improvement) on January 28, 2012 (01/28/2012).

III. RESPONDENT THE DUTRA GROUP/ENSTAR shall receive Special Fund relief, with interest, commencing 104 weeks after the MMI date of January 28, 2012 (01/28/2012).

IV. With the conclusion of remand issues, the Trial level issues are complete such that the previously filed appeals can proceed.

V. IT IS SO STIPULATED

Dated: 03/11/2021

DUPREE LAW

By:

/s/ Eric A. Dupree
Attorney for Claimant

Dated: 03/11/2021

ENGLAND,
PONTICELLO &
ST. CLAIR

By:

/s/ Barry W. Ponticello
Attorney for Respondent

EXHIBIT B
ORDER APPROVING STIPULATIONS
AND VACATING HEARING
(MARCH 12, 2021)

U.S. Department of Labor
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San Francisco, CA 94103-1516
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Issue Date: 12 March 2021

CASE NO.: 2012-LHC-00988

OWCP NO.: 18-099601

IN THE MATTER OF KELLY ZARADNIK,

Claimant,

v.

THE DUTRA GROUP, INC., and SEABRIGHT
INSURANCE COMPANY,

Employer and Carrier.
and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest.

ORDER APPROVING STIPULATIONS AND VACATING HEARING

This is a claim for benefits under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("the Act" or "LHWCA"). This matter is currently set for further hearing by video on April 7, 2021.

Claimant and Employer/Carrier have filed written stipulations executed by counsel on their behalf on March 11, 2021. Those stipulations are approved, and incorporated by this reference into this Order. The parties stipulate:

1. The claimant, Kelly Zaradnik, is permanently and totally disabled.
2. The claimant reached maximum medical improvement on January 28, 2012.
3. Pursuant to agreement with the Director, confirmed by e-mail dated March 3, 2021, Employer/Carrier will receive Special Fund relief, with interest, commencing 104 weeks after the maximum-medical-improvement date of January 28, 2012.

Because these stipulations dispose of the issues before me on remand from the Benefits Review Board, the videoconference hearing on July 10, 2021, is vacated.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

Digitally signed by John C. Larsen
DN: CN=John C. Larsen,
OU=Administrative Law Judge, O=US
DOL office of Administrative Law
Judges, L=San Francisco,
S=CA, C=US
Location: San Francisco CA

**RESPONDENT'S MOTION FOR
RECONSIDERATION
(AUGUST 20, 2021)**

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Attorneys for Employer/Respondent,
THE DUTRA GROUP, INC., SeaBright Insurance

**U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD**

KELLY ZARADNIK,

Claimant,

v.

THE DUTRA GROUP; ENSTAR (US) INC., DBA
ENSTAR ADMINISTRATORS FOR SEABRIGHT
INSURANCE COMPANY,

Respondent.

OWCP No.: 18-99601
OALJ No.: 2012-LHC-00988
BRB Docket No. 16-0128; 16-0128A
Ninth Cir. No.:17-73093

RESPONDENT'S MOTION FOR RECONSIDERATION

[33 U.S.C. § 921(b)(5); 20 C.F.R. § 802.407]

Comes Now RESPONDENT THE DUTRA GROUP; ENSTAR (US) INC., dba ENSTAR ADMINISTRATIONS [sic] for SEABRIGHT INSURANCE COMPANY (hereinafter "Respondent") and files this Motion for Reconsideration of the Benefits Review Board's Order, issued July 27, 2021 (*hereinafter "BRB Order"*). Therein, the Board declined to render its own December 9, 2016 Decision and Order "final", which is a necessary ministerial step for Respondent to proceed with its appeal to the Ninth Circuit as contemplated by and stipulated to by the parties.

STATEMENT OF FACTS

This matter proceeded to Trial before the Office of Administrative Law Judges ("OALJ") on December 14, 2012 and January 25, 2013. The OALJ issued a Decision and Order Granting Benefits. (*See Decision and Order Granting Benefits, dated 08/25/15 ("ALJ Decision and Order")*). Both parties appealed to the Board. Respondent appealed the OALJ's finding on various issues arising from its finding of industrial causation, including but not limited to the substantiality of the evidence supporting the finding, the OALJ's application of *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse (Price)* 339 F.3d 1102 (9th Cir. 2003), and the finding as to a subsequent intervening trauma. (*Employer/Petitioner/Cross-Respondent, The Dutra Group, Inc.'s Petition for Review, dated 03/09/16*). On appeal, the BRB issued a split decision affirming

the OALJ's findings on all issues except one. (*See BRB Decision & Order, dated 12/09/16*). The Board vacated the finding that Claimant's disability was temporary in nature and remanded the case for further consideration. (*BRB Decision & Order, p.13-14*). Respondent sought reconsideration, which was denied. (*Employer /Petitioner/Cross-Respondent, The Dutra Group, Inc.'s Motion for Reconsideration, dated 01/09/17; BRB Order on Motion for Reconsideration En Banc, dated 09/22/17*).

Respondent filed a Notice of Appeal with the Ninth Circuit and briefed the issues in its Petition for Review. (*Petition for Review, dated 03/01/18*). Claimant /Appellee filed a responsive brief and the Director separately moved to have Respondent/Appellants' petition dismissed on the grounds that the matter was not final because of the single issue which had been remanded by the BRB to the OALJ. (*Director's Motion To Dismiss For Lack of Jurisdiction, dated 02/21/18, "Motion To Dismiss", attached hereto without exhibits as Exhibit A*). The Ninth Circuit issued an Order finding that it lacked jurisdiction over appeal of a BRB's Order, dated December 9, 2016, and remanded the matter to the administrative law judge for further proceedings. (*Ninth Circuit Order, dated 05/22/18*).

Following several years at the OALJ level, the parties entered Stipulations of Claimant and Request For Order. (*Stipulations of Claimant and Respondent and Request for Order, dated 03/11/21, attached hereto as Exhibit B ("Stipulations")*). Amongst the stipulations, the parties resolved the issue which had been remanded by the BRB to the OALJ. (*Id., at p.1*). The parties further stipulated,

The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit. (Emphasis added) (*Id.*, at p.2).

ALJ Christopher Larsen issued an Order Approving Stipulations and Vacating Hearing wherein he specifically noted, “Claimant and Employer/Carrier have filed written stipulations executed by counsel on their behalf on March 11, 2021. Those stipulations are approved and incorporated by this reference into this Order.” (*Order Approving Stipulations and Vacating Hearing, dated 03/12/21, p.1, attached as Exhibit C (“ALJ Order Approving Stipulations”)*). The Stipulations were filed and served by the OWCP on March 17, 2021. (*OWCP Certificate of Filing and Service, dated 03/17/21, attached hereto as Exhibit D*). Consistent with the parties’ stipulation and with resolution of the remand issue before the OALJ, Respondent filed a motion requesting the clerk of the BRB render the Board’s December 9, 2016 decision final so that an appeal to the Ninth Circuit could occur.¹ (*Respondent’s Motion for BRB Order Rendering Its December 9, 2016 Decision and Order “Final” For Purposes of Appeal to the Ninth Circuit, dated 05/28/21 (“Motion for BRB Statement of Finality”)*). The Board denied Respondent’s ministerial motion stating that it did not have jurisdiction

¹ This appeal to the 9th Circuit is one that was already briefed by the parties before the Ninth Circuit in 2018 but was deemed premature because the BRB’s Decision and Order was not final because of remand on one issue. The remand issue was resolved in conjunction with a number of Stipulations, but further appellate proceedings on the merits were contemplated and agreed to by the parties. Only a declaration of “finality” was needed at the BRB level to proceed with appeal.

because a timely appeal of the ALJ's Order Approving Stipulations was not filed. (*BRB Order, dated 07/27/21*). It is from this BRB Order that Respondent now seeks reconsideration.

SUMMARY OF ARGUMENT

Respondent respectfully requests reconsideration of the Board Order, dated July 27, 2021, on the following grounds:

- An appeal is not the appropriate procedural vehicle when there is no final order, no aggrieved party, no disputed facts, no disputed law, and no Board review of an ALJ Order being sought.
- The case law relied upon by the Board illustrates its authority to grant procedural *motions* to move a matter through to the appellate level.
- Motions, unlike appeals, are not jurisdictional in nature.
- Even if an appeal is the only procedural vehicle to have the Clerk of the Board exercise a ministerial duty, then Respondent points to the stipulations themselves as timely notice of appeal filed with two adjudicatory levels of the Department of Labor.
- Respondent will be irreparably harmed by the Board's construance of its motion as an appeal and will be deprived the benefit of its stipulated agreement and due process right to appeal the merits to the Ninth Circuit.

- Claimant is receiving permanent and total disability benefits. Claimant stipulated to Respondent's appeal of merit issues, including causation. Claimant did not oppose Respondent's procedural motion seeking finality from the BRB. Claimant will not be harmed or prejudiced by the grant of reconsideration and order of finality of the December 9, 2016 BRB Decision and Order because it is consistent with the parties' approved stipulations.

For these reasons and the authority and analysis set forth below, Respondent respectfully requests reconsideration be granted and its underlying motion granted.

ARGUMENT

I. THE ALJ'S ORDER APPROVING STIPULATIONS WAS NOT A FINAL APPEALABLE ORDER. THE ISSUE OF CAUSATION WAS PRESERVED FOR APPEAL VIA APPROVED STIPULATIONS

The Board erred in concluding that the administrative law judge's order, and the non-final orders preceding it, became final as of April 16, 2021. (*BRB Order*, p.2). A decision is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *See also Riley v. Kennedy*, 553 U.S. 406, 419 (2008). "[A]n order is not final where it 'contemplates the possibility of future proceedings.'" *In re Odyssey Contracting Corp.*, 944 F.3d 483, at 486, quoting *Delgross v. Spang & Co.*, 903 F.2d 234, 236 (3rd Cir. 1990). Here, the ALJ's Order Approving Stipulations which incorporated and approved the parties' stipulations was non-final. It did not end the litigation

on the merits nor did it leave nothing for the court to do but execute the judgment. To the contrary, the ALJ's Order Approving Stipulations incorporating the parties' stipulations explicitly left unresolved the threshold issue of causation which the ALJ and parties agree would proceed on appeal to the Ninth Circuit. (*Stipulations*, p.2, ¶ 4, ¶ IV). Neither the ALJ nor the BRB finally decided the case. The BRB remanded the case to the ALJ and the ALJ determined the remand issue, but preserved Respondent's appellate rights on the merits (causation). Neither adjudicator had issued a final appealable decision, thus prompting Respondent's motion to the Board to obtain a "final" order from which an appeal to the Ninth Circuit could be taken. Future proceedings were explicitly contemplated and agreed upon. Just as a decision remanding an issue is not final, a decision preserving a substantive issue for appeal is likewise not final. *See generally Bish v. Brady-Hamilton Stevedore & Co.*, 880 F.2d 1135, 1137 (9th Cir. 1989).

When the Director sought dismissal of Respondent's 2018 appeal before the Ninth Circuit on the grounds that the BRB's Decision and Order was nonfinal, the Director acknowledged, "The issues the Employer intends to present on appeal involve the merits of the case, and are reviewable on appeal. Dismissal of the petition will not preclude the Employer from obtaining appropriate review of these issues once the administrative process is final." (*Exhibit A*, p.5). The Director explained,

After the ALJ issues a decision determining the nature of the Claimant's disability in light of Carrior [sic], the ***Employer . . . may appeal to the Board if it is aggrieved by***

any aspect of that decision. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.201(a)." (Emphasis added) *Id.*

This process for appeal as outlined by the Director did not occur in this case. The ALJ did not issue any final determination (much less one in which Respondent was aggrieved) on the merits, but rather preserved the threshold issue of causation for appeal. Most relevant is that no party was aggrieved by any aspect of the ALJ's decision. It was not a final order and there was nothing for any party to dispute, from which an appeal would have been proper. For that reason, Respondent's motion to the Board, which is not subject to appellate timeframes, was an appropriate and timely procedural tool to obtain a "final" Order from the BRB from which the preserved appellate rights could then proceed.

II. APPEALS ARE INTENDED TO ADDRESS SUBSTANTIAL QUESTIONS OF LAW OR FACT RAISED BY AN AGGRIEVED PARTY. WHERE NO PARTY IS AGGRIEVED AND NO QUESTIONS OF LAW OR FACT EXISTS, AN APPEAL SERVES NO PURPOSE AND APPELLATE PROCEDURE IS NOT APPLICABLE

This matter involves a ministerial procedural *motion* to the Clerk of the Board under the authority of 20 C.F.R. § 802.219(g) and not an appeal under 33 U.S.C. § 921 and 20 C.F.R. § 802.205. Pursuant to § 802.219, Respondent filed a motion in writing for an order rendering the Board's Decision and Order, dated December 9, 2016, final in light of resolution of the remanded issue before the OALJ. The particular grounds for the motion were set forth, the motion was unopposed, and it was directed to the Clerk of the

Board as a procedural matter (mere formality) to move the case to a posture for appeal to the Ninth Circuit as the parties had so stipulated. The Board treated the filing not as its stated Motion, but as a late filed appeal, which it is not. Respectfully, the Board erred in conflating the procedural rules for motions with those for appeals, and in applying substantive law on appellate procedure and jurisdiction to a procedural motion.

Pursuant to 33 U.S.C. § 921(b)(3), “The Board shall be authorized to hear and determine appeals raising a substantial question of law of fact taken from any party in interest from decisions with respect to claims of employees under this Act . . .” 33 U.S.C. § 921(b)(3). This is not the factual or legal scenario presented in this matter. The parties resolved the remand issue among other issues at the OALJ level and no dispute exists as to the ALJ’s Order Approving Stipulations. Under the circumstances of this case, wherein no party was aggrieved and no dispute of law or facts exists, an appeal is discordant. The Board is not being asked to review ALJ findings or in any way to make any determinations as to the substantiality or correctness of the Order Approving Stipulations. An appeal in such a case is inconsistent with the purpose and nature of appeals.

According to the Board, “Employer should have filed a timely appeal of the administrative law judge’s Order Approving Stipulations seeking summary affirmance of this decision and noting the appeal was for the purpose of preserving its right to appeal the underlying Board decision.” (*Board Decision and Order*, p.3, fn.2). In essence, this is what Respondent did in the name of a motion and not an appeal—since no issue is being

disputed or appealed. The sole authority cited by the Board for the procedure to advance a case with no disputed issues to the Board is *Morganti v. Lockheed Martin Corp.*, BRB No. 04-0407 (Feb. 17, 2004) (unpub.).² In addition to being an unpublished case with no precedential value, *Morganti* did not decide the issue of whether an appeal and/or motion is a proper vehicle to advance a case with no disputed issues to the Board. If anything, *Morganti* muddies the waters for the Board and arguably lends support to the fact that a motion is the valid procedural vehicle for moving undisputed cases like ours from the OALJ to the BRB. Specifically, the Board notes it is addressing the matter “[o]n appeal”. (*Id.*, at p.2). However, the Board did not issue a Decision and Order from an appeal. Rather, the Board “grant[ed] employer’s motion for summary decision.” (*Id.*). And the Board concluded that “employer’s Motion for Expedited Summary Decision is granted.” (*Id.*, at p.3). In other words, the Board considered and ruled on a *motion* not an appeal in *Morganti*. This is precisely what Respondent sought to have happen via its motion to the Clerk of the Board for an Order of “finality”. Thus, *Morganti* lends credence to the use of a motion as the means to have the Board render a summary decision or, as Respondent requested, render “final” it underlying Decision and Order.

² The Board regards its unpublished Decision and Orders as lacking precedential value. Therefore, unpublished Board decisions generally should not be cited or relied upon by parties in presenting their cases. *Lopez v. Southern Stevedores*, 23 BRBS 295, 300, fn.2 (1990).

III. RESPONDENT IS NOT ASKING FOR NOR DOES IT NEED THE BOARD TO EXERCISE AUTHORITY OR DISCRETION TO BYPASS STATUTORY RULES OF PROCEDURE

The Board relies on case law and statutory authority for the general proposition that timeliness of a notice of appeal is jurisdictional. (*BRB Order*, p.2). Respondent does not dispute this tenet, but does dispute its applicability to this case. Respondent's procedural motion is not akin to an appeal with jurisdictional consequences.

Amongst the cases cited by the Board is *Hamer v. Neighborhood Housing Svcs. Of Chicago*, ___ U.S. ___, 138 S.Ct. 13 (2017). In addition to supporting the general jurisdictional premise, *Hamer* also supplies authority and reasoning supporting the Board's discretion to rule on the merits of Respondent's motion. Specifically, the Supreme Court discusses the distinction between Congressionally established time frames for appeal and court-promulgated rules. *Hamer*, at p. 17. In the former case, the failure to comply with a jurisdictional time prescription "deprives a court of adjudicatory authority over the case, necessitating dismissal—a 'drastic' result." *Id.*, citing *Henderson v. Shineski*, 562 U.S. 428, at 435, 131 S.Ct. 1197. In the latter case, time limits prescribed in court made rules are not jurisdiction, but rather "claim-processing" rules "to promote the orderly progress of litigation by requiring certain procedural steps at certain specified times." *Id.* In this case, motions to the Board are governed by regulation with no time limitation except for the time for a reply. 20 C.F.R. § 802.219. Unfor-

tunately, the Board overlooked the distinction and mischaracterized claim processing rules as jurisdictional. Per the Supreme Court, such an error is “critical”. *Id.*

If the Board’s Order is left undisturbed and the distinction is not correctly made between a motion governed by regulation and an appeal established by statute, the result will be drastic and draconian (and contrary to what was anticipated and agreed to by the parties through their Stipulations). No authority was cited which mandates that addressing a motion to act on its own earlier Decision and Order with an appeal of an aggrieved party from a final order are required to be the same. Rather, the Board relies on *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989) and *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107 (CRT) (2d Cir. 1983). Both *Jeffboat* and *Gee* involve adjudication over filing and service of an ALJ order. The decisions are not applicable to the facts of this case. This case involves a non-final order, no aggrieved party, no disputed facts, no disputed law, no appeal, and a procedural motion to the Board to act on its own prior Decision and Order.

IV. IN THE EVENT THE BOARD MANDATES THAT AN APPEAL FROM A NONFINAL ORDER BY A NON-AGGRIEVED PARTY IS REQUIRED FOR THE BOARD TO RULE ON A PROCEDURAL MOTION, THEN RESPONDENT AVERS THAT THE STIPULATIONS FILED WITH THE OALJ AND OWCP CONSTITUTE TIMELY NOTICE OF APPEAL

The Board states that Respondent did not file “any document that could be perceived as a timely notice of appeal.” (*BRB Order*, p.2). Respondent avers that the stipulations filed with the OALJ and OWCP

contain notice of appeal as allowed under 20 C.F.R. § 802.207 (a)(2).

“Notices of appeal submitted to any other agency or subdivision of the Department of Labor . . . shall be promptly forwarded to the office of the Clerk of the Board. The notice shall be considered filed with the Clerk of the Board as of the date was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.” 22 U.S.C. § 802.201(a)(2). Here, the parties filed written stipulations executed by counsel with the OALJ on March 11, 2021. The parties stipulated, “The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit.” (*Stipulations*, p.2, ¶ 4). The parties requested an Order finding, “With the conclusion of the remand issues, the Trial level issues are complete such that the previously filed appeals can proceed.” (*Stipulations*, p.2, ¶ IV). Respondent contends that this language is unambiguous and constitutes substantial notice of a timely appeal submitted to the OALJ. The same notice of appeal was also given to the OWCP, who filed and served the Order Approving Stipulations on March 17, 2021. (*Exhibit D*). Thus, the OALJ and OWCP were each on notice of the parties’ intent that this matter proceed on appeal to the Ninth Circuit. Neither the OALJ nor the OWCP on its own authority forwarded notice of appeal to the Clerk of the Board, which was received by these agencies of the Department of Labor on March 11, 2021 and March 17, 2021 respectively. Thus, even if a notice of appeal by an unaggrieved party to a nonfinal Order containing no disputes is the necessary procedure, such notice of appeal was given by the parties. That the OALJ and OWCP neglected to forward the notice of appeal to the

BRB is an administrative oversight that should not be held against Respondent to deprive it of its right to due process and appeal.

Administrative errors by adjudicators are not held against parties to deprive them of fundamental and substantial rights. This is illustrated in the matter of *Weeks Marine, Inc. v. Briskie*, 161 Fed. Appx. 178 (2nd Cir. 2006). In *Weeks*, the Board errantly issued its decision after one year from receipt of notice of appeal. When the worker sought to appeal the Board's decision, the Director and employer moved for dismissal of the appeal arguing that the Board decision was final and not appealable. In rejecting the Director and employer's motion to dismiss, the appellate court explained,

We conclude that [appellant] should not be required to bear the harsh consequences of the Board's apparent error under these circumstances. The filing date established by § 802.207(b) is designed to preserve an aggrieved party's right to appeal an ALJ's decision to the Board when the appeal would otherwise be untimely; it should not in turn operate to deprive that party of any effective remedy before this Court, at least where all of the relevant parties operated on the assumption that the Board's decision was indeed appealable. *Weeks*, at pp.180-181.

As the regulation reflects, the Board has discretion to find that a notice of appeals has been filed with the Clerk of the Board as of the date it was received by another governmental entity if the Board finds that it is in the interest of justice to do so. While Respondent disputes that its only mechanism to move this matter

back to the Ninth Circuit was via appeal from an Order from which it was not aggrieved, Respondent nevertheless gave notice of the intent to appeal to the OALJ who in turn gave it to the OWCP. If the Board requires “any document that could be perceived as a timely notice of appeal” then that search leads to the Stipulations filed with the OALJ and OWCP. An intent to appeal was conveyed. The Board is empowered through Section 802.207 to vindicate the interests of justice and view the notice of appeal in the Stipulation as timely notice of appeal to rule on the substance of its motion seeking a determination of finality as to the Board’s December 9, 2016 Decision and Order.

V. THE PARTIES STIPULATED TO FURTHER APPENDIX LATE PROCEDURES, WHICH ARE ONGOING. RESPONDENT’S MOTION WAS NOT OPPOSED. THERE IS NO PREJUDICE TO CLAIMANT

Per ALJ approved stipulation, “The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit.” (*Stipulations.*, at p.2, ¶ 4). An Order was sought reading, “With the conclusion of remand issues, the Trial level issues are complete such that the previously filed appeals can proceed.” (*Id.*, at p.2, ¶ IV). Nothing within the Stipulation references or limits Respondent’s appeal to the March 17, 2021 ALJ Order. In fact, appeal of the March 17, 2021 Order was not contemplated or specified since it would have been nonsensical. There was no aggrievement arising from the OALJ’s Order, which was an adoption of the parties’ agreement and stipulation. Nothing contained within the March 17, 2021 is appealable. To the contrary, the issues previously presented to the Ninth Circuit arising out of the earlier OALJ and BRB Decisions and Orders are those in

dispute, as referenced in the Stipulations. The underlying issue of compensability, which was not part of the March 17, 2021 Order, is the primary issue for appeal. This is of no surprise to Claimant, who entered the agreement and who did not oppose Respondent's motion for a "final" Order at the BRB level.

Through its May 27, 2021 motion, Respondent is exercising a procedural vehicle to obtain a BRB "finality" determination that would then be transferable and appealable. As it stands, the ALJ's Order is not final as it contemplates further adjudication and the BRB's prior Decision and Order is not final as it contains remand instructions. No party is harmed or prejudiced by honoring the stipulations and obtaining a ruling from the BRB of finality of its December 9, 2016 Decision and Order. All that is required is simple order noting all issues are now adjudicated at the OALJ and BRB levels and the prior Board decision is "final". This is needed to refile the previously premature Ninth Circuit appeal.

Claimant is receiving permanent and total disability payments from the Special Fund as provided for in the stipulations. (*OWCP Correspondence, dated 04/02/21, attached hereto as Exhibit E*). She is no way aggrieved by the timing of Respondent's motion, which she did not oppose and for which she had no reasonable bases to oppose. Proceeding on appeal of the underlying merits (causation) was part of the agreement. Left unaltered, the Board is depriving Respondent of an essential term of its approved settlement with Claimant—a term which no party is disputes and which yields no prejudice or harm.

CONCLUSION

Wherefore, Respondent respectfully requests that its Motion for Reconsideration be granted and the BRB's Decision and Order, dated December 9, 2016 be rendered "final" for appeal to the Ninth Circuit.

ENGLAND, PONTICELLO & ST.CLAIR
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Dated: August 20, 2021