The Authority of Administrative Law Judges to Impose Sanctions in Cases Arising under the Longshore Act

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It is well-settled that Administrative Law Judges ("ALJs") have the authority to impose sanctions in cases arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA" or "Act"). This article explores the contours of this authority.

Section 19(d) of the LHWCA incorporates the Administrative Procedure Act ("APA"), 5 U.S.C. § 554, *et seq.*, into the hearing process. 33 U.S.C. § 919(d); 20 C.F.R. § 702.332. The APA grants the ALJs the authority, "[s]ubject to published rules of the agency and within its powers, . . . to regulate the course of a hearing." 5 U.S.C. § 556(c)(5).[1] Section 27(a) of the LHWCA provides that an ALJ may take such actions as compelling testimony and the production of documents, as well as other lawful actions necessary to enable the ALJ to effectively discharge his or her duties. Under § 27(b), where any person disobeys or resists any lawful order or process, misbehaves during a hearing, neglects to produce, after having been ordered to do so, any pertinent documents or other materials, refuses to appear after being subpoenaed or refuses to take the oath and testify, the ALJ shall certify the facts to the appropriate U.S. District Court which, after a summary hearing regarding the acts complained of, shall punish the offender in the same manner as for contempt committed before the court or commit such person as if the forbidden act had occurred with reference to the process or in the presence of the court. 33 U.S.C. § 927. The appropriate district court is the one "having jurisdiction in the place in which [the ALJ] is sitting." *Id.*

Further, the Rules of Practice and Procedure for the Office of Administrative Law Judges ("OALJ Rules") apply to the extent they are not inconsistent with the Act or its regulations.[2] 29 C.F.R. § 18.10(a). Provisions for the imposition of sanctions by ALJs, generally modelled on the Federal Rules of Civil Procedure ("Federal Rules" or "FRCP"), are found in Rules 18.12,[3]

[1] *See also* 5 U.S.C. § 558(b)(''[a] sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and authorized by law'').

[2] Prior to the 2015 amendments to the OALJ Rules, Rule 18.29(b) stated that the ALJ, "where authorized by statute or law, may certify the facts to the Federal District Court having jurisdiction in the place in which he or she is sitting to request appropriate remedies." 29 C.F.R. § 18.29(b). In 2015, "the enforcement provision of prior § 18.29(b) was deleted due to its contents of referring contumacious conduct to an appropriate federal court is (sic) set forth in applicable statutes, such as Section 927(b) of the LHWCA." *See* 80 Fed. Reg. 28767, 28773 (May 19, 2015) (29 C.F.R. Part 18, Final Rule).

[3] Rule 18.12 references the powers described in the APA, including the power to "[t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order[,]" 29 C.F.R. § 18.12(b)(7), and "[w]here applicable take any appropriate action authorized by the FRCP," 29 C.F.R. § 18.12(b)(10).

18.35,[4] 18.50,[5] 18.56,[6] 18.57,[7] 18.64,[8] 18.72,[9] and 18.87.[10] Additionally, Rule 18.10(a) provides that the Federal Rules apply in any situation not provided for or controlled by these rules, the Act or its regulations. However, as detailed below, § 27(b) of the LHWCA limits the applicability of the OALJ Rules and Federal Rules in Longshore cases.

Sanctions Held to be Precluded by Section 27(b) of the Act

To date, Benefits Review Board ("Board") decisions addressing ALJs' sanction-wielding authority are relatively sparse. In *Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981), claimant

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[4] Under Rule 18.35(c), an ALJ may impose a sanction on a party, representative, or law firm that improperly certified a document under Rule 18.35(b), including striking all or part of the document, forbidding the filing of further documents, excluding evidence, admonishment, referral of counsel misconduct to the appropriate licensing authority, and "including the sanctioned activity in assessing the quality of representation when determining an appropriate hourly rate and billable hours when adjudicating attorney fees." 29 C.F.R. § 18.35(c). The preamble to the OALJ Rules states that "Section 18.35(c) . . . is not identical to FRCP 11(c)(4) and does not seek to invest OALJ judges with powers beyond the APA's grant of authority to impose appropriate sanctions where necessary to regulate and ensure the integrity of the hearing process." *See* 80 Fed. Reg. 28767, 28776 (May 19, 2015).

[5] Rule 18.50(d)(3) provides for sanctions for violations of Rule 18.50(d)(1) pertaining to certifications made when signing disclosures and discovery requests, responses and objections. 29 C.F.R. § 18.50(d)(3).

[6] Rule 18.56(c)(1) provides for sanctions for an unduly burdensome subpoena. 29 C.F.R. § 18.56(c)(1). Enforcement of subpoenas is a two-tiered process. If a person fails to comply with a subpoena, the party adversely affected should by written motion request the ALJ to compel compliance. If the offending party still does not comply, the ALJ may certify the facts to the appropriate federal district court. 33 U.S.C. § 927; 29 C.F.R. § 18.56(e).

[7] Rule 18.57 addresses failure to make required disclosures or cooperate in discovery, and related sanctions (which may be imposed upon a motion or upon a notice from the ALJ followed by an opportunity to be heard). *See* 29 C.F.R. § 18.57(b), (c), (d), (e), (f). Rule 18.57(c) provides that if a party fails to make required disclosures or respond to a request for admission, "the party is not allowed to use that information or witness . . ., unless the failure was substantially justified or is harmless;" the ALJ, on motion, may impose other, or additional, sanctions. 29 C.F.R. § 18.57(c). Rule 18.57(b)(1), generally modelled on FRCP 37(b)(2)(A), provides the following sanctions for failure to comply with an ALJ's discovery order:

> If a party or a party's officer, director, or managing agent—or a witness designated under §§ 18.64(b)(6) and 18.65(a)(4)—fails to obey an order to provide or permit discovery . . ., the judge may issue further just orders. They may include the following:
> (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;
> (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) Striking claims or defenses in whole or in part;
> (iv) Staying further proceedings until the order is obeyed;
> (v) Dismissing the proceeding in whole or in part; or
> (vi) Rendering a default decision and order against the disobedient party[.]

29 C.F.R. § 18.57(b)(1). Rule 18.57(b)(2) addresses failure to produce a person for examination under 29 C.F.R. § 18.62. In Longshore cases, § 7(d)(4) of the Act addresses a claimant's unreasonable refusal to undergo an examination or treatment. 33 U.S.C. § 907(d)(4); *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014).

[8] Rule 18.64(d)(2) provides that "[t]he judge may impose an appropriate sanction, in accordance with Rule 18.57, on a person who impedes, delays, or frustrates the fair examination of the deponent." 29 C.F.R. § 18.64(d)(2). Rule 18.64(g) provides for the imposition of sanctions under Rule 18.57 for failure to attend a deposition or serve a subpoena. 29 C.F.R. § 18.64(g).

[9] Rule 18.72(h) allows an ALJ to impose sanctions for submitting in bad faith an affidavit or declaration to support or oppose a motion for summary decision.

[10] Rule 18.87 prescribes the standards of conduct and allows an ALJ to exclude any person for contumacious conduct. 29 C.F.R. § 18.87.

failed to appear at his deposition and to answer interrogatories, and employer filed a motion for sanctions. The Board affirmed the ALJ's denial of employer's motion and held that Fed. R. Civ. P. 37, which identifies possible sanctions the district court may impose, is not applicable. The appropriate action to be taken, pursuant to § 27(a), is a motion to compel. If the order is disobeyed, the next appropriate action is to refer the matter to district court for the imposition of sanctions under § 27(b).[11] *Id.*, 14 BRBS at 436.

More than two decades later,[12] in the oft-cited decision *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003), the Board held that an ALJ cannot dismiss a claim as a sanction for claimant's refusal to comply with the ALJ's discovery order because § 27(b) of the Act provides the specific sanction to be applied where a party fails to obey an ALJ's order.[13] The Board reasoned that neither the Federal Rules[14] nor the OALJ Rules apply where a specific provision of the Act is applicable, citing *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999),[15] and *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993).[16] The Board denied employer's request to instruct the ALJ to certify the facts

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[11] Under the amended OALJ Rules, sanctions are immediately available when a party fails to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection. 29 C.F.R. § 18.57(d). However, as § 27(b) certification of facts is premised on a non-compliance with an ALJ order, the two-step process outlined in *Crease* appears to apply if certification is pursued. Alternatively, an ALJ might grant a motion for sanctions limited, as discussed in the text below, to evidentiary exclusions or similar sanctions that remain within the ALJ's discretion.

[12] In the interim between *Creasy* and *Goicochea*, the Board decided *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993). It held that the ALJ acted within his discretion when he declined to schedule a formal hearing because claimant had repeatedly refused to comply with outstanding discovery requests. The Board also held that the ALJ acted within his discretion in dismissing claimant's claims with prejudice pursuant to FRCP 41(b)(involuntary dismissal for failure to comply with an order of the court) due to his repeated and numerous abuses of the administrative process, including failure to comply with discovery. However, in *Olsen v. Triple A Mack Shop, Inc.*, BRB No. 02–0612, 2003 WL 26100022 (DOL Ben. Rev. Bd. June 4, 2003) (unpub.), the Board acknowledged that "*Harrison* appears to be anomalous in not discussing Section 27(b)." *Id.*, 2003 WL 26100022 at 8, n.13. The Board also stated that, in *Harrison*, due to claimant's failure to cooperate, the record contained no evidence that would support his claim, and, "[w]here a claim can be denied due to a failure of evidence, Section 27(b) would not come into play." *Id.*

[13] By contrast, dismissal for abandonment is available in Longshore cases. *See*, *e.g.*, *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989) (Following case precedent under FRCP 41(b) which permits involuntary dismissal of a case for failure to prosecute only where there is a clear record of delay or contumacious conduct or when less drastic sanctions have been unsuccessful, the Board vacated dismissal and remanded for reconsideration). Another line of cases addressed an ALJ's ability to declare an employer in default. *See McCracken v. Spearin, Preston & Burros, Inc.*, 36 BRBS 136 (2002) (ALJ cannot award benefits due to employer's failure to appear at the hearing when no evidence supporting the claim was admitted into evidence); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993).

[14] The ALJ relied on FRCP 41(b) and FRCP 37(b)(2)(C) (*Payment of Expenses*). Fed. R. Civ. P. 41(b), 37(b)(2)(C).

[15] In *A-Z Int'l*, the Ninth Circuit held that the filing by claimant of a fraudulent claim under the Act does not constitute disobeying or resisting any "lawful order or process" within the meaning of § 27(b), as the term "lawful process" in the context of the contempt power generally refers to the use of summons, writs, warrants or mandates issuing from a court in order to obtain jurisdiction over a person. Moreover, the Act expressly provides mechanisms other than contempt sanctions, under § 31(a), for the filing of a fraudulent claim. Thus, the Ninth Circuit affirmed the district court's dismissal of employer's complaint for lack of subject matter jurisdiction to impose sanctions on claimant. It also stated that § 27(b) specifically, and exclusively, gives contempt power to the district courts once the facts are certified to it. *Id.* at 1191.

[16] In *Brickner*, in addressing the ALJ's authority to assess costs under § 26 of the Act against a claimant who filed a claim in bad faith, the court held that neither the OALJ Rules nor the FRCP applied because § 26 provides the procedure for punishing a party who institutes or continues proceedings without reasonable grounds.

and recommend the sanction of dismissal to the district court, citing the Ninth Circuit's holding in *A-Z Int'l* that the Board lacks jurisdiction to address the ALJ's certification under § 27(b). *Goicochea*, 37 BRBS at 8, n.4. Accordingly, the Board vacated the dismissal and remanded the case for the ALJ to consider whether the certification of the facts was appropriate, noting that it is for the ALJ to decide whether to recommend a particular sanction when certifying facts to a district court. *Id. Cf. Washington v. SSL Cooper, LLC*, No. 2:13–cv–393–RMG, 2014 WL 971766 (D.S.C. Mar. 7, 2014) (unpub.).[17]

More recently, in *Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014), the Board vacated an ALJ's order directing claimant to attend defense examinations (psychiatric, orthopedic and vocational) at his own expense. It reasoned that

> . . . to the extent the [ALJ's] order that claimant pay his own expenses to attend employer's defense evaluations constitutes a sanction for claimant's non-attendance at prior appointments, the [ALJ] abused his discretion. The Act provides specific procedures to sanction a party who "disobeys any lawful order." 33 U.S.C. §927(b). Specifically, Section 7(d)(4) provides that if a claimant "unreasonably refuses to submit . . . to an examination by a physician selected by the employer," the [ALJ] may "suspend the payment of further compensation during such time as such refusal continues[.]" 33 U.S.C. §907(d)(4); *see also* 33 U.S.C. §919(h). In addition, if the [ALJ] deems sanctions warranted for a party's failure to follow a lawful order, he must certify the facts to the appropriate district court and the court will order sanctions. 33 U.S.C. §927(b). Thus, ordering claimant to pay the costs of attending medical and vocational evaluations arranged by employer for discovery purposes is not an appropriate sanction.

Id. at 38-39 (additional citations omitted).[18]

Aside from its published decisions, the Board provided a particularly thorough discussion of the ALJs' authority to sanction in an unpublished decision in *Olsen v. Triple A Mack Shop,*

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[17] In *Washington*, claimant failed to comply with the ALJ's discovery orders directing him to sign medical releases giving employer unfettered access to his medical information. Claimant appealed the orders to the Board, arguing that the orders violated the Health Insurance Portability and Accountability Act ("HIPAA") and that the ALJ erred by not considering less intrusive alternatives for giving employer access to his medical information. The Board dismissed the appeal as interlocutory, noting that claimant could seek a protective order. Thereafter, on employer's motion, the ALJ cancelled the hearing on the grounds that claimant appeared to be incarcerated and unavailable for deposition and failed to comply with his discovery orders. The ALJ remanded the case to the District Director until claimant and his attorney complied with his orders. Claimant and his attorney brought action in a (wrong) district court, seeking a declaratory judgment allowing claimant to proceed on his claim and to declare the ALJ's orders contrary to law. They asserted that the ALJ's remand of the case amounted to a sanction, which he lacked the power to impose. They also asked for a writ of mandamus compelling the ALJ, *inter alia*, to certify to a district court the facts concerning claimant's failure to provide a medical release. The court dismissed all claims for lack of subject matter jurisdiction. Agreeing with other district courts, the court concluded that it lacked jurisdiction to review the ALJ's order because neither the ALJ nor the BRB had certified facts to the district court. It also noted that claimant could appeal the ALJ's remand order to the Board.

[18] *See also Moore v. Int'l Transportation Serv.*, BRB No. 05-0522, 2005 WL 6765007 (Oct. 7, 2005) (unpub.) (The ALJ was without authority to order claimant to pay employers' fees and costs associated with the missed depositions and appointments. The Act does not provide a basis for claimant to pay employers' fees and costs. Moreover, employers are not prejudiced by any potential award of interest as the liable employer has had the use of the funds during the pendency of the claim.).

Inc., BRB No. 02–0612, 2003 WL 26100022 (DOL Ben. Rev. Bd. June 4, 2003) (unpub.) ("*Olsen I*"). Having determined that claimant had engaged in action intended to prevent or delay a hearing on employer's modification request, the ALJ attempted to impose sanctions on claimant by requiring that he obtain a lawyer before proceeding[19] and by suspending disability benefits until a hearing on the proposed modification could be held. The ALJ concluded that § 27(b) did not apply and that he had the power to issue civil, as opposed to criminal, sanctions for those actions that did not rise to the level of "contempt of court."[20] The Board rejected this reasoning, stating that

> [w]e need not decide what type of "contempt" Section 27(b) contemplates because, as the Director correctly states, the language of the section demonstrates that the nature of a party's offense, rather than the sanctions available, invokes the applicability of Section 27(b). It is clear from the statements of the Ninth Circuit, within whose jurisdiction this case arises, that it interprets Section 27(b) as contemplating either punishing a party's misdeeds or compelling his compliance with a directive of the [ALJ]. In any event, once Section 27(b) is applied, it is for the district court to determine the appropriate sanction.

Olsen I, 2003 WL 26100022 at *7. The ALJ thereafter certified the facts to the district court. The district court determined that a "coercive sanction" was appropriate to gain the claimant's compliance and participation in a proceeding to modify or terminate benefits before the ALJ, and therefore ordered the Secretary of Labor to reassign the claimant's disability checks to the district court. *Triple A Mack Shop, Inc. v. Olsen*, No. C 07-02371 CRB, 2008 WL 131665 at *3-4 (N.D. Cal. Jan. 11, 2008) (unpub.) ("*Olsen II*").

What ALJs Can Do To Control the Administrative Process

In *Olsen I*, the Board took pains to describe the tools available to the ALJs to maintain control of the administrative process, collecting the relevant case law. In particular, the Board highlighted the ALJ's authority to impose evidentiary sanctions, stating:

> The conclusion that Section 27(b) applies because claimant disobeyed orders and failed to produce documents does not necessarily leave the [ALJ] empty-handed. There remains a number of actions he may take to "discharge the duties of his office." 5 U.S.C. §556(c); 33 U.S.C. §927(a). First, the word "shall" in Section

[19] The Board held that the ALJ erred in suspending proceedings until such time as claimant retains an attorney, stating that "we see no reason why a claimant under the Act should not have the right to represent himself" and that "[the ALJ's] frustration with claimant's pre-trial filings and tactics does not give him the authority to require claimant to hire an attorney." *Olsen I*, 2003 WL 26100022 at *4.

[20] The ALJ cited the following five reasons: 1) § 27(b) is limited in scope to those actions that "are so disrespectful of the judicial process that they constitute contempt of court[;]" 2) in contempt cases, district courts are limited to either imprisoning or fining the offender, so there is no conflict between § 27(b) and the OALJ Rules at 29 C.F.R. Part 18; 3) the Board, as affirmed by the United States Court of Appeals for the D.C. Circuit, *see Harrison*, 24 BRBS 257, has held that the OALJ has the authority to dismiss a claim because of the claimant's abuses of the administrative process and to depart from that position would be inconsistent with then-current Rule 18.29(b), which provided that an ALJ "may" invoke the certification process; 4) in analogous situations in federal courts, statutes nearly identical to § 27(b) are not interpreted as precluding a bankruptcy referee or a magistrate judge from imposing civil sanctions; and 5) it would be highly impractical to require an ALJ to certify all violations of orders to the district court as this would result in relieving ALJs of the power to control the cases before them and it would cause prolonged delays in the resolution of longshore cases. *Olsen I*, 2003 WL 26100022 at *2, n.5.

> 27(b) requires the [ALJ] to follow that section if he decides sanctions should be implemented, but the [ALJ] has the authority to decide *whether* claimant's misconduct falls within Section 27(b) and should be sanctioned.[21] He may also recommend an appropriate sanction in the certification papers to the court.
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> Moreover, the [ALJ] retains control over the proceedings before him. In particular, he retains control over the admission of evidence and the direction of discovery. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). For example, if a party does not submit evidence within his control, the [ALJ] may draw an adverse inference against that party and conclude that the evidence is unfavorable to that party. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). If a party does not act with due diligence in obtaining evidence, the [ALJ] can close the record and exclude the evidence. *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *see also Ezell*, 33 BRBS 19. An [ALJ] also may dismiss claims that have been abandoned, *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989), and can deny a claim for failure of the proponent to present credible evidence establishing a basis for an award.

Id., 2003 WL 26100022 at *8 (citations and footnote omitted; emphasis in original).

In Longshore cases, evidentiary sanctions may be particularly potent because they have a solid basis in the law. ALJs have wide discretion in addressing pre-hearing issues and an ALJ's discovery rulings are reviewed under an abuse of discretion standard. *Olsen v. Triple A Machine Shops, Inc*., 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). The ALJ has great discretion concerning the admission of evidence, and such decisions are reversible only if they are arbitrary, capricious, or based on an abuse of discretion. *See*, *e.g.*, *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). For example, the Board has long held that it is within the ALJ's discretion to exclude even relevant and material testimony for failure to comply with the terms of a pre-hearing order, notwithstanding that an ALJ has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents, 20 C.F.R. § 702.338. *See*, *e.g.*, *Durham v. Embassy Dairy*, 19 BRBS 105 (1986); *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732-733 (1981); *see also* The BRB Longshore Deskbook, Part XXIV, *Pre-Hearing Order* (collecting cases).[22]

The Board's decision in *Dodd v. Crown Cent. Petroleum Corp.*, 36 BRBS 85 (2002), exemplifies an impactful sanction. The Board affirmed the ALJ's denial of claimant's request for reimbursement for expenses related to pain management treatment for the duration of the time claimant refused to undergo a medical examination ordered by the ALJ. The ALJ rejected claimant's evidence in support of his request for reimbursement, pursuant to 29 C.F.R. § 18.6(d)

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[21] The Board's discussion in *Demarco v. Global Terminal and Container Servs., Inc.*, BRB No. 96-1619 (Aug. 22, 1997) (unpub.), illustrates this point. It held that the ALJ erred in dismissing the claim for failure to comply with discovery orders. The Board further noted that the ALJ failed to consider several mitigating factors. Thus, on remand, the ALJ was instructed to determine if employer's interrogatories were necessary, or if claimant's non-responsiveness to these questions would have prejudiced employer. If the ALJ nevertheless were to conclude that sanctions were warranted, the § 27 certification process would have to be followed.

[22] *Available at*: https://www.dol.gov/brb/References/Reference_works/lhca/lsdesk/dbsec19.htm

then in effect. The Board stated that this action was not inconsistent with § 7(d)(4) of the Act, which addresses only the suspension of compensation, or § 27(b). *Dodd*, 36 BRBS at 89, n.6.[23]

A recent ALJ order, affirmed by the Board in *Hansen v. Ports America Texas*, BRB No. 15-0297, 2016 WL 1403216 (Mar. 3, 2016) (unpub.), highlights the ALJ's power to impose evidentiary sanctions. The ALJ sanctioned a self-represented claimant after conducting conference calls to resolve discovery disputes and after repeated failed attempts to contact claimant. Due to claimant's direct and continued violations of the ALJ's orders regarding discovery and submission of trial witnesses and exhibits, the ALJ ordered that claimant was not allowed to call any witnesses other than himself at the hearing, was not allowed to introduce any non-medical exhibits that have not been specifically identified by claimant during the discovery process, and was not allowed to introduce any medical exhibits that were not in the possession of employer.[24] After acknowledging the ALJ's great discretion concerning the admission of evidence, the Board held that "the [ALJ] did not abuse his discretion by imposing sanctions in the form of limiting the evidence claimant could submit." *Id.*, 2016 WL 1403216 at *2 (*citing Patterson*, 36 BRBS 149; *Olsen*, 25 BRBS 40; 29 C.F.R. § 18.6(d)(2) (2014)[25]).

In some cases, evidentiary sanctions may affect the outcome of the case. *See generally A Guide to the Federal Magistrate Judge System, A White Paper Prepared at the Request of the Federal Bar Association* (Peter G. McGabe, Esq.) (Updated October 2016) ("Guide");[26] *see also* 12 Fed. Prac. & Proc. Civ. § 3068.2 (3d ed.) (Wright and Miller) (§ 3068.2 Magistrate Judge Handling of Matters Other Than Trial—Dispositive and Nondispositive Matters). Conversely, in some cases, evidentiary sanctions may be insufficient, as illustrated by *Ports America Outer Harbor Terminals v. Hayes*, No. 17-mc-80129-DMR, 2018 WL 5099272 (N.D. Cal. March 7, 2018), discussed below. Section 22 of the Act, 33 U.S.C. § 922, which provides a liberal standard for modification of ALJ decisions, adds another layer of complexity.

The extent of ALJs' authority to impose sanctions in Longshore cases was recently addressed, in rather cautious terms, in the preamble to the revised OALJ Rules. *See* 80 Fed. Reg. 28767 (May 19, 2015) (29 C.F.R. Part 18, Final Rule). In response to public comments, the

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[23] The Board specifically cited Rule 18.6(d)(2)(iii), which allowed the ALJ to "[r]ule that the non-complying party may not introduce into evidence . . . documents or other evidence . . . in support of . . . any claim . . . ," and Rule 18.6(d)(2)(v), which allowed the ALJ to "[r]ule . . . that a decision of the proceeding be rendered against the non-complying party." The Board stated that, because § 7(d)(4) and § 27 of the Act "are not inconsistent with the regulation at 29 C.F.R. § 18.6(d)(2), the [ALJ] did not err in applying it in this case." It should be noted that *Dodd* predated *Goicochea*.

[24] At the hearing, the ALJ relaxed the sanctions by allowing claimant to submit exhibits that had not already been submitted into the record by employer, and by allowing claimant's testimony to include hearsay statements by persons that claimant had not previously identified to employer (stating that little weight would be accorded to hearsay not corroborated by other evidence).

[25] The Board specifically cited 29 C.F.R. § 18.6(d)(2)(iii) then in effect.

[26] *Available at: https://drive.google.com/file/d/0ByvBzJht_FX3blVMUEhNaVEyaEE/view.* Stating that "discovery motions and sanctions for discovery violations are considered non-dispositive matters, but in certain cases a sanction may effectively dispose of a claim or defense." *Id.* at 48. In Longshore cases, if an ALJ's non-final order is appealed to the Board, the Board determines whether the standard for interlocutory appeal has been met. *See Percoats v. Marine Terminals Corp.*, 15 BRBS 151 (1982) (accepting direct appeal of an order denying depositions); *Lopes v. George Hyman Constr. Co.*, 13 BRBS 314 (1981) (accepting appeal of ALJ's order denying claimant's motion to quash notice of deposition).

preamble acknowledged that some of the sanctions may be precluded by § 27(b), but concluded that the comments overstated the alleged conflicts between the new OALJ Rules and the LHWCA, stating:

> The Department agrees with the commenters that section 927(b) provides the district courts with the exclusive power to punish contumacious conduct consisting of a refusal to comply with a judge's order, lawful process or subpoena, or hearing room misbehavior in proceedings under the LHWCA. See Goicochea v. Wards Cove Packing Co., 37 Ben. Rev. Bd. Serv. (MB) 4, 6 (2003) (vacating dismissal of claim as sanction for claimant's refusal to comply with a judge's discovery order). To the extent that any of the new rules conflict with section 927(b), the latter controls. See 29 CFR 18.10(a). However, there are several situations addressed by the new rules involving conduct that likely would fall outside the categories of contumacy requiring certification to a district court for a section 927(b) summary contempt proceeding. See A-Z Intn'l v. Phillips, 323 F.3d 1141, 1146-47 (9th Cir. 2003) (holding that the district court lacked section 927(b) jurisdiction over conduct that did not involve a refusal "to comply with a summons, writ, warrant, or mandate issued by the ALJ"). See, e.g., 29 CFR 18.35(c) (sanctions for violations of §18.35(b) relating to the representations made when presenting a motion or other paper to the judge), 18.50(d)(3) (sanctions for violations of §18.50(d)(1) pertaining to certifications made when signing disclosures and discovery requests, responses and objections), 18.56(d)(1) (sanctions for violations of the duty under §18.56(c)(1) to protect a person subject to a subpoena from undue burden), 18.57(c) (sanctions for failures to disclose information, supplement an earlier response or to admit as required by §§18.50(c), 18.53 and 18.63(a)), 18.57(d) (sanctions for a party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection), 18.64(d)(2) (sanctions for impeding, delaying or frustrating a deposition), 18.64(g) (sanctions for failing to attend or proceed with a deposition or serve a subpoena on a non-party deponent when another party, expecting the deposition to be taken, attends), 18.72(h) (sanctions for submitting in bad faith an affidavit or declaration in support of or in opposition to a motion for summary decision). To the extent these provisions address violations of the procedural rules falling outside the scope of section 927(b), there is no conflict with the statute.
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> The Department also rejects the commenters' argument that section 927(b) provides the exclusive remedy for any misconduct or rules violation occurring in LHWCA and [Black Lung Benefits Act ("BLBA")] proceedings. Section 927(b) . . . was originally enacted in 1927, decades before the passage of the APA which also governs adjudications under the LHWCA and the BLBA. 33 U.S.C. 919(d); 30 U.S.C. 932(a); [. . .]. Notably, the APA's grant of authority to "regulate the course of the hearing," 5 U.S.C. 556(c)(5), provides a judge with an independent basis to take such actions as are necessary to ensure parties a fair and impartial adjudication. Such authority includes the power to compel discovery and impose sanctions for non-compliance pursuant to the OALJ rules of practice and

> procedure. See Williams v. Consolidation Coal Co., BRB No. 04-0756 BLA, 2005 WL 6748152, at *8 (Ben. Rev. Bd. Aug. 8, 2005), appeal denied, 453 F.3d 609 (4th Cir. 2006), cert. denied, 549 U.S. 1278 (2007).[27] The bifurcation of general adjudicatory authority and contempt powers between [ALJs] and the district courts under the LHWCA is analogous to adjudication in the federal courts after passage of the Federal Magistrates Act, 28 U.S.C. 604, 631-39, under which magistrate judges have general authority to order non-dispositive discovery sanctions while contempt charges must be referred to a district court judge. See Grimes v. City and County of San Francisco, 951 F. 2d 236, 240-41 (9th Cir. 1991) (discussing the scope and limits of magistrate judges' sanction authority)[28]; see also Dodd v. Crown Cent. Petroleum Corp., 36 Ben. Rev. Bd. Serv. (MB) 85, 89 n.6 (2002) (affirming, as not inconsistent with section 927(b), judge's imposition of sanctions pursuant to 29 CFR 18.6(d)(2) for claimant's noncompliance with a discovery order). The Department therefore believes that the commenters' proposal to exempt LHWCA and BLBA proceedings from the judge's authority under the APA to regulate the course of the hearing is neither warranted by the statute nor consistent with the efficient and impartial conduct of administrative hearings.

Id. at 28769-28770 (additional citations omitted); *see also id.* at 28770-28773. More generally, the Department rejected comments which asserted that the litigation sanctions set forth in the OALJ Rules exceed a judge's authority under the APA, and attempt to arrogate contempt power and claim "inherent judicial authority" that is vested exclusively in the Article III courts.[29] *Id.* at 28770. It reasoned that the APA empowers ALJs to regulate the course of a hearing. To ensure integrity and efficiency of the adjudicative process, ALJs must be able to impose litigation sanctions for violating procedural rules to the extent such sanctions do not conflict with the substantive statute. *Id.* The preamble notes that ALJs have used "a broad range of sanctions for the nearly 30 years under the prior rules," including evidentiary sanctions.[30] *Id.*

District Court's Review of an ALJ's Certification of Facts under Section 27

[27] In *Williams*, the Board and the Fourth Circuit recognized the ALJ's authority to draw adverse inferences, but both ultimately denied the appeal on other grounds.

[28] In *Grimes*, the Ninth Circuit held that the magistrate's sanction of $500 per day for failure by the city to comply with a discovery order was not dispositive and did not amount to a finding of contempt that had to be referred to the district court. The Federal Magistrates Act has been amended since the issuance of this decision. *See generally Guide, supra.*

[29] The Department acknowledged that ALJs have no Article III status or powers, and that neither the APA nor FRCP 11 vests contempt powers in ALJs. *Id.* at 28771. The Department further acknowledged that FRCP 11 was determined to be unavailable for incorporation in Longshore claims. *Id.* (collecting cases). *See*, *e.g.*, *R.S. [Simons] v. Va. Int'l Terminals*, 42 BRBS 11, 14 (2008) (rejecting an argument that an ALJ could assess attorney's fees against an employer that were unavailable under § 28 of the LHWCA by using FRCP 11).

[30] When considering § 27 certification or a different sanction, an ALJ may issue an order directing parties to show cause why such measures should not be implemented, which is sometimes sufficient to elicit compliance.

It is well-settled that the Board lacks jurisdiction to review the ALJ's certification of facts to the district court pursuant to § 27(b). *A-Z Int'l v. Phillips [Phillips I],* 179 F.3d 1187, 33 BRBS 59(CRT)(9th Cir. 1999); *Floyd v. Penn Terminals, Inc.,* 37 BRBS 141 (2003).[31]

Two district court cases, of which one is quite recent, discuss the procedure to be used with respect to § 27 certifications. In *Olsen II,* 2008 WL 131665, the District Court for the Northern District of California looked to *Proctor v. State Government of North Carolina,* 830 F.2d 514 (4th Cir. 1987), which provided the following framework to be applied by a district court in reviewing a magistrate judge's certification of facts regarding contempt under then-current language in the Federal Magistrate Judges Act that mirrored the language of § 27(b) of the LHWCA. A certificate of facts is considered the statement of a *prima facie* case and any party should be allowed the opportunity to introduce evidence challenging the magistrate judge's certification. If no evidence is submitted and the certified facts, if true, would support a violation, then the court may find a party in contempt. If evidence is submitted, it must be considered along with the certification to determine whether a finding of contempt can be sustained. Applying the *Proctor* framework, the district court in *Olsen II* found that the ALJ's certification was unrebutted because the claimant had offered no evidence calling it "into doubt." As noted above, the court ultimately determined that a coercive sanction was appropriate, and therefore ordered the Secretary of Labor to reassign the claimant's disability checks to the district court pending his cooperation in the modification proceeding before the ALJ.[32] *Olsen II,* 2008 WL 131665 at *3-4.

In *Hayes*, 2018 WL 5099272, a case involving a self-represented clamant, the same district court followed *Olsen II*. Claimant filed a claim for hearing loss, but failed to cooperate in audiological testing performed at employer's request. Employer filed a motion to compel attendance at an examination and cooperation. The ALJ granted the motion and warned that the failure to cooperate could result in sanctions, including dismissal. Claimant again failed to cooperate. Employer filed a motion for sanctions, asking for dismissal. Claimant, whose counsel withdrew, did not respond. The ALJ granted the motion, but declined to impose a sanction in light of *Goicochea*, 37 BRBS 4. Instead, the ALJ certified the matter to the district court for the imposition of an appropriate sanction under § 27(b). In the Certificate of Facts, served on all parties, the ALJ stated that claimant had been given four opportunities to cooperate but had failed to do so, despite being ordered. The ALJ recommended dismissal as a sanction, explaining that imposition of a lesser sanction, such as barring claimant from introducing audiological evidence, could be insufficient to preclude claimant from obtain medical benefits if employer were unable to rebut the 20(a) presumption due to claimant's non-cooperation.

Employer then filed a miscellaneous action in a district court pursuant to § 27(b) and moved to dismiss the claim. The matter was assigned to a magistrate judge. Claimant did not file an opposition and did not appear at the evidentiary hearing. The court found only one case –

[31] In *Floyd*, citing *A-Z Int'l*, the Board declined to review the ALJ's certification of facts to the federal district court regarding claimant's alleged misrepresentations. Claimant argued that the ALJ erred by certifying the facts to the district court regarding his alleged misstatements on an LS-200 form and regarding a pre-existing back condition. Claimant asserted that the proper remedy for misrepresentations on an LS-200 are set forth in § 8(j) of the Act, 33 U.S.C. § 908(j), and its implementing regulations, and thus the ALJ's use of § 27(b) as a remedy was improper. The Board did not reach the merits of this argument.

[32] The ALJ was ordered to inform the court when he believed the claimant was participating in good faith, so that the district court could order the Department of Labor to recommence issuing the checks in the claimant's name.

Olsen II – that discussed the standard of review that a district court should apply in certifying facts under § 27(b). Applying the same framework used in *Olsen II*, the magistrate judge found that the *prima facie* case contained in the certificate of facts was unrebutted and recommended dismissal with prejudice for claimant's failure to comply with the ALJ's order to cooperate at employer's examination. The magistrate agreed with the ALJ that any action less than dismissal would not be appropriate under these circumstances because claimant's failure to cooperate with the testing effectively blocked employer's ability to develop evidence to rebut the statutory presumption of compensability. Thereafter, the district court issued an order adopting the report and recommendation in full and dismissing the action (No. C 17-80129 JSW). Based on the order, the ALJ dismissed the case. *See Hayes v. Ports America Outer Harbor Terminal*, No. 2016-LHC-01940 (ALJ Apr. 2, 2018).

Conclusion

The ALJ's authority to impose sanctions in Longshore cases, while limited by § 27, is substantial. Such sanctions will be upheld by the Board when substantiated by the facts and procedurally sound. Further, although certification of facts to the district court under § 27(b) is rarely invoked, it is an option available to ALJs in appropriate cases.