U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

Appeals of the Decision and Order – Denying Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Ian Anderson, Kew Gardens, New York, for claimants.

Sarah B. Biser (Fox Rothschild, LLP), New York, New York, for E. Pihl & Sons.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decision and Order – Denying Benefits (2012-LDA-00540, 2012-LDA-00541, 2012-LDA-00543) of Administrative Law Judge Adele H. Odegard rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Each claimant contends his injury occurred as a result of the same event. On January 21, 1968, a United States Air Force B-52 bomber crashed near Thule Airbase in Greenland. The plane carried nuclear weapons, and the crash released radioactive plutonium (Pu-239). The U.S. military commenced clean-up operations to remove aircraft debris as well as

[1] The Board granted claimants' motion to consolidate these cases for purposes of decision in its Order dated April 9, 2018. The claims were consolidated for decision by the administrative law judge as well. The Board denies claimants' motion for oral argument, filed September 19, 2018. 20 C.F.R. §§802.305-802.306.

contaminated ice and snow, loading it into storage tanks to transport back to the United States. Clean up, designated "Operation Crested Ice," lasted from January to September 1968. Claimants worked for the Danish Construction Corporation (DCC), a joint venture of Danish companies. They were assigned to the airbase and assisted with the clean-up operations. Claimants allege they were exposed to plutonium radiation which caused their cancers and resulted in losses of wage-earning capacity. They filed claims under the Act in the summer of 2010.[2] Decision and Order at 3-5, 118-119; CX 1; DX 1(a); HX 1.

Claimant Carswell was a shipping clerk responsible for verifying freight and for preparing documentation and labels to enable transport and identification of container contents. He alleges he was exposed to Pu-239 while he worked in the hangar in the vicinity of the loading operations and when he accompanied inspectors to the "tank farm" where workers transferred contaminated snow and ice from storage tanks to transport tanks. Carswell testified he was diagnosed with stomach and esophageal cancer in 1984 and underwent surgery. Tr. at 114-116. In 2005, he was diagnosed with a thyroid problem.

Claimant Hansen was a carpenter responsible for constructing shelters for workers at the crash site, shovels for scooping contaminated materials, and chutes for filling the storage tanks. He alleges he was exposed to Pu-239 when he delivered timbers and built shelters at the crash site and when he worked on the chutes in the vicinity of the loading operations. HX 6. Hansen was diagnosed with kidney cancer, and he underwent surgery in 2002 to remove his tumorous left kidney. HX 3.

Claimant Eriksen was a fireman assigned to observe the welding of the tanks and put out fires. He alleges he was exposed to Pu-239 while working in and near the hangar where the loading operations took place.[3] He testified that the floor of the hangar was often wet with contaminated melted ice and snow. Tr. at 176-180, 192-196, 285-290. In 2005, he was diagnosed with kidney cancer and had surgery to remove his tumorous left kidney. EX 3; Tr. at 203-209.

The administrative law judge, inter alia, found that: 1) the claims of Carswell and

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[2] Only two venture companies of the DCC were viable at the time claimants filed their claims: E. Pihl & Sons (Pihl or employer) and Topsoe-Jensen & Schroeder (Topsoe). Topsoe refused service and refused to participate in the proceedings. While this case was pending before the administrative law judge, Pihl filed for bankruptcy in Denmark; the bankruptcy court permitted Pihl's counsel to continue in these proceedings. Decision and Order at 3-4.

[3] Eriksen did not work at the crash site; the fire that resulted from the crash was left to burn itself out. Tr. at 218-219.

Hansen were untimely filed;[4] 2) claimants invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking their harms to the exposure to Pu-239;[5] 3) employer rebutted the presumption; 4) claimants failed to establish a causal relationship between their exposures and their cancers on the record as a whole; 5) claimants were not entitled to a default judgment against Topsoe; and 6) the Director, Office of Workers' Compensation Programs (the Director), was a proper party to the proceedings. Decision and Order at 139-146, 158-161. She denied the claims. *Id.* at 163-164.

Claimants appeal, challenging the administrative law judge's findings that two of the claims were not timely filed, that there is not a causal connection between their injuries and their employment exposure to plutonium radiation, and that default judgment was not warranted against Topsoe.[6] Employer responds, urging affirmance, to which claimants

[4] The administrative law judge also found Eriksen's claim for disability due to his surgery to be untimely filed, but his claim for benefits following his retirement in 2008 is presumed timely. Decision and Order at 134. At the time of the hearings, Carswell was working in human resources for a cruise line; Hansen and Eriksen were retired. *Id.* at 10, 18, 25.

[5] The administrative law judge acknowledged employer's argument that, although the Thule incident occurred and caused the dispersion of plutonium radiation, the amount of exposure was small and could not have caused claimants' conditions. Decision and Order at 145.

[6] Claimants also appeal "all related motions" decided during the proceedings before the administrative law judge; however, in addition to the denial of a default judgment, they specifically challenge only two other orders. Claimants first contend the administrative law judge erred in admitting Dr. Juel's testimony and reports into evidence because he was not an expert witness. Tr. at 1755-1766. The administrative law judge has great discretion concerning the admission of evidence and the issuance of a motion to compel, and any decisions in this regard are reversible only if arbitrary, capricious, or an abuse of discretion. *See Mugerwa v. Aegis Defense Services*, 52 BRBS 11 (2018), *recon. denied*, BRB No. 17-0407 (Oct. 4, 2018); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Because of Dr. Juel's status as a government employee at the University of Southern Denmark, the Danish government prohibited his testimony as an expert witness. Tr. at 1755-1766. The administrative law judge did not abuse her discretion in permitting Dr. Juel to testify as a "fact witness" as claimants' counsel was permitted to cross-examine him. *See generally Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997).

Claimants also challenge the administrative law judge's order declining to compel Dr. Siegel to conduct urinalyses. The administrative law judge permitted the doctor to

filed a reply brief. The Director also responds to the petition for review and urges affirmance of the administrative law judge's denial of benefits.[7]

We first address claimants' contentions regarding a causal nexus between their work and their injuries as it is the dispositive issue.[8] Claimants contend the administrative law judge erred in finding that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption linking their cancerous conditions to their plutonium exposures.[9] Once the Section 20(a) presumption is invoked, as here, the relevant inquiry is whether the employer produced substantial evidence of the lack of a causal nexus. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008); *see Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *see also American Grain*

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decide which objective tests would assist him in drawing his conclusions. Order at 7 (June 10, 2013). We reject claimants' contentions that the administrative law judge abused her discretion in this regard. *See generally Augillard v. Pool Co.*, 31 BRBS 62 (1997). As claimants are the proponents of the compensability of their claims, nothing prevented them from obtaining and submitting urinalysis evidence themselves.

[7] We acknowledge receipt of claimants' pleading wherein claimants reject the Director's brief and reserve any rights they may have against the Director and the agency should the Board accept and give weight to the Director's brief and arguments. We reject claimants' contention that the Director is not a proper party in proceedings under the Act before the administrative law judge and the Board. The Act's regulations establish the Director's standing. *See* 20 C.F.R. §§701.201, 702.321(b)(3), 702.333(b); 801.2(a)(10); *see Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989); *Powell v. Brady Hamilton Stevedore Co.*, 17 BRBS 1 (1984); *see also Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991); Board's Order (October 11, 2018).

[8] While claims for disability benefits must be filed within a specific period following a claimant's awareness of the relationship between his injury, work, and disability, claims for medical benefits are never time-barred. *Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994) (decision on recon. *en banc*).

[9] The administrative law judge invoked the Section 20(a) presumption based upon the opinions of Drs. Barnaby, Edwards, and Rollins that claimants' cancers were caused by their exposure to Pu-239, in conjunction with claimants' testimony and the evidence establishing the occurrence of the plane crash and the potential for plutonium exposure. Decision and Order at 140-144.

Trimmers v. Director, OWCP, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). An employer's burden on rebuttal is one of production, not persuasion; it is an "objective test," and the determination of whether the employer has produced "substantial evidence" that a reasonable mind would accept as evidence of the non-work-relatedness of the injury is a legal judgment and is not dependent on the relative credibility of competing evidence. *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT).

Employer presented, inter alia, the medical opinions of Drs. Mettler and Turnbull and the plutonium radiation dosage estimates of Dr. Anspaugh. The administrative law judge found this evidence rebuts the Section 20(a) presumption. Decision and Order at 145-146. Dr. Anspaugh, who has a Ph.D. in biophysics and is an expert in the field of radiation dosimetry, relied on documents from and about the Thule incident, as well as studies on plutonium radiation and his own expertise to conclude that the uppermost dose of radiation claimants' organs could have received from the Thule incident was far less than the average exposure a person is subjected to each year from background radiation. DX 23 at 8, 13; *see* Decision and Order at 47-49, 89-101. He considered the amount of radiation dispersed from weapons-grade plutonium and explained that plutonium must enter the body through inhalation, ingestion, or an open wound in order to be hazardous, and its normal targets are the lungs, the liver, and the bones. Further, he stated that, because none of the urine samples from the 1988 studies of non-Americans who were at Thule at the time of the 1968 incident met the detection limit of the test (no positive results of radiation), claimants, likewise, would have received no demonstrable dose from the clean-up activities. DX 23 at 1, 9-14; *see also* DXs 26-30.

Dr. Mettler, a medical doctor board certified in radiology and nuclear medicine and an expert on the effects of radiation on humans, opined that claimants' diseases were not due to plutonium radiation from the Thule incident given Dr. Anspaugh's dosage estimates. DX 32. Based on the studies he attached to his report, and with a high degree of certainty, Dr. Mettler stated there is extremely low probability of a causal relationship because there is no evidence in the literature of increased incidents of stomach, esophagus, and kidney cancers with exposure to plutonium radiation. *Id.* at 9-10; DX 33; *see* Decision and Order at 55-61, 101-106. Similarly, Dr. Turnbull, an emeritus oncology surgeon from Sloan-Kettering Cancer Center specializing in the gastric and mixed tumor service, testified that Carswell's stomach and esophagus cancer is more likely to be related to his Barrett's esophagus and reflux syndrome, or to an H. pylori infection, than to exposure to plutonium. He also stated that any thyroid problems Carswell may have (which he found to be unclear) are age-related. DX 35 at 3-4; DX 42; *see* Decision and Order at 63-65, 109-113.

An expert's opinion, given to a reasonable degree of medical or scientific certainty, that a claimant's condition is not causally related to an injurious exposure at his work

constitutes substantial evidence rebutting the Section 20(a) presumption. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013). Therefore, the administrative law judge correctly found that the opinions of Drs. Anspaugh, Mettler, and Turnbull constitute substantial evidence rebutting the Section 20(a) presumption linking claimants' cancers to plutonium radiation. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012); *Cline*, 48 BRBS 5. We affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption in each case.

Once the Section 20(a) presumption has been rebutted, it drops from the case, and the question of a causal relationship must be decided on the record as a whole with each claimant bearing the burden of establishing the work-relatedness of his injury by a preponderance of the evidence. *Sprague*, 688 F.2d 862, 15 BRBS 11(CRT); *see Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). On the record as a whole, the administrative law judge found that claimants provided little evidence linking plutonium exposure and their respective cancers, though they demonstrated the risks of plutonium exposure in general. She gave little weight to claimants' experts, specifically noting the lack of detailed explanations or evidentiary support from either Dr. Robbins, who reviewed Hansen's and Eriksen's records, or Dr. Edwards, Carswell's treating physician.[10] Decision and Order at 152-154; CXs 3, 5; DXs 7a, 11, 14-15; EXs 3-5; HXs 3, 5. She also acknowledged that employer's experts are better credentialed, with greater experience and expertise on the topics of cancer and radiation, than claimants' experts.[11] *Id.* at 152. The administrative law judge found:

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[10] Dr. Robbins stated only that it is "reasonable" to conclude kidney cancer is associated with the "potential risk of plutonium inhalation during the period [they were] involved in contamination clean-up operations at Thule." DX 7a; EX 5; HX 5. Dr. Edwards stated "it is widely accepted that exposure to ionizing radiation can cause many cancers – carcinoma of the stomach being one of them." DX 11. He also stated "there is a reasonable degree of probability" that Carswell's hypothyroidism is "attributable to the longterm effect of radiation exposure." CX 5; DX 14. Neither doctor provided scientific support for their conclusory statements. Additionally, Dr. Turnbull disputed Dr. Robbins's categorization of Hansen's and Eriksen's kidney cancers as "advanced" because "advanced" generally refers to widespread cancer, and, here, the tumors were contained and removed with good results. DX 35 at 6.

[11] The qualifications of Drs. Robbins and Edwards are not in the record, but Dr. Turnbull looked them up. Decision and Order at 152 n.241. Per Dr. Robbins's letterhead

> [I]n order for me to conclude that the Claimants' health conditions were due to any plutonium radiation exposure at Thule, I would have to discount the opinions of highly-credentialed physicians and ignore a multitude of medical and epidemiological studies, in favor of the vague opinions of Dr. Robbins and Dr. Edwards, as well as the conclusory opinion of Dr. Barnaby. I would also have to ignore the testimony of Dr. Mettler and others regarding the specific health effects of plutonium radiation, in favor of reports and studies that addressed the health effects of radiation, but did not specify the type of radiation involved.

Decision and Order at 158;[12] *see id.* at 155-157;[13] *see also* CX 9; DOLXs 2-3, 10; EX 9;

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and Dr. Turnbull's research, Dr. Robbins specializes in allergies and environmental health, and Dr. Edwards is a general practitioner with a special interest in dermatology, obstetrics, gynecology, and fertility. *Id.*; DX 35; EX 5; HX 5. Employer's experts, on the other hand, all specialize in studying cancer or radiation and their effects on the human body.

[12] Claimants submitted the report of Dr. Barnaby, who has a Ph.D. in nuclear physics and specializes in nuclear weapons. He discussed weapons-grade plutonium and toxicity due to radioactivity and chemicals, stating, in general, that it is cancer-causing. He concluded that participation in the clean-up operations "would have seriously exposed [claimants] to the risk of plutonium inhalation and the long-term development of cancer." GX 3. Dr. Anspaugh questioned Dr. Barnaby's summary conclusion, as his report was less than three pages long, did not contain any quantitative information or supporting studies, and was vague. DX 23 at 10.

[13] The administrative law judge acknowledged the large number of studies presented by the parties but specifically noted "there cannot be an epidemiological study more relevant to the issues before me than Dr. Juel's study of the DCC workers at Thule" during the time of the crash and clean-up. Decision and Order at 157 n.257. Dr. Juel holds a Ph.D. in epidemiology and is the head of a research program on health and morbidity at the National Institute of Public Health in Denmark. DX 38; Tr. at 1766-1769. Having conducted multiple studies concerning the health effects, cancer incidence, and morbidity rate of Thule crash workers and compiled data from other studies as well as from Danish hospital and death registries, he concluded there is no difference in total mortality rates or hospital admission rates between those Danes who worked at Thule at the time of the crash and clean-up and those who worked at Thule at other times. Dr. Juel concluded there were no harmful effects from having participated in the Thule clean up. DXs 5, 38, 45; *see* Decision and Order at 50-53, 113-116.

HX 8.

Having exhaustively set forth the evidence and having permissibly identified the evidence she deemed probative, Decision and Order at 7-117, we reject claimants' assertions that the administrative law judge erred in giving greater weight to employer's evidence. The fact-finder has the discretion to weigh, credit, and draw her own inferences from the evidence of record; she is not bound to accept the opinion or theory of any particular expert. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Perini Corp. v. Heyde,* 306 F. Supp. 1321 (D.R.I. 1969). The Board may not reweigh the evidence but may assess only whether there is substantial evidence to support the administrative law judge's decision. *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961); *see also Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 U.S. 954 (1963); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981).

The administrative law judge found that claimants did not satisfy their burden of proving the causal nexus between their employment at the Thule airbase and their medical conditions. She gave greater weight to the evidence of record refuting any causal connection between any exposure to Pu-239 and claimants' cancers. These findings are rational and supported by substantial evidence.[14] *Victorian v. International-Matex Tank Terminals,* 52 BRBS 35 (2018); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Therefore, we affirm the administrative law judge's denial of benefits.[15]

[14] Claimants assert that employer's evidence conflicts with other federal laws recognizing that radiation is cancer-forming. Cl. Br. at 11, 22-23. The enactment of other laws, which have their own criteria for applicability, does not negate the requirements for establishing entitlement to benefits for a specific injury in a claim under the Act. *See* 42 U.S.C. §1651(c) (exclusivity of liability); 33 U.S.C. §905(a) (exclusivity of liability); *Vilanova v. U.S.*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989) (exclusivity); *see also O'Connor v. Yezukevicz,* 589 F.2d 16 (1st Cir. 1978) (absent subject matter jurisdiction, statute does not apply). Nor does such other law interfere with an administrative law judge's authority to weigh the evidence before her. 5 U.S.C. §554 *et seq.*; 33 U.S.C. §§919, 923, 927.

[15] We reject claimants' contention that the administrative law judge should have immediately granted their motion for a default judgment against Topsoe. Section 18.21(c) of the Rules of Practice and Procedure of the Office of Administrative Law Judges provides:

Accordingly, the administrative law judge's Decision and Order is affirmed.

> *Failure to appear*. When a party has not waived the right to participate in a hearing, conference or proceeding but fails to appear at a scheduled hearing or conference, the judge may, after notice and an opportunity to be heard, dismiss the proceeding or enter a decision and order without further proceedings if the party fails to establish good cause for its failure to appear.

29 C.F.R. §18.21(c) (emphasis in original). The language makes clear that the decision to issue an order against a party who has failed to appear or establish good cause is discretionary. *Id.* Generally, courts are to issue default judgments sparingly but set them aside readily. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136, 140 (2002) (citing *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2d Cir. 1993)). FRCP 55 provides guidance for determining whether a party has established good cause such that default should not be ordered or should be set aside. Fed. R. Civ. P. 55; *see also McCracken*, 36 BRBS at 140. One factor to consider is whether the party has a meritorious defense. *Id.*; *see Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1, 3 (1st Cir. 2010).

By virtue of their relationship as members of the DCC joint venture, the administrative law judge recognized that Pihl and Topsoe have the same liability such that Pihl's defense can be attributed to Topsoe. Decision and Order at 160: Order Denying Claimants' Motion for Default Judgment at 5; *see generally U.S. v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007) (members of joint venture have common legal interest in venture's defense); *Edens v. Hannigan*, 87 F.3d 1109 (10th Cir. 1996) (representation of multiple defendants poses no conflict unless there is a divergence of interests with respect to a material fact or legal issue); ALJX 1. By not addressing claimants' motion for default judgment until after she considered all the evidence and rendered her decision, the administrative law judge determined Pihl's non-liability and, consequently, Topsoe's. Decision and Order at 160; *see* Fed. R. Civ. P. 55(b)(2); *see Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young, Inc.*, 109 F.3d 105 (2d Cir. 1997) (court may conduct a hearing to ensure there is a basis for damages and to ascertain the amount for which the defendant would be liable); *see also Indigo Am., Inc. v. Big Impressions, LLC*, 597 F.3d 1 (1st Cir. 2010) (court set aside default judgment after considering factors). The granting of default judgment is discretionary; claimants have not shown that the administrative law judge abused her discretion by delaying a decision on the motion until she determined the compensability of the claims based on the evidence presented by the appearing parties. *See Indigo Am., Inc.*, 597 F.3d at 3; *McCracken*, 36 BRBS at 140. The finding in favor of Pihl means there is no basis to render judgment against Topsoe.

SO ORDERED.

BETTY JEAN HALL,
Chief Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge