BRB Nos. 00-838,
00-838A and 00-838B

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| JOSEPH D. WEBER, III | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| S.C. LOVELAND COMPANY | ) | |
| | ) | |
| Employer-Respondent | ) | |
| Cross-Petitioner A | ) | |
| | ) | |
| and | ) | |
| | ) | |
| AETNA CASUALTY | ) | DATE ISSUED: Jan. 30, 2002 |
| AND SURETY COMPANY | ) | |
| | ) | |
| Carrier-Respondent | ) | |
| Cross-Petitioner B | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CHUBB INSURANCE COMPANY | ) | |
| | ) | |
| Carrier-Petitioner | ) | |
| Cross-Respondent B | ) | |
| | ) | |
| and | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' | ) | |
| COMPENSATION PROGRAMS, | ) | |
| UNITED STATES DEPARTMENT | ) | |
| OF LABOR | ) | DECISION AND ORDER |
| | ) | ON MOTIONS FOR |
| Party-in-Interest | ) | RECONSIDERATION |

Appeal of the Decision and Order Upon Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Jane G. O'Donnell (Deasey, Mahoney & Bender, Ltd.), Philadelphia,

Pennsylvania, for claimant.

Michael Huber (Freeman, Barton, Huber & Sacks, P.C.), Haddonfield, New Jersey, for employer.

John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Aetna Casualty & Surety Company.

David R. Kuntz (David Robertson Kuntz & Associates), Philadelphia, Pennsylvania, for Chubb Insurance Company.

Joshua T. Gillelan II (Eugene Scalia, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, employer, Chubb Insurance Company (Chubb), and the Director, Office of Workers' Compensation Programs (the Director), have filed timely motions for reconsideration of the Board's decision in the captioned case, *Weber v. S.C. Loveland Co. [Weber II]*, 35 BRBS 75 (2001). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Aetna Casualty and Surety Company (Aetna) and employer have filed response briefs.

The facts of this case are not in dispute. To reiterate, on May 3, 1986, while working for employer as a field superintendent, claimant injured his back in the port of Kingston, Jamaica, when he was walking on the catwalk on employer's barge, and he slipped and fell. Claimant was hospitalized in Jamaica and later flown back to the United States. Chubb has paid claimant medical benefits in the amount of $550,335.79 and workers' compensation payments in the amount of $231,880.67, under Pennsylvania law pursuant to the Foreign Voluntary Workers' Compensation insurance policy purchased by employer. From May 3, 1986, through February 18, 1989, in addition to payments from Chubb, claimant received from employer supplementary payments of salary in contemplation of its potential liability under the Jones Act.

Claimant's usual job at the time of his injury included making repairs, cleaning and painting employer's vessel, loading and unloading cargo, and transferring people to different jobs. Claimant testified that 90 to 95 percent of his work occurred within the United States, and the remaining time was spent in other countries, including Canada, Mexico, Columbia,

Costa Rica, Venezuela, Cuba, and Jamaica. On the day of his injury, claimant was sent to Jamaica to discharge a vessel's grain cargo, which had been loaded in New Orleans, Louisiana.

Claimant brought an action in the United States District Court for the Eastern District of Pennsylvania under the Jones Act, 46 U.S.C. §688 *et seq*. In an Order dated March 18, 1989, the court determined that the Jones Act did not apply and granted summary judgment in favor of employer. The court found that claimant is an "employee" under Section 2(3) of the Longshore Act, 33 U.S.C. §902(3), and not a Jones Act seaman. Cl. Ex. 1. Following the dismissal of the Jones Act case, employer continued to pay claimant his salary, in appreciation of claimant's past services, until June 30, 1994.[1]

In his initial decision, the administrative law judge found, and the parties do not dispute, that claimant meets the status requirement of Section 2(3) of the Act. However, the administrative law judge determined that "navigable waters of the United States," pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a), did not extend to the territorial waters of another nation. As claimant's injury occurred in the territorial waters of Jamaica, the administrative law judge concluded that claimant did not meet the Section 3(a) situs requirement, and he denied claimant benefits.

[1]On October 12, 1993, employer, S.C. Loveland, filed for bankruptcy, and subsequent to a final decree on October 27, 1995, a new company was formed. The new company purchased the assets and the name from the bankrupt company and became a new "S.C. Loveland Co." which is still in operation. Because it sold its name, the "old" company needed a new name and is now known as "Loveland Holdings." Loveland Holdings, therefore, is the name of the bankrupt employer for which claimant worked and was injured and against which claimant would have any claim for benefits.

Claimant appealed, and the Board reversed the administrative law judge's determination that claimant's injury did not occur on a site covered under the Act. Relying on cases which discuss the Act's coverage over injuries occurring on the high seas,[2] the Board held that Longshore Act coverage extends to claimant who was injured in the port of Kingston, Jamaica. The Board remanded the case for the administrative law judge to address Chubb's contention regarding its right to reimbursement from employer's longshore carrier, Aetna, and employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). *Weber v. S.C. Loveland Co. [Weber I]*, 28 BRBS 321 (1994).

On remand, the administrative law judge determined that claimant's injury is covered by the Act, pursuant to the Board's decision in this matter. Decision and Order Upon Remand at 6. The administrative law judge next found that the longshore endorsement contained in the insurance policy issued by Aetna does not provide coverage for claimant's injury, as it limits coverage only to work performed in the states designated therein and does not cover injuries extending beyond the borders of the United States. *Id.* at 12. By contrast, the administrative law judge found that the insurance policy issued by Chubb did cover claimant's injury, as no exclusion for longshore benefits is contained in Coverage A of that policy. Accordingly, the administrative law judge concluded that Chubb is not entitled to reimbursement from Aetna, but found that pursuant to Section 14(j) of the Act, 33 U.S.C. §914(j), employer is entitled to reimbursement from Chubb for the payments employer made from May 3, 1986, through February 18, 1989, under the assumption that it would be reimbursed by its Jones Act carrier. *Id.* at 13-15. Employer, Chubb and Aetna each appealed this decision.

In its decision, the Board held it will adhere to its holding that claimant's injury occurred on a covered situs, as being the law of the case. *Weber II*, 35 BRBS at 78-79. The Board also addressed the issue of responsible carrier and reversed the administrative law judge's conclusion that Chubb is liable for claimant's longshore benefits. After a review of the two insurance policies, the Board concluded that neither policy covers the injury herein and that employer is liable for claimant's longshore benefits. *Id.* at 81. Finally, as the parties, including the Director, had stipulated to liability of the Special Fund, the Board modified the administrative law judge's decision to reflect employer's entitlement to Section 8(f) relief. *Id.* at 82. In footnotes pertinent to the motions herein, the Board held harmless the administrative law judge's failure to consider Aetna's lack of a response to a request for

[2]*Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995); *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *Cove Tankers Corp. v. United Ship Repair*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982).

admissions, *Id.* at 81 n.7, and it noted that Chubb did not appeal the administrative law judge's ruling that it is not entitled to a credit from Aetna, but maintained only that it is entitled to reimbursement from the Special Fund, *Id.* at 82 n.9.

Four parties have moved for reconsideration of this decision, raising numerous issues.[3]

*Effect of the Administrative Law Judge's August 4, 1998 Interlocutory Order*

[3]Employer moves for oral argument, stating that the issues herein are novel. 20 C.F.R. §802.305. We deny employer's motion. 20 C.F.R. §802.306.

Claimant and employer move the Board to reverse its decision, contending that no party appealed the administrative law judge's order of August 4, 1998, denying employer's motion to be dismissed from the case and finding that one of the insurance companies, and not employer, would be held liable for claimant's benefits, and that order is final and controlling.[4] Thus, they argue that the Board's decision holding employer liable for claimant's benefits is contrary to that final order. We reject this argument. The order on which claimant and employer rely in asserting that a carrier *must* be held liable in this case was interlocutory and did not conclusively resolve any issue of the case. Rather, the administrative law judge identified the disputed issue of responsible carrier and stated that a resolution of this issue would be forthcoming in a Decision and Order. Such an order is non-final and could not have been appealed at the time it was rendered because it did not meet the criteria for the Board to accept an interlocutory appeal. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). However, failure to appeal an interlocutory order does not bar consideration of any issues raised therein when a final decision is issued, as appeal of those findings may be made after the final decision is issued. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Butler*, 28 BRBS 114; 20 C.F.R. §702.350. Moreover, an employer is primarily liable for a claimant's benefits, and it remains so in the absence of an insurance carrier. 33 U.S.C. §§904, 905, 932, 935, 936; *see B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989). Consequently, we deny the motion to reverse the Board's decision on these grounds.

*Effect of Foreign Voluntary Workers' Compensation Insurance*

Claimant and employer next argue that the Board erred in holding employer, and not Chubb, liable for longshore benefits. They first assert that the Board remanded the case to the administrative law judge with the authority to determine the responsible carrier and,

[4]Specifically, employer filed for bankruptcy, listing claimant as a creditor, and its debts were discharged as a result of the bankruptcy proceedings. Accordingly, it moved to be dismissed from the Longshore case. The administrative law judge denied employer's motion in an August 4, 1998 Order wherein he stated: "Since the Carrier with liability will be established by my Decision and Order, and the Employer cannot be found liable since there are two viable carriers disputing coverage, the issue is moot." Order at 2.

without a change in the underlying facts, the Board cannot disturb the administrative law judge's decision. We reject this assertion. The Board is vested with the power to review the administrative law judge's decision, and, if his findings of fact and conclusions of law are not supported by substantial evidence, are not rational, or are not in accordance with law, 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965), then they cannot be affirmed. To hold that the Board cannot review an administrative law judge's responsible carrier findings unless there has been a change in the underlying facts is to divest the Board of its statutory review authority.

The issue before the administrative law judge involved which of two, if any, insurers was on the risk for longshore benefits at the time of claimant's injury and is liable for those benefits.[5] Consequently, it is necessary to review the language of the insurance contracts to determine whether employer had longshore insurance for this injury and which, if either, of

[5]The Fifth Circuit recently held that contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the administrative law judge and the Board. *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001). This case, however, does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of employer's carriers is liable. The administrative law judge has the authority to address this issue. *See, e.g., Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999) (responsible carrier is issue properly addressed by administrative law judge on remand).

the two carriers is the "carrier of record." *See Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. (TESI)*, 261 F.3d 456, 464, 35 BRBS 92, 98(CRT) (5th Cir. 2001). The question of responsible carrier is a question of fact, and, while the administrative law judge is vested with authority to fact-find, the Board's review authority is such that it need not accept an ultimate finding or inference which was reached in an invalid manner, *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965), or which is not supported by substantial evidence, *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968). In this case, the administrative law judge made a finding of fact as to the liability of Chubb based on its insurance policy with employer. On review, the Board thoroughly addressed the language of both insurance policies to determine the responsible party. In doing so, it recognized a fallacy in the administrative law judge's reasoning leading to his conclusion that Chubb is liable, and it reversed that finding. *Weber II*, 35 BRBS at 81-82. Such action is within the Board's powers of review.

Next, claimant and employer contend the Board erred in relieving Chubb of liability for longshore benefits, arguing that the Foreign Voluntary Workers' Compensation Policy equated to a longshore endorsement. We disagree, and we reaffirm the holding that Chubb is not liable for benefits under the Longshore Act. As the Board discussed in *Weber II*, 35 BRBS at 80-81, the relevant portions of the coverage section of the policy provide:

> **Coverage A–Workers' Compensation**
>
> The Company agrees to pay voluntarily on behalf of the **Insured** to **employees** defined in this insurance schedule, the compensation, medical and other benefits specified in the **Worker's Compensation Law** of the state or province designated in this insurance schedule in the same manner as if such **employees** were covered under the provisions of the said law or laws.
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> **Coverage B–Employer's Liability**
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> The Company agrees to pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as damages because of the **bodily injury** by accident or disease, including death at any time resulting therefrom, sustained by an **employee** as defined in this insurance schedule and arising out of and in the course of employment in operations connected with his employment in a country or countries stated in this insurance schedule.
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> * * *
>
> **Application of this Insurance**

This insurance applies only to injury (1) by accident occurring during the policy period, or (2) by disease caused or aggravated by exposure of which the last exposure, in the employment of the **Insured**, to conditions causing the disease occurs during the policy period.

The coverage afforded herein shall attach and shall terminate as respect any individual **employee** as follows:

> A. If the **employee** is not hired in the **United States** or Canada, coverage shall attach from the moment he is hired or assigned for such work and shall terminate at the moment his employment or assignment is terminated.
>
> B. If the **employee** is hired within the **United States** or Canada, coverage shall attach at the time of his departure from the **United States** or Canada and shall terminate upon his return to the **United States** or Canada; except that if the **employee** resigns from his employment or elects after termination of his employment to remain outside the **United States** or Canada, coverage shall in either case terminate upon termination or his employment.

Jt. Ex. 2 at 24 (bold in original policy). Paragraph 6 of the "Exclusions" Section, which delineates when the policy will not apply, was amended on January 1, 1985, and states the following:

Under Coverage B, to bodily injury, including death resulting therefrom, sustained by a master or member of the crew of any vessel or by any employee of the Insured in the course of an employment subject to the United States Longshoremen's and Harbor Workers' Compensation Act, U.S. Code (1946) Title 33, Sections 901-49, or the Federal Employers' Liability Act, U.S. Code (1946) Title 45, Sections 51-60, or sustained by any member of the Flying Crew of any Aircraft.

*Id.* at 10, 25.[6] *Weber II*, 35 BRBS at 80-81.

[6]The original policy excludes the Longshore Act from Coverage B; the amendment adds the Federal Employers' Liability Act as being excluded under Coverage B of the policy. *See* Jt. Ex. 2 at 10, 25.

Contrary to claimant's and employer's argument, the administrative law judge's finding that longshore coverage is included in Coverage A of the Chubb policy is in error. The fallacy in the administrative law judge's reasoning, which the Board discussed in its decision, results from his conclusion that the specific exclusion of longshore coverage from Coverage B of the policy inherently means that it is included in Coverage A. *Weber II*, 35 BRBS at 81. Such is not the case. Rather, Sections 32, 35 and 36 of the Act and their implementing regulations specify that an employer is required to secure payment of compensation with a company authorized by law and by the Secretary of Labor to secure workers' compensation, that an insurance policy *must contain a longshore endorsement* acknowledging that the carrier is subject to the laws of the Act, and that the insurance company is obligated to pay benefits even if the employer becomes insolvent. 33 U.S.C. §§932, 935-936; 20 C.F.R. §§703.101 *et seq*. The Act does not provide that the absence of an explicit exclusion of the Longshore Act from one part of the insurance policy automatically includes it in another part. This would result in reading longshore coverage into policies where it is not provided. Accordingly, the Chubb policy, which covers workers injured overseas, does not contain a legitimate longshore endorsement.[7] Consequently, Chubb cannot be held liable for benefits under the Longshore Act.[8]

Claimant, employer, the Director, and Aetna argue that, as currently written, the Board's decision could be interpreted as providing Chubb with the impetus for suspending the payments for which it is liable under Pennsylvania law, and they request a clarification of the Board's holding in this regard. *See Weber II*, 35 BRBS at 81. We grant this request, as

[7]Claimant argues that ambiguities in insurance contracts in Pennsylvania are to be construed in favor of the insured, *K & Lee Corp. v. Scottsdale Ins. Co.*, 769 F.Supp. 870, 873 (E.D. Pa. 1991), and that coverage which is not specifically excluded is included, *Allstate Ins. Co. v. Brown*, 834 F.Supp. 854, 857 (E.D. Pa. 1993). There is, however, no ambiguity in the Chubb contract which would invoke this aspect of Pennsylvania law.

[8]Employer's expectations of complete coverage, *i.e.*, Aetna's policy covering injuries within the United States and Chubb covering injuries outside the United States, also do not convert coverage applying Pennsylvania law into federal coverage under the Longshore Act.

the Board's holding in no way supports the notion that Chubb is released from *all* liability. Consequently, based on the language of the Aetna and Chubb insurance policies, neither Aetna nor Chubb is liable to claimant for benefits under the Longshore Act; employer alone is responsible for those benefits. 33 U.S.C. §904. This decision in no way affects Chubb's liability for benefits due claimant based on Pennsylvania compensation law pursuant to the Chubb policy. Such state payments are credited against the longshore payments due claimant. 33 U.S.C. §903(e).

*Effect of Employer's 1995 Bankruptcy*

Employer contends, and claimant and Aetna agree, that the Board's decision holding employer liable cannot stand because employer cannot be held liable for benefits for a 1986 injury after it was discharged in bankruptcy on October 27, 1995. Employer asserts that claimant was listed as a creditor in the bankruptcy proceedings, and those proceedings erased all debts prior thereto. Under bankruptcy law, the effect of a discharge in bankruptcy "voids any judgment of any court that violates the bankruptcy discharge, and . . . operates as an injunction against the continuation or commencement of an action to collect any discharged debt." *In re Hensler*, 248 B.R. 488 (Bankr. D.N.J. 2000); *see* 11 U.S.C. §524(a). This discharge operates automatically, requiring no action on the part of the discharged debtor. *Id.* Generally, any post-discharge judgments holding the debtor liable for a discharged debt are "void *ab initio* as a matter of federal statute." *Hensler*, 248 B.R. at 492; *In re Miller*, 228 B.R. 203 (Bankr. N.D. Ill. 1999); *see also* 8A C.J.S. Bankruptcy §§316-336 (1988). As there is no dispute regarding the fact of employer's discharge in bankruptcy, Jt. Ex. 1 at 73, employer is correct in asserting that its bankruptcy may affect whether the Board's decision is enforceable against it. Nevertheless, we decline to modify the Board's decision, as the Act requires a holding that employer is primarily liable for claimant's benefits. 33 U.S.C. §904.; *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989). Whether this liability is enforceable is not a matter for the Board's review, as enforceability is determined under Section 18 of the Act, 33 U.S.C. §918, rather than Section 21, 33 U.S.C. §921, which provides the authority for the Board's review of findings of fact and conclusions of law. *See generally Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985). We note that Section 18(b) of the Act specifically provides for the contingency that the liable employer is insolvent.[9] Section

[9]Section 36 of the Act, 33 U.S.C. §936, provides that the carrier remains liable for benefits despite the insolvency of the liable employer. In this case, however, the Board has held neither of the carriers is the liable party. Chubb contends the Board erred in holding harmless the administrative law judge's failure to address Aetna's failure to respond the Chubb's request for admissions. It again asserts that Aetna's failure constituted an admission that it is liable for claimant's benefits. The Board addressed this issue to the extent necessary and explained that Aetna's admission that it was employer's longshore carrier did not amount

18(b), 33 U.S.C. §918(b), states:

> In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment the Secretary of Labor may, in [her] discretion and to the extent [she] shall determine advisable after consideration of current commitments payable from the special fund . . . make payment from such fund upon any award made under this chapter . . . .

33 U.S.C. §918(b); 20 C.F.R. §702.145(f). Thus, if the employer cannot pay due to insolvency or for some other reason, the claimant may be able to obtain benefits from the Special Fund at the Secretary's discretion. 33 U.S.C. §918(b); *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140, 144 n.2 (1989). We decline to modify or void the Board's decision on the ground that employer has been discharged in bankruptcy.

*Effect of Section 8(f)(2)(A)*

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to admission that it, therefore, must be liable for claimant's benefits. *Weber II*, 35 BRBS at 81 n.7. Chubb's reiteration of the argument does not persuade us to modify the Board's conclusion.

The Director contends the Board erred in awarding employer Section 8(f) relief from liability for compensation after May 2, 1994. He argues that, because employer did not have longshore coverage outside New Jersey, Pennsylvania, Maryland and Virginia, and this injury occurred in Kingston, Jamaica, employer is excluded from entitlement to Section 8(f) relief pursuant to Section 8(f)(2)(A), 33 U.S.C. §908(f)(2)(A), because of its failure to comply with Section 32 of the Act. Therefore, the Director contends he had no notice that the administrative law judge would revisit the responsible carrier issue when the Board first remanded the case in 1994, Dir. Brief at 2, and he withdraws the stipulation regarding employer's entitlement to Section 8(f) relief, which was made at a time when he believed Aetna to be the liable party.[10] Employer and claimant argue that if the Director's contentions are meritorious, the case must be remanded for a hearing on the issue of employer's insurance coverage and its effect on employer's entitlement to Section 8(f) relief.[11]

[10]Contrary to claimant's argument, the equitable doctrines of waiver, estoppel and laches are not applicable in this instance to prevent the Director from withdrawing his stipulation. *See Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *United States v. Harris*, 230 F.3d 1054 (7th Cir. 2000); *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *aff'd and remanded on other grounds*, 521 U.S. 121 (1997); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989).

[11]Employer argues that the Board's situs determination should be applied prospectively only, so as not to affect its compliance with Section 32 and its entitlement to Section 8(f) relief. We reject this contention. Applying a decision "fully retroactively" is

Section 32(a) of the Act provides that every employer shall secure payment of compensation under the Act with a company authorized to insure workers' compensation. Alternatively, an employer may be designated a self-insured employer by the Secretary. 33 U.S.C. §932(a). If an employer establishes the requirements of Section 8(f)(1), 33 U.S.C. §908(f)(1), and would otherwise be entitled to relief from liability for payments of permanent disability compensation after 104 weeks, Section 8(f)(2)(A) provides that "the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with [Section 32(a)]." 33 U.S.C. §908(f)(2)(A); *see also* 20 C.F.R. §702.321(b)(3).

The Director argues that the Board's decision in *Lewis v. Sunnen Crane Service, Inc.*, 34 BRBS 57, 61 (2000), in which the Section 8(f)(2)(A) bar was applied to prevent an employer from obtaining Section 8(f) relief due to its non-compliance with Section 32, is dispositive of this issue. Employer disagrees and contends it had sufficient coverage for all work-related injuries as of the date of claimant's injury because, as of that date, injuries which occurred in foreign territorial waters had not been held covered under the Act. Thus, injuries occurring within the United States were covered by employer's insurance with Aetna, and injuries occurring outside the United States were covered under the Foreign Voluntary Workers' Compensation insurance provided by Chubb. Accordingly, employer argues it complied with Section 32(a). We agree with employer, and we hold that *Lewis* is

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"overwhelmingly the norm" and "is in keeping with the traditional function of the courts to decide cases before them. . . ." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). Judicial decisions are given retroactive effect, even when they overrule prior law. *See Hughes Aircraft Co. v. United States Emp. Ex. rel. Schumer*, 520 U.S. 939 (1997); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Beam*, 501 U.S. at 543; *Griffith v. Kentucky*, 479 U.S. 314 (1987). That is because court decisions do not change the law; rather, they interpret the law and explain what it has always meant. *Rivers v. Roadway Express*, 511 U.S. 298, 313 n.12 (1994); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

distinguishable from this case and, therefore, is not controlling.

In *Lewis*, it was undisputed that the employer was uninsured at the time the claimant was injured and that it obtained its longshore insurance coverage shortly before the Special Fund would have assumed liability for the claimant's benefits. *Lewis*, 34 BRBS at 59. In the instant case, however, employer purchased insurance appropriate for covering claimant's injuries under the statute and case law existing at that time. It was not until the Board's decision in *Weber I* that an injury in the Port of Kingston was explicitly held to be compensable under the Act. In *Weber I*, the Board's holding rested on cases holding that "navigable waters of the United States" could include the "high seas." This case law had its genesis in *Cove Tankers Corp. v. United Ship Repair*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982). In *Cove Tankers*, the United States Court of Appeals for the Second Circuit held that a worker injured on the high seas while working on his employer's ship, bearing the flag of the United States, was a covered employee, as the employee would not have been covered by state law and as there was no deviation into the territorial waters of another nation. Under *Cove Tankers*, therefore, coverage did not necessarily extend to the port of another nation. This holding was broadened by the United States Court of Appeals for the Fifth Circuit in its decision in *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986). The Fifth Circuit held that an employee injured during a ship's sea trials on the high seas was covered, as employers should not be able to avoid liability by shifting into non-covered territory. Finally, the Second Circuit revisited this issue and held in *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995), that the term "navigable waters" includes the "high seas" without qualification. *See Weber I*, 28 BRBS at 325-327. Consequently, employer in this case was caught in a developing area of law, and the holdings in those cases would eventually affect employer's insurance coverage in this case.

In this case, employer's effort to obtain all coverage available and necessary is a far cry from the *Lewis* employer's attempt to circumvent the Act in order to receive the benefit of Special Fund relief without the responsibility of making contributory payments. In fact, employer did secure Longshore coverage, although it lacked the prescience to extend it to extra territorial injuries. Prior to 1986, the year claimant's injury occurred, and *Reynolds* was issued, it was reasonable for employer to believe it had satisfied its insurance obligations under the Act. That employer's insurance ultimately contained a gap in the two policies which omitted coverage for this particular injury to claimant does not mandate the conclusion that employer failed to secure payment of compensation under Section 32. Accordingly, we hold that Section 8(f)(2)(A) is not applicable to the facts of this case and does not bar employer's entitlement to Section 8(f) relief. Therefore, as the Director stipulated to employer's entitlement to Section 8(f) relief, the Special Fund shall assume payment for claimant's benefits after May 2, 1994.

*Typographical Errors*

The Director contends there are some typographical errors in the Board's decision which should be corrected. Initially, the Director suggests amending the error in the administrative law judge's decision which placed the date of injury at February 19, 1986, rather than at May 3, 1986. There is no dispute as to the date of injury; therefore, we shall make this correction to the administrative law judge's Order at page 15 of the Decision and Order Upon Remand. The Director also contends the Board inadvertently modified the administrative law judge's decision to reflect employer's liability for permanent total disability benefits from May 2, 1992, through May 2, 1994, rather than from the date of injury.[12] Chubb agrees. Employer argues that benefits prior to May 2, 1992, were not in dispute and had been paid, so no modification is necessary.

The stipulated date of maximum medical improvement is May 2, 1992. Decision and Order Upon Remand at 4. Pursuant to our above correction, the administrative law judge's order now states that Chubb is liable to claimant for permanent total disability benefits "beginning on May 3, 1986." Contrary to this statement, however, claimant cannot be entitled to *permanent* total disability benefits prior to the date on which his condition reached maximum medical improvement and became permanent. Therefore, claimant is entitled to temporary total disability benefits from May 3, 1986, through May 2, 1992, and permanent total disability benefits thereafter. Pursuant to the Board's decision, employer is liable for the benefits due claimant between May 3, 1986, and May 2, 1994, and the Special Fund is liable for claimant's benefits commencing thereafter, subject to a credit for state payments pursuant to Section 3(e) and any credit pursuant to Section 14(j), discussed *infra*. Accordingly, we modify the Board's decision to reflect these corrected dates.

*Credit*

The Director contends the Board's decision cannot be implemented because the discussion in footnote 9 regarding Chubb's credit is incomplete. Footnote 9 states:

> The administrative law judge granted employer a credit, and he ordered Chubb to reimburse employer for the amounts it paid as salary to claimant from May 3, 1986, to February 18, 1989, finding that this credit was necessary to prevent

[12]Because Section 8(f)(2)(A) does not apply, we reject the Director's assertion that the entire sentence should be omitted.

> claimant from receiving a double recovery; *i.e.*, "retaining the previous payments of his full salary by the Employer as well as payments to be received under the Chubb policy." Decision and Order Upon Remand at 15. Chubb does not appeal this ruling and requests only reimbursement from the Special Fund.

*Weber II*, 35 BRBS at 82 n.9. The Director asserts that to give Chubb any credit for salary continuation payments made by employer would be error, that the administrative law judge failed to specify a dollar amount to credit, and that he failed to discuss whether any credit should be based on gross or net amounts. Employer challenges the Director's ability to raise the credit issue as such was not appealed by any party and the credit does not affect the liability of the Special Fund. Moreover, employer asserts that medical and disability benefits which have been paid by Chubb should be credited against its liability, presuming it remains liable. Chubb also argues that the Board's assessment of its entitlement to a credit is incomplete. It contends employer should have to reimburse Chubb for payments it made from the date of injury until May 1, 1994, and that the Special Fund should reimburse it thereafter. Employer responds that Chubb's argument of subrogation is being first raised in a motion for reconsideration, would deprive employer of the coverage for which it paid Chubb, and would result in added liability for the Special Fund. Chubb contends it sought reimbursement from Aetna and is now merely following through with the argument and seeking recoupment from the party now liable.

According to the record, employer paid various amounts of salary and Chubb paid medical benefits of $550,335.79 and compensation of $231,880.67 to claimant beginning on May 3, 1986, under Pennsylvania law pursuant to the Foreign Voluntary Workers' Compensation policy. Section 3(e) of the Act, 33 U.S.C. §903(e), provides that "any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter." Thus, the payments made by Chubb under the Pennsylvania workers' compensation law are to be credited against employer's liability under the Act. *See Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2$^{d}$ Cir. 1992). As Chubb is still liable to claimant for benefits under Pennsylvania law, it is not entitled to reimbursement.

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, [it] shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). Where an employer continues a claimant's regular salary during the claimant's period of disability, employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5$^{th}$ Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Van Dyke v. Newport News Shipbuilding*

*& Dry Dock Co.*, 8 BRBS 388 (1978). Where an employer transfers an employee from the position in which he incurred a disability to a position with a lower pay scale, but continues to pay him at the higher salary, the employer may be entitled to a credit for the difference in pay against its liability for compensation if it can establish it intended the extra pay to be compensation. *White v. Bath Iron Works Corp.*, 7 BRBS 86 (1977). This issue has not been addressed fully by the administrative law judge; however, the record contains evidence that employer paid claimant a salary post-injury, which may or may not have been advance payments of compensation. Consequently, we remand the case for the administrative law judge to consider this issue pursuant to Section 14(j) of the Act.

Accordingly, we grant the motions to clarify that the Board's decision does not affect Chubb's liability for benefits pursuant to Pennsylvania law, to correct the administrative law judge's decision to reflect a date of injury of May 3, 1986, to clarify that claimant is entitled to temporary total disability benefits from May 3, 1986, through May 2, 1992, and permanent total disability benefits from May 2, 1992, through May 2, 1994, payable by employer, and permanent total disability benefits thereafter, payable by the Special Fund.
We remand the case for further consideration of employer's entitlement to a credit for salary payments pursuant to Section 14(j). In all other respects, the motions by the parties herein are denied, and the Board's decision is affirmed.[13] 20 C.F.R.§802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[13]Claimant's counsel has not filed a petition for an attorney's fee; therefore, we need not address this issue.