BRB Nos. 03-0561
and 03-0561A

GARY L. KIRKPATRICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
B.B.I., INCORPORATED	)	
	)	
Employer	)	
	)	
and	)	
	)	
HOUSTON GENERAL INSURANCE COMPANY	)	DATE ISSUED: May 20, 2004
	)	
Carrier-Respondent Cross-Petitioner	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Carrier-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts & Associates), Houston, Texas, for claimant.

Christopher Lowrance (Royston, Rayzor, Vickery & Williams, L.L.P.), Corpus Christi, Texas, for employer and Houston General Insurance Company.

Michael J. Kincade, Metairie, Louisiana, for employer and Insurance Company of North America.

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

PER CURIAM:

Insurance Company of North America (INA) appeals, and Houston General Insurance Company, and its successor in interest following insolvency, Texas International Solutions, LLC (collectively referred to as Houston General), cross-appeals, the Decision and Order Awarding Benefits (2002-LHC-1656) of Administrative Law Judge Larry W. Price 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.* (the Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (OCSLA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case are not in dispute. Claimant was a "material expeditor" employed by B.B.I., Incorporated (BBI). BBI had a contract with Bay, Incorporated to provide general contractor labor, and Bay had a contract with Conoco to construct a fixed platform on the Outer Continental Shelf (OCS) approximately 170 miles southwest of New Orleans in the Gulf of Mexico.[1] On October 21, 1989, claimant was working in his capacity as a material expeditor in an office on the fixed platform when he leaned across his desk to answer the phone. Jt. Ex. 1. He sustained an injury to his lumbar spine, requiring five surgeries. HG Ex. 3; Jt. Ex. 1. He also suffered a post-injury stroke. As the result of his injury and complications, he is unable to return to any work. Houston General, one of BBI's carriers, voluntarily paid claimant temporary total disability and medical benefits from 1989 until May 2, 2001, totaling $656,374.39. Jt. Ex. 1.

In 2000, Houston General controverted its liability for benefits and at an informal conference before the district director on January 23, 2001, it asserted a claim for reimbursement against INA, another of BBI's carriers. Jt. Ex. 1. The parties stipulated that Houston General issued an insurance policy to BBI, effective from December 19, 1988, through December 19, 1989, with an OCSLA endorsement covering work on the

[1]Conoco fixed platform CPP-52, the platform at issue, is on Green Canyon Block 52. It was built to extract oil and natural gas from Conoco's Jolliet Field and to transfer product obtained from Green Canyon Block 184 and from Green Canyon Well 52-A-5. Decision and Order at 2-3; Jt. Ex. 1. At the time of claimant's injury, the platform was not in production; the first product from Green Canyon Block 184 was extracted in November 1989, and the first product from Well 52-A-5 was obtained in May 1990. INA Ex. D.

OCS off the coast of Texas in the Gulf of Mexico. The parties also stipulated that INA issued BBI an insurance policy, effective from July 24, 1989, through July 24, 1990, with an OCSLA endorsement covering all "oil lease work off the coast of Louisiana in the Gulf of Mexico." Decision and Order at 4-5; Jt. Ex. 1. The administrative law judge found that this claim is covered by the OCSLA, as claimant satisfied the OCSLA situs and status criteria. Decision and Order at 14. He then found that because the parties agreed the injury occurred off the coast of Louisiana, the INA policy covered claimant's injury. Decision and Order at 15-16. Additionally, the administrative law judge determined that Houston General's claim for reimbursement was not essential to resolving the rights and liabilities of the parties herein; therefore, he found that the reimbursement issue falls outside his jurisdiction, and he dismissed it without prejudice. *Id.* at 18. As the parties had not disputed claimant's entitlement to benefits or to the amount he received, the administrative law judge ordered INA to pay claimant permanent total disability benefits from May 3, 2001, and continuing based on an average weekly wage of $763.26. He gave INA a credit for benefits it had paid.[2] *Id.*

INA appeals the decision holding it to be the responsible carrier and holding it liable for permanent total disability benefits. Houston General responds, urging the Board to affirm the determination that INA is the responsible carrier. Claimant responds, arguing that he has no opinion on which carrier is liable, as long as one remains so, and he urges affirmance of the award of permanent total disability benefits. BRB No. 03-561. Houston General cross-appeals the administrative law judge's decision declining to address the reimbursement issue. INA responds, arguing that the administrative law judge properly declined to address the reimbursement issue. BRB No. 03-561A.

INA first contends the administrative law judge erred in finding it liable for benefits because claimant did not satisfy the status and situs requirements of the OCSLA. Compensation is available under the Longshore Act for those employees injured on the OCS if they meet the status and situs test of the OCSLA.[3] 43 U.S.C. §1333(a)(1), (b);

---

[2]Despite disavowing liability, INA voluntarily paid claimant indemnity benefits in the amount of $6,106.08 for the period between September 18, 2002, and the date of the hearing, January 21, 2003, at a compensation rate of $254.42, a reduction from the compensation rate of $508.84 that Houston General had paid. Decision and Order at 5, 7; Jt. Ex. 1.

[3]Contrary to Houston General's assertion in defense of the administrative law judge's decision, coverage in this case cannot be conferred by the Longshore Act alone. The coverage provisions of the LHWCA and the OCSLA are separate and not related. *Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987). The administrative law judge did not address whether claimant satisfied Sections 2(3) and 3(a) of the Act. 33 U.S.C. §§902(3), 903(a). Further, contrary to Houston General's assertion, Section 20(a), 33 U.S.C.

Offshore Logistics v. Tallentire, 477 U.S. 207 (1986); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 35 BRBS 131(CRT) (5th Cir. 2002); *see also Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989) (*en banc*). Specifically, the OCSLA situs applies to:

> 1) the subsoil and seabed of the OCS; 2) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it has been erected on the seabed of the OCS, and (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS; 3) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it is not a ship or vessel, and (c) its presence on the OCS is to transport resources from the OCS.

Demette, 280 F.3d at 497, 35 BRBS at 134(CRT); *see also Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002); *Mills*, 877 F.2d at 361, 22 BRBS at 101-102(CRT). The OCSLA covers non-seamen who are injured "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the [OCS.]" 43 U.S.C. §1333(b); *Demette*, 280 F.3d at 498, 35 BRBS at 134(CRT). An employee's activities have been held to be the "result of" these operations if they would not have occurred "but for" the employee's actions in furtherance of the exploration, development, removal or transportation of natural resources from the OCS. *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1983); *Recar v. CNG Producing Co.*, 853 F.2d 367 (5th Cir. 1988). If the employee meets the status and situs requirements of Section 1333(a)(1), (b) of the OCSLA, then his exclusive remedy against his employer is compensation under the Longshore Act. *Barger*, 692 F.2d at 341.

INA first asserts that claimant does not satisfy the OCSLA situs requirement because the decision in *Demette*, issued by the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, effectively overruled the Board's decision in *Robarge* wherein the Board held that installations under construction are covered under an "expansive" reading of the OCSLA definition of "development." *See* 43 U.S.C. §1331(l). INA argues that the platform on which claimant was injured was still under construction ("not yet erected"), not in production ("not engaged in the transportation of resources"), and cannot be a covered situs because it was not "fully erected," and it asserts that *Demette* prohibits any result to the contrary. INA Original Brief at 10, 14. Houston General asserts the platform need not be "fully erected" in order

---

§920(a), is not applicable to the legal interpretation of the Act's coverage provisions. *Arjona v. Interport Maintenance Co., Inc.*, 34 BRBS 15 (2000); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996).

to be a covered situs. In support of its position, Houston General cites the OCSLA's definition of "development" as well as the decision of the United States Court of Appeals for the Ninth Circuit in *Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987), *aff'g Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985). Without addressing the significance of the production status of the platform, the administrative law judge found that claimant was injured, during construction, on a fixed platform that fell within *Demette's* second category of OCSLA situs locations. Decision and Order at 8, 12, 14; Cl. Ex. 1 at 9-10, 15-16, 54; INA Ex. D.

We first reject INA's assertion that *Demette* changed the span of the coverage of the OCSLA.[4] *Demette's* second situs category covers "any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it has been *erected* on the seabed of the OCS, and (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS[.]" *Demette*, 280 F.3d at 497, 35 BRBS at 134(CRT) (emphasis added). The use of the term "erected" in *Demette* comes directly from Section 1333(a)(1) of the OCSLA.[5] Nevertheless, INA interprets the section as requiring the structure to be "fully erected," which it considers synonymous with being "fully operational," or "completed." Although neither Congress nor the Fifth Circuit has separately defined the term "erected," we conclude that there is no support for an interpretation limiting the scope of coverage to only "fully operational" and/or "completed" structures.

When interpreting a statute, we begin with the words of the statute, *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989), and we look first to the plain meaning of the language, then to the legislative history. *Amgen, Inc. v. U.S. International Trade Comm'n*, 902 F.2d 1532 (Fed. Cir. 1990). The plain meaning of "erect" includes: "to construct by assembling materials and parts," "to fix in an upright position," and "to assemble or set up." Webster's II New Riverside University Dictionary (1984). The parties here stipulated that claimant was injured on Conoco's Fixed Platform CPP-52 on the OCS and the platform's purpose was to extract and transfer oil and natural gas from the OCS. *See* n.1, *supra*. Although the platform at issue was not "fully operational" or "completed" at the time of claimant's injury, a structure was in place on the OCS for the purpose of "producing resources therefrom[,]" pre-production work was being performed, and claimant was sitting in an office in the platform complex. By its plain meaning, the platform had been "erected." As the term "erect" pertains to the assembly

[4]Indeed, the Fifth Circuit specifically stated that its situs test in *Demette* does not conflict with its prior decision in *Mills*. *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 543 (5th Cir. 2002).

[5]The statute covers artificial islands attached to the seabed, "which *may be erected* thereon for the purpose of . . . producing resources therefrom. . . ." 43 U.S.C. §1333(a)(1).

of the platform and not to its operational status, we reject INA's assertion that the language in *Demette* changes the scope of the OCSLA coverage.

Because we conclude the Fifth Circuit's decision in *Demette* does not alter the situs requirement for OCSLA coverage, it follows the *Demette* decision does not conflict with the Board's prior decision in *Robarge* and the Ninth Circuit's affirmance thereof. In *Robarge*, the Board affirmed the administrative law judge's determination that OCSLA coverage is not affected by the fact that a platform is not yet operational. In doing so, the Board relied on the definition of "development" under the OCSLA, which expressly includes "platform construction," 43 U.S.C. §1331(l), and it relied on the legislative history of the OCSLA which "reveals no intention to exclude workers engaged in pre-production" activities. *Robarge*, 17 BRBS at 216-217. The Ninth Circuit affirmed.[6] *Kaiser Steel*, 812 F.2d at 521. In this case, claimant's injury occurred on the platform in a pre-production phase. The administrative law judge properly found that claimant was injured on a covered situs, and we affirm his conclusion.

Next, INA argues that claimant's employment does not satisfy the status requirement set forth in Section 1333(b) of the OCSLA. That section provides that injuries occurring "as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the [OCS]" are covered. 43 U.S.C. §1333(b); *Demette*, 280 F.3d at 497, 35 BRBS at 134(CRT). The administrative law judge found that claimant satisfies this criterion and that his injury would not have occurred "but for" the performance of his duties as a materials expeditor. Decision and Order at 14. INA alleges that claimant does not meet the OCSLA standard because his injury occurred on an incomplete, non-producing, structure and because it occurred while he was answering a telephone, an activity it alleges cannot be considered to have happened "but for" the extracting operations, which were non-existent. Houston General urges us to follow the precedent set forth in *Diamond Offshore* and *Kaiser Steel* and reject INA's restrictive interpretation of the OCSLA status requirement. We agree with Houston General, and we affirm the administrative law judge's conclusion that claimant meets the OCSLA status requirement.

In *Robarge*, the claimant worked as a pipefitter/welder on the construction of a fixed platform on the OCS. He was injured during the construction phase of the project. *Robarge*, 17 BRBS at 217. The Ninth Circuit rejected three challenges to the finding of coverage. Relevant to the case herein is the court's conclusion that the claimant's welding activities were related to the development of the natural resources of the OCS.

[6]Although referenced relative to affirming the Board's decision regarding the claimant's status, the Ninth Circuit acknowledged and relied upon the fact that the OCSLA definition of "development" includes "platform construction."

The court relied on the definition of "development," which includes "platform construction," and it explicitly noted that Fifth Circuit opinions support the conclusion that the "purpose" requirement in the OCSLA "should not be narrowly construed." *Kaiser Steel*, 812 F.2d at 521 (citing *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir. 1983) (night cook on offshore platform covered) and *Barger*, 692 F.2d at 340 (helicopter pilot who transported workers to offshore platform covered)). In *Diamond Offshore*, a Fifth Circuit decision, the claimant worked as a welder hired to perform repairs and maintenance on offshore platforms and drilling rigs. Although at the time of his injury he was performing his work in the pollution pan of a semi-submergible drilling rig and satisfaction of the situs issue was unresolved, the Fifth Circuit held that the claimant's work as a welder was necessary to the exploration and drilling functions of the rig and satisfied the status element. *Diamond Offshore*, 302 F.3d at 546-547.

Similarly, the Fifth Circuit held covered a maintenance foreman who was injured while supervising painting and repair work on a production platform. The claimant ate, slept and spent the majority of his time on the vessel that transported him and his crew between platforms. The claimant was injured when he was swinging from a platform to the vessel and the rope broke, causing him to fall to the vessel deck. *Recar*, 853 F.2d at 368. In reaching the conclusion that the claimant alleged sufficient facts to bring his case within the provisions of the OCSLA and the jurisdiction of the district court, the Fifth Circuit stated: "The reach of OCSLA is broad and includes cases 'arising out of or in connection with any operation conducted on the Outer Continental Shelf which involves . . . production of the minerals. . . .'" *Id.* at 369. Not only did the Fifth Circuit determine that "production" included maintenance, but it applied the "but for" test and concluded that the claimant's work in "maintaining the production platform furthered mineral development. [The claimant] would not have been injured 'but for' the maintenance work he was performing and supervising on the platform." *Id.*; *see also Nix v. Hope Contractors, Inc.*, 25 BRBS 180 (1991) (foreman of offshore construction crew covered under OCSLA); *compare these cases with Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002) (worker constructing off-coast outfall tunnel of sewage treatment plant not covered as duties did not relate to explorative or extractive operations on OCS).

Although claimant here was not directly involved in the physical construction of the platform, the parties stipulated that his "primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured." Decision and Order at 5; Jt. Ex. 1. As claimant's purpose for being on the platform was to procure supplies necessary to construct the platform, and his injury occurred during the course of his duties, his work satisfies the OCSLA status test. Consequently, we affirm the administrative law judge's conclusion that claimant is covered by the OCSLA, as he satisfies both the situs and status requirements of that statute, and that he is entitled to benefits under the Act. *See Nix*, 25 BRBS 180.

Next, INA argues that it should not be held liable for benefits because neither Houston General nor claimant filed timely notices or claims with respect to their claims against INA. INA avers that if there is "technical" compliance with Section 13, 33 U.S.C. §913, neither claimant nor Houston General gave it timely notice of the injury and Section 12, 33 U.S.C. §912, bars the "claims" against it. Houston General argues that Sections 12 and 13 do not apply to the claim for reimbursement. We agree with Houston General.

Sections 12 and 13 apply to a *claimant's* notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits. 33 U.S.C. §§912, 913; *see generally Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991); *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991). There is, in fact, no statutory provision requiring a carrier seeking reimbursement from another carrier to do so within a specified period. In this case, claimant notified his supervisor the day the injury occurred, October 21, 1989, and a written statement was taken in compliance with Section 12. Claimant filed his claim for compensation under the Act on September 13, 1990, less than one year after the date of injury, in accordance with Section 13.[7] Decision and Order at 5, 8; Cl. Ex. 1; Jt. Ex. 1. Thus claimant gave timely notice to his employer, BBI, and the 1990 claim against BBI was filed in timely fashion. Pursuant to Section 35 of the Act, 33 U.S.C. §935, knowledge of the injury and claim is imputed to INA as BBI's carrier. *See Derocher v. Crescent Wharf & Warehouse*, 17 BRBS 249 (1985); *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985). The requirements of Sections 12 and 13 have been satisfied in this case and do not bar Houston General's claim for reimbursement.[8]

INA next raises several equitable doctrines in support of its contention that Houston General is estopped from seeking reimbursement. It contends the administrative law judge should have applied the doctrines of equitable estoppel, laches and/or "jurisdictional" estoppel to prevent Houston General from requesting reimbursement after paying benefits for 12 years. However, none of these defenses applies in this case.

[7]INA concedes claimant gave timely notice to and filed a timely claim against BBI. Claimant also filed claims for benefits with the Texas Workers' Compensation Commission and the Louisiana Office of Workers' Compensation on April 1, 2002. Claimant had previously filed a claim against Bay, Inc. on March 16, 2001. INA Ex. I.

[8]We reject INA's assertion that the reimbursement claim should be barred by the limitations period set forth in the Death on the High Seas Act, 46 App. U.S.C. §763a. That provision is inapplicable.

First, equitable estoppel is a doctrine in equity which prevents one party from taking a position inconsistent with a position it took in an earlier action such that the other party would be at a disadvantage. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *rev'd on other grounds*, 521 U.S. 121 (1997); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR at 2-1 (4th Cir. 1999); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992). It typically holds a party to a representation made, or a position assumed, because another party has in good faith relied upon that representation or position.[9] *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113, 119 (2002). Reasonable reliance to the party's detriment is essential for application of this doctrine. *Betty B*, 194 F.3d at 504, 22 BLR at 2-23. In order to apply equitable estoppel here, assuming, *arguendo*, that the other three elements have been satisfied, an assumption that is far from certain, INA must have acted to its detriment in reliance upon an action or representation of Houston General's. INA claims that it relied on Houston General's 12-year acceptance of this claim and, to its detriment, "is now facing a claim for reimbursement approaching three-quarters of a million dollars, without the opportunity to investigate contemporaneously, manage medical treatment, engage in vocational rehabilitation, monitor disability status, etc." INA Original Brief at 19. We reject INA's contention of error as there was no representation or action by Houston General on which INA relied to cause its alleged injuries.[10] In the absence of any detrimental reliance, there can be no application of the doctrine of equitable estoppel. *Betty B*, 194 F.3d at 504, 22 BLR at 2-24; *Rambo*, 81 F.3d at 843, 30 BRBS at 29(CRT); *Porter*, 36 BRBS at 119-120.

Laches, INA's next asserted equitable defense, precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. *Costello v United States*, 365 U.S. 265 (1961); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). The Supreme Court has

[9]To apply this doctrine to claims under the Act, four elements are necessary: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury." *Rambo*, 81 F.3d at 843, 30 BRBS at 29(CRT); *see also Betty B*, 194 F.3d at 504, 22 BLR at 2-23; *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113, 119 (2002).

[10]INA's contention that the delayed investigation by Houston General prevented INA from conducting its own investigation, managing the medical treatment or engaging in vocational rehabilitation, is negated by its agreement that "[n]o outstanding issues exist relative to [Houston General's] past expenditures . . . paid pursuant to the dictates of [the Act.]" Decision and Order at 7; Jt. Ex. 1.

previously rejected attempts to apply laches as a matter of "federal common law" because "the approach 'subverts the congressional intent documented in *Rodrigue* [395 U.S. 352] . . . that admiralty doctrines should *not* apply under the Lands Act.'" *Fontenot v. Dual Drilling Co.*, 179 F.3d 969, 977, 33 BRBS 88, 94(CRT) (5th Cir. 1999) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971)) (emphasis added by court in *Fontenot*); *see generally Kenney v. Trinidad Corp.*, 349 F.2d 832, 839 (5th Cir. 1965); *Harris v. Lykes Bros. Steamship Co., Inc.*, 375 F.Supp. 1155 (E.D. Tex. 1974). Because the Act contains specific statutory periods of limitation, 33 U.S.C. §§912, 913, the doctrine of laches is not available to defend against the filing of claims thereunder. *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (Brown, J., dissenting on other grounds), *aff'g on recon. en banc* 25 BRBS 79 (1991); *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.*, 20 BRBS 126 (1987). Further, as the claim for reimbursement is related to claimant's claim under the Act by extension of OCSLA, and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case. *Rodrigue*, 395 U.S. 352; *Fontenot*, 179 F.3d at 977.

The last equitable defense INA asserts is the doctrine of "jurisdictional estoppel," a "lesser-included defense of judicial estoppel," INA Original Brief at 30. Houston General argues that "jurisdictional estoppel" is a fictitious doctrine. We agree with Houston General, and we reject INA's arguments. To the extent "jurisdictional" estoppel exists as a type of equitable estoppel, we have already held that equitable estoppel is inapplicable. To the extent it exists as a form of judicial estoppel, we shall consider whether judicial estoppel is an available defense.

Judicial estoppel "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Fox v. West State, Inc.*, 31 BRBS 118, 122 (1997) (citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)). Judicial estoppel is implicated only if the first forum in which the party's case is heard accepts the legal or factual determination alleged to be at odds with the party's position advanced in the current forum. *Fox*, 31 BRBS at 123. There was no prior forum in this case, so no prior court has accepted a position contrary to Houston General's current position that it is not liable for claimant's benefits. Consequently, Houston General is not seeking to take a "second advantage," and judicial estoppel is not applicable in the instant case.

As a final defense against liability for benefits, INA contends the administrative law judge erred in failing to address the fact that claimant's activities outside Texas were temporary and, therefore, covered by Houston General's policy. That is, INA asserts that claimant was a Texas employee, working for a Texas company, who was temporarily assigned to work in Louisiana, and his employment injury therefore is covered by Houston General's insurance policy. INA asserts that the only evidence establishing that

this was not a temporary work assignment is Mr. Harbison's expert testimony.[11] In interpreting the Houston General policy, and concluding that claimant's injury was not covered, Mr. Harbison stated that the platform was a permanent operation and Houston General's all states endorsement covered only temporary operations in states outside of Texas. Decision and Order at 9; Tr. at 52-54, 61, 69-70, 94-95. The administrative law judge found Mr. Harbison's testimony to be credible. Decision and Order at 13.

A review of Houston General's insurance policy for BBI reveals that it contained an "Assigned Risk Pool – all states endorsement pool." This endorsement provided:

> Like any all states endorsement, it is designed to cover only incidental operations undertaken after the effective date of the policy and is not designed to provide coverage for continuing operations in another state.
>
> * * *
>
> No coverage will be provided if the insured has other coverage for its out-of-state operations under a workers' compensation or occupational disease policy, self-insurance, or has elected not to be covered by a state workers' compensation or occupational disease law.
>
> * * *
>
> The insurance afforded by this endorsement does not cover:
>
> 1. any obligation by a workers' compensation or occupational disease law or any similar law;
>
> 2. bodily injury to an employee while employed in work in a state where [the insured has] secured [its] obligation under the Workers' Compensation Law by other insurance. . . .
>
> * * *
>
> "Temporary operations" means all of [the insured's] operations in the states listed in the schedule except for operations performed:

[11]Mr. Harbison was an assistant general counsel for the Texas Workers' Compensation Insurance Facility who testified about the terms of the Houston General insurance policy. *See* Decision and Order at 9; Tr. at 28-29.

1. at or from a permanent location. . . .

HG Ex. 12; INA Ex. F. States included in the schedule and excluded from coverage did not at first include Louisiana; however, when BBI obtained insurance through INA for operations in Louisiana, a "General Change" was executed and Louisiana was also excluded. *Id.*; HG Ex. 14.

The plain language of the Houston General contract reveals that it did not cover injuries occurring outside the state of Texas unless they involved "incidental" operations. Moreover, it did not cover injuries occurring on a permanent location. Although claimant was not to be permanently stationed on the Conoco platform once operations commenced, he was permanently stationed there during the course of construction. The platform is a fixed structure, permanently embedded on the OCS off the coast of Louisiana. Mr. Harbison merely interpreted the language of the contract. His opinion was not the only evidence that claimant's work was of a permanent nature. Therefore, the administrative law judge rationally concluded that the Houston General policy did not cover claimant's injury.

Additionally, as the injury occurred on the OCS, the OCSLA endorsements of the two policies are pivotal. The Houston General OCSLA endorsement stated that it covered employees engaged in work in the Texas territory and the Gulf of Mexico, *i.e.*, work on the OCS off the coast of Texas. HG Ex. 12; INA Ex. F. The INA OCSLA endorsement stated that it covered oil lease work off the coast of Louisiana in the Gulf of Mexico. INA Ex. H. There is no dispute that claimant's injury occurred off the coast of Louisiana in the Gulf of Mexico on a platform affixed to the OCS. Thus, as the administrative law judge previously concluded, INA's policy was the one at risk. Therefore, we reject INA's argument that claimant's work was temporary and should have been covered by Houston General's policy, and we affirm the administrative law judge's finding that INA is liable for claimant's benefits.

Finally, INA contends the administrative law judge erred in holding it liable for *permanent* total disability benefits, as there is no evidence to support such an award in the record. Claimant responds, arguing that the award is proper.

In order to be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). Only after such a showing has been made does the burden shift to employer to establish the availability of suitable alternate employment. *Turner*, 661 F.2d 1031, 14 BRBS 156. Generally, a claimant's condition is permanent if it has reached maximum medical improvement. The determination of when maximum medical improvement is reached is

primarily a question of fact based on medical evidence. *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). A claimant's condition also may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

The record establishes that Houston General paid claimant temporary total disability benefits from November 28, 1989, through May 2, 2001. HG Ex. 23. A review of the stipulations reveals that the parties agreed that claimant underwent several surgeries on his lumbar spine and suffered a post-injury stroke. They also stipulated that the injury and subsequent complications rendered claimant unable to return to his usual work or to any work. Decision and Order at 3; Jt. Ex. 1. Further, the parties stipulated to the amount of benefits claimant was paid and to the absence of a dispute regarding those payments including "average weekly wage [and] disability status. . . ." Decision and Order at 7; Jt. Ex. 1. As the parties agreed claimant cannot return to any work, claimant has established entitlement to total disability benefits. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

With regard to permanency, INA argues, there is no medical evidence in this record and, thus, no doctor's opinion regarding the date of maximum medical improvement. However, the injury in this case occurred in 1989, and claimant was unable to return to any work even after 12 years. This may be sufficient to establish that his disability has continued for a lengthy period and is of lasting duration. *SGS Control*, 86 F.3d 438, 30 BRBS 57(CRT); *Watson*, 400 F.2d 649; *see also* INA Exs. I-J; Cl's LS-18 (April 9, 2002). Although claimant raised the issue of permanency in his pre-hearing statement, the administrative law judge did not discuss it. Thus, the administrative law judge made no findings regarding whether claimant's condition was "lengthy" so as to be considered permanent. Because the administrative law judge did not address the permanency issue, we vacate the award of permanent disability benefits and remand the case for the administrative law judge to address the nature of claimant's total disability.

In its cross-appeal, Houston General challenges the administrative law judge's determination that he lacks jurisdiction to address the request for reimbursement. Instead, Houston General asserts that the issue of reimbursement is integral to the responsible carrier issue that must be resolved under the Act. INA argues that the administrative law judge properly recognized the limitations of his jurisdiction and properly declined to resolve the reimbursement question. We vacate the administrative law judge's determination that he does not have jurisdiction and remand the case for him to resolve the reimbursement question.

It is axiomatic that the administrative law judge has the authority to decide all issues integral to resolving the claimant's claim for compensation under the Act. 33 U.S.C. §919; *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001); *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990). Moreover, the administrative law judge may adjudicate insurance disputes that are necessary to resolve claimants' claims under the Act. *Barnes v. Alabama Dry Dock & Shipbuilding Co.*, 27 BRBS 188, 191 (1993); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123, 126 (1984). The administrative law judge also has the authority to resolve related reimbursement claims. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996) (Fifth Circuit stated that absent valid and enforceable indemnity agreement, borrowing employer must reimburse lending employer for benefits paid); *Schaubert v. Omega Services Industries*, 32 BRBS 233, 235 (1998) (Act permits lending employer's carrier to seek reimbursement from borrowing employer); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994) (proper to enjoin borrowing employer and order it to reimburse lending employer).

In concluding he lacked jurisdiction to address reimbursement, the administrative law judge relied on the Fifth Circuit's decision in *Ricks*. His reliance is misplaced. In *Ricks*, the administrative law judge determined that Trinity Marine was the borrowing employer and was liable for claimant's benefits. This decision was affirmed by the Board and uncontested at the circuit court. Rather, on appeal to the Fifth Circuit was the issue of whether the Board properly held that there was contractual indemnity between Temporary Employment Services and Trinity Marine, thereby relieving Trinity Marine of its liability under the Act. *Ricks*, 261 F.3d at 460, 35 BRBS 95(CRT). The court stated:

> courts have repeatedly rejected attempts to read the 'in respect of' language expansively;[12] rather, courts have focused on the fact that the disputed issue must be essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law.

Ricks, 261 F.3d at 463, 35 BRBS 97(CRT) (footnote added). The Fifth Circuit further stated:

> Once all the LHWCA issues in respect of the compensation claim have been adjudicated, an adjudication of who else may be liable on other

[12]Section 19(a) of the Act, 33 U.S.C. §919(a), provides that the administrative law judge "shall have full power and authority to hear and determine all questions in respect of such claim [for compensation]."

> grounds is, therefore, unnecessary to the objectivity of the LHWCA proceedings.

Id., 261 F.3d at 464, 35 BRBS 98(CRT) (parenthetical omitted). Thus, the Fifth Circuit determined that the contractual dispute between Temporary Employment Services and Trinity Marine was not integral to the compensation claim and should not have been addressed by the administrative law judge. *Id.*, 261 F.3d at 465, 35 BRBS 99(CRT). Trinity Marine was liable under the Act, and if Trinity Marine had a contract executed under state law that would relieve it of its liability, then that issue had to be resolved in the state forum. *Id.*, 261 F.3d at 464-465, 35 BRBS 98-99(CRT); *see Equitable Equipment Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

Contrary to the administrative law judge's findings, the instant case is not analogous to *Ricks*. Rather, it is more akin to *Total Marine* and the cases involving reimbursement between borrowing and lending employers. In *Total Marine*, CPS, a temporary labor service that supplied workers to Total Marine, employed the claimant. The claimant was injured while working at Total Marine and he filed a claim for benefits against CPS. CPS controverted the claim, asserting that Total Marine, as borrowing employer, was liable; nevertheless, CPS settled the claim with claimant and paid disability and medical benefits. Because Total Marine stipulated it was the claimant's borrowing employer, the Fifth Circuit held that Total Marine is the claimant's employer under the Act and is liable for the claimant's benefits. *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT). "Because CPS has already paid those compensation benefits, it is entitled to reimbursement from Total Marine[,]" absent "a valid and enforceable indemnification agreement. . . ." *Total Marine*, 87 F.3d at 779, 30 BRBS at 66(CRT).

In the case currently before the Board, there is one established responsible employer, BBI. BBI had two insurers with OCSLA endorsements effective at the time of claimant's injury. Those insurers did not have a contractual relationship with each other. Thus, unlike *Ricks*, there was no contract dispute to resolve invoking some law other than the Act. The issue evolving here as a result of claimant's original claim for benefits was the issue of which of BBI's two carriers is the responsible carrier. This is clearly an issue the administrative law judge has the authority to resolve, and he did so here, finding INA to the be responsible carrier, because the rights and liabilities of the insurers are considered to be "in respect of" compensation claims under the Act. *Ricks*, 261 F.3d at 463, 35 BRBS 97(CRT); *see, e.g., Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997). However, his resolution is incomplete without addressing the reimbursement issue raised by Houston General. Although the administrative law judge found INA to be the carrier on the risk and liable for claimant's benefits, his refusal to address the reimbursement issue effectively made INA liable for benefits only from May 3, 2001, and continuing, leaving Houston General liable for benefits prior thereto. As

INA is the responsible carrier, it is liable for all of claimant's benefits, and the administrative law judge should have addressed Houston General's request for reimbursement of the benefits it erroneously paid.[13] Because INA's liability evolved from claimant's active claim for continuing benefits, and because its responsibility for those benefits is based entirely on the provisions of the Act, as extended by the OCSLA, we vacate the administrative law judge's determination that he does not have jurisdiction to address the reimbursement issue, and we remand the case to him for further consideration of this issue. *Total Marine*, 87 F.3d at 779, 30 BRBS at 66(CRT); *Schaubert*, 32 BRBS at 235; *Vodanovich*, 27 BRBS at 290.

Accordingly, the administrative law judge's award of permanent disability benefits and his finding that he lacks jurisdiction to address the reimbursement issue are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[13]We reject INA's argument that the administrative law judge has no jurisdiction over the reimbursement issue because claimant has no interest in this dispute between two carriers. Claimant is and has been an active participant in the proceedings, asserting his entitlement to benefits, and the reimbursement issue follows from the responsible carrier holding. *Compare Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981), *with Mulligan v. Haughton Elevator*, 12 BRBS 99 (1980).