BRB No. 04-0200

EDWARD R. NEWTON, Sr.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
P & O PORTS LOUISIANA, INCORPORATED	)	DATE ISSUED: MAR 11, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	ORDER

Employer appeals the administrative law judge's "Order Granting Claimant's Motion to Compel Discovery, Denying Employer's Motion to Quash Subpoena Duces Tecum, and Denying Employer's Motion for Protective Order." Claimant has filed a motion to dismiss employer's appeal, contending it is an appeal of an interlocutory discovery order. Employer responds that the Board should exercise its discretion to review the administrative law judge's Order, as the issue presented is legal in nature, is collateral to the merits of the claim, and undue hardship will result to employer if it has to comply with the administrative law judge's Order.

Claimant's claim for benefits is pending before the district director. Claimant filed a motion with the administrative law judge seeking enforcement of a subpoena that the administrative law judge had issued. The subpoena called for employer to disclose the names and addresses of the companies identified as potential suitable alternate employment by employer's vocational expert, Ms. Favoloro. Employer resisted on the ground that it is not required to disclose this information, and it filed motions to quash the subpoena and for a protective order.

The administrative law judge found that employer was confusing the standard for establishing suitable alternate employment with the standard for what is discoverable material. The administrative law judge stated that under 29 C.F.R. §18.14, the parties may obtain discovery regarding any matter which is not privileged and which is relevant to the subject matter involved in the proceeding or which appears reasonably calculated to lead to the discovery of admissible evidence. The administrative law judge found that while employer is not obligated to produce its evidence of suitable alternate employment at the hearing, its vocational evidence is nonetheless discoverable in that claimant is entitled "to test the quality of the employer's vocational evidence." Order at 3. Thus, the administrative law judge found that the information sought by claimant is relevant,

notwithstanding that claimant's attorney is familiar with Ms. Favoloro's qualifications and methodology. The administrative law judge further stated that the information is not privileged. The administrative law judge therefore denied employer's motions to quash and for a protective order and granted claimant's motion to compel. Employer appeals the administrative law judge's Order.

Employer's appeal is of a non-final, or interlocutory, order and the Board ordinarily does not undertake review of non-final orders. *See, e.g., Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995); *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. First, the order must conclusively determine the disputed question. Secondly, the order must resolve an important issue which is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (collateral order doctrine). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862 n.16, 15 BRBS 11 n.16(CRT) (1st Cir. 1982). Thus, where the order appealed from does not satisfy the aforementioned three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to properly direct the course of the adjudicatory process. *See Butler v. Ingalls Shipbuilding, Inc.*, 28 BRBS 114 (1994); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The Board generally declines to review interlocutory discovery orders, as they fail to meet the third prong of the collateral order doctrine, that is, the discovery order is reviewable when a final decision is issued, under the abuse of discretion standard. *See Tignor*, 29 BRBS 135; *Butler*, 28 BRBS 114. If, after a final order is issued, the aggrieved party establishes that the administrative law judge abused his discretion in ordering discovery, the case can be remanded for reconsideration with any wrongly obtained evidence excluded from the record.

An exception to this general practice concerning discovery orders involves cases involving serious due process considerations. In *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987), the Board accepted the appeal of an intervenor, The George Washington University Hospital, of an order by the administrative law judge compelling responses to requests for production of documents and interrogatories. The hospital alleged that it had not had an opportunity to respond to employer's motion to compel. The Board held that the hospital's right to due process of law is separable from and collateral to the rights asserted in the action, which related to the necessity of claimant's medical care and employer's liability therefor. *Niazy*, 19 BRBS at 269. The Board accepted the interlocutory appeal holding that "it would be difficult to conceive of a more

important right or one more independent of the merits of the case." *Id*.; *see also Percoats v. Marine Terminals Corp*., 15 BRBS 151 (1982) (taking interlocutory appeal to determine if deputy commissioner has authority to order deposition); *Lopes v. George Hyman Constr. Co*., 13 BRBS 314 (1981) (to determine if Act permits taking of depositions).

The instant case does not raise any due process considerations such as that presented in *Niazy*, nor does employer allege that the documents claimant seeks to discover constitute privileged materials. Moreover, we are not persuaded by employer's bare allegation that undue hardship will result if it is forced to comply with the administrative law judge's Order, as the "evidence" claimant seeks to discover is already in existence. As the administrative law judge is afforded broad discretion in authorizing discovery, it is not necessary for the Board to direct the course of the adjudicatory process in this case. *See Baroumes*, 23 BRBS 80. Moreover, the administrative law judge=s interlocutory order will be reviewable after the administrative law judge issues a final decision in this matter. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Thus, we grant claimant's motion to dismiss employer's appeal of the administrative law judge's interlocutory order.

Accordingly, employer's appeal is dismissed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge