SAM E. BUTLER	)	BRB No. 93-2048
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
ROBERT HART	)	BRB No. 93-2049
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
	)	
THOMAS L. HARRIS	)	BRB No. 93-2050
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	ORDER

BEFORE: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

Claimants have filed motions to dismiss employer's appeals of the administrative law judge's Order Compelling Discovery filed June 4, 1993 in the above-captioned cases as interlocutory. In the three captioned cases, the claimants were successful in obtaining compensation for their work-related hearing losses. Thereafter, claimants' counsel filed fee petitions for services performed at the

district director level, and employer filed objections. Claimants' counsel then submitted amended Petitions for Attorney's Fees and motions to hold the fee applications in abeyance pending a decision by the administrative law judge on the issue of discovery.

Among employer's contentions were objections to time billed on certain enumerated dates based upon the fact that claimants' counsel had previously billed in excess of 20 hours on those particular dates.[1] In support of its allegation of excessive billing, in each case employer attached an affidavit signed by Ms. Kirby Hopper, an employee of F.A. Richard and Associates,[2] to its objections. The affidavit stated that claimants' counsel had previously submitted fee petitions which contained charges for the dates in question. The affidavit enumerated the total number of hours previously billed on these dates and further noted the fact that F.A. Richard and Associates had copies of these fee petitions in its files.

Claimants' counsel then filed a Request for Production of Documents at the district director level, seeking, among other things, "any and all records including but not limited to the computer generated records logging hours billed on [claimants' attorneys'] fee petitions." Employer filed an Objection to claimants' Request for Production in each case, and the claimants then filed a Motion to Compel Production of Documents with the Office of Administrative Law Judges.[3] Attached to the claimants' Motion to Compel was a subpoena directed to employer. Thereafter, employer filed an Objection to claimants' Motion to Compel Production of Documents and a Motion to Quash Subpoena.

At claimants' request, a hearing on the Motions to Compel Production of Documents in the three cases was set for June 16, 1993, by Administrative Law Judge C. Richard Avery. Claimants' counsel had a subpoena issued to Ms. Kirby Hopper in an attempt to obtain the documents which were the subject of the hearing. Employer filed a Motion to Quash Subpoena at the time of the hearing. After hearing the positions of the parties, the administrative law judge issued a bench ruling that employer must provide claimants' counsel with the documents requested, but limited the scope of the discovery to the seven dates on which the alleged excessive billing occurred. This ruling was later incorporated into an Order dated June 4, 1993, which is the subject of employer's appeals in the three captioned cases.[4] The administrative law judge also ordered employer to make Ms. Hopper available for a discovery deposition on July 5, 1993, at a location to be agreed upon by the parties.

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[1]In the three cases, there were a total of seven dates at issue: October 16, 1986; February 25, 1987; April 8, 1987; April 11,1987; April 30, 1987; December 2, 1987; and December 10, 1987.

[2]F.A. Richard and Associates is employer's claims administrator.

[3]There is no dispute that the administrative law judge has the authority to issue this order. *See Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986)(Decision and Order on Recon. *En Banc*).

[4]Employer also filed a separate appeal of the administrative law judge's award of attorney's fees in *Hart v. Ingalls Shipbuilding, Inc.*, which has been assigned BRB No. 91-1791 and is the subject of a separate decision, as it raises different issues from those addressed in this order.

In so concluding, the administrative law judge rejected employer's arguments that the information sought is not discoverable because claimants' counsel have access to the statistics in their own office, that the work is privileged, that claimants' counsel failed to show a substantial need for the materials, and that discovery is procedurally unavailable to claimants' counsel because counsel are not a party to the proceedings. Rather, the administrative law judge concluded that inasmuch as the affidavits contain conclusions, claimants' counsel were entitled to test the accuracy of, and the methodology used in reaching, those conclusions, indicating that he could not envision any better use of this discovery tool. The administrative law judge further noted that inasmuch as Ms. Hopper was apparently an employee of Ingalls, and not an attorney who was representing employer in this action, and as the discovery at issue did not deal with any theory or strategy used to defend employer, the information sought was not privileged.

Employer urges the Board to accept these interlocutory appeals because it contends that they fall into the collateral order exception to the final judgment rule enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Employer also argues that the Board should entertain the interlocutory appeals to "properly direct the course of the adjudicatory process" under *Lopes v. George Hyman Construction Co.*, 13 BRBS 314 (1981). Employer asserts that the issues addressed by the administrative law judge in his Order Compelling Discovery are pending in numerous similar cases and a definitive ruling is needed by the Board for the sake of consistency. In response, claimants oppose employer's interlocutory appeals, requesting that they be dismissed and the cases remanded to the administrative law judge.

Federal courts ordinarily will not grant interlocutory review of an incomplete decision. *See* 28 U.S.C.A. §1291.[5] Such review is permissible, however, in that "small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546; *United States v. 101.88 Acres of Land, Etc.*, 616 F.2d 762, 765 (5th Cir. 1980). Ordinarily, a discovery order directed to the production of documents which imposes no sanctions is not a final order appealable under Section 1291. *Miller v. Reighter*, 581 F.2d 1181, 1182 (8th Cir. 1978), *quoted in Robinson v. Tanner*, 798 F.2d 1378, 1381 (11th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987). The Board generally does not accept interlocutory appeals so as to avoid piecemeal review. *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266, 268-69 (1987); *Hudnall v. Jacksonville Shipyards*, 17 BRBS 174 (1985); *Holmes & Narver, Inc. v. Christian*, 1 BRBS 85, 87 (1974). The Board will accept an interlocutory review nonetheless if necessary to properly direct the course of the adjudicatory process. *Murphy v. Honeywell Inc.*, 8 BRBS 178, 180 (1978); *see generally Jackson v. Strauss Systems, Inc.*, 21 BRBS 266, 269 n.2 (1988);

[5]While the Board is not bound by formal or technical rules of procedure, 33 U.S.C. §923(a), it has relied on the Federal Rules of Civil Procedure for guidance where the Act and Regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862 n.16, 15 BRBS 11 n.16 (CRT)(1st Cir. 1982).

The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve a 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, 108 S.Ct. 1133 (1988).[6] If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral order exception to Section 1291. *Id.*, 485 U.S. at 276. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction the instant case arises, in adapting the collateral order doctrine, has stated that in deciding the question of finality the most important competing considerations are the "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418, 426-27 (5th Cir. 1976), *rehearing denied en banc*, 542 F.2d 1173, *quoting Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

We conclude that employer's appeals of the administrative law judge's Order Compelling Discovery do not meet the three-pronged test of *Gulfstream Aerospace.* Initially, the order does not resolve an important issue totally separate from the merits of the action. Employer has submitted an affidavit directly challenging the number of hours billed by claimant in this attorney's fee case. Employer seeks to have the fact-finder credit this affidavit and reduce the fee. The administrative law judge's Order grants claimant an opportunity to discover the facts underlying the affidavit. The discovery action approved by the administrative law judge thus relates to the credibility of evidence relevant to the merits of the fee award.

Moreover, the Order will not be "effectively unreviewable" on appeal from a final judgment. Once discovery is completed as directed by the administrative law judge, and the district director enters an award of attorney's fees for the work performed at that level, any party remaining aggrieved may appeal the fee award. While employer correctly asserts that the production of documents or deposition cannot be "undone," we note that if the attorney's fee issue is appealed, the Board can address the question of whether the administrative law judge abused his discretion in issuing his discovery ruling and whether it was so prejudicial as to result in a denial of due process at that time. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 45 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. June 15, 1993). We do not feel that the danger of denying justice by delaying a determination on the administrative law judge's order weighs heavily in this case. *See Litton Systems*, 539 F.2d at 426-27. Accordingly, as the

[6]There are variously phrased statutory and jurisdictional exceptions to the final judgment rule which have the same effect as the *Cohen* exception, *e.g.*, the "irreparable injury" exception, where not entertaining the interlocutory appeal would cause hardship or irreparable injury to the appealing party. *See, e.g., Robinson v. Tanner*, 798 F.2d 1378, 1381 (11th Cir. 1986); *Mulay Plastics, Inc. v. Grand Trunk Western R.R. Co.*, 742 F.2d 369, 370-71 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1409 (1985); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1095 (5th Cir. 1977).

applicable test has not been satisfied, we conclude that the captioned appeals do not fall within the collateral exception to the final judgement rule. *See Gulfstream Aerospace*, 485 U.S. at 276.

We also reject employer's argument that the Board should accept the appeals to properly direct the course of the adjudicatory process. Although employer argues that the issue in these appeals has been, and will continue to be, treated differently by different administrative law judges, thereby resulting in inconsistency, each administrative law judge is vested with broad discretion to direct and authorize discovery in the particular cases which are before him. *Olsen*, 25 BRBS at 45.

Claimants have also filed a Motion for Certification to the district court under Section 27(b) of the Act, 33 U.S.C. §927(b), based on employer's refusal to comply with the administrative law judge's discovery order. Employer has filed a motion in opposition. Under Section 27(b), the Board shall certify the facts to a district court if a person resists any lawful order. 33 U.S.C. §927(b). As employer has appealed the administrative law judge's discovery order to the Board and has not, as yet, resisted any lawful order, we deny claimant's motion as premature.

Accordingly, as jurisdiction over these matters remains with the Office of Administrative Law Judges, we grant the claimants' Motion to Dismiss employer's appeals in BRB Nos. 93-2048, 93-2049 and 93-2050 as interlocutory, and remand the cases for further proceedings consistent with this opinion. Claimants' Motion for Certification pursuant to Section 27(b) is denied.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge