BRB No. 02-0159

MICHAEL TIMOTHY SULLIVAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ST. JOHNS SHIPPING COMPANY, INCORPORATED	)	DATE ISSUED: Oct. 31, 2002
	)	
Employer-Petitioner	)	
	)	
TRI-STATE EMPLOYMENT SERVICES	)	
	)	
Employer	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Granting Attorney Fees of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.C.), Dania Beach, Florida, for claimant.

Craig T. Galle, West Palm Beach, Florida, for St. Johns Shipping Company.

Peter B. Silvain, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

St. Johns Shipping appeals the Decision and Order and the Supplemental Decision and Order Granting Attorney Fees (2001-LHC-00486) of Administrative Law Judge Paul H. Teitler 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). 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).

Claimant was injured at work on May 28, 1998. Claimant apparently was employed by TriState Employment Services to work at St. Johns Shipping. TriState's carrier paid claimant some benefits under the Florida workers' compensation law, but the carrier then determined that claimant was covered under the Longshore Act and ceased payment of benefits. The carrier did not provide coverage under the Longshore Act. *See* Tr. 2 at 7. At this point, the attorney, Gary Miller, who was representing both TriState and St. Johns Shipping withdrew from the case and advised St. Johns Shipping to obtain its own counsel.

A notice of formal hearing and pre-hearing order was issued by the administrative law judge on December 19, 2000, for the period of April 24-27, 2001. The order noted that there was no attorney of record for TriState or St. Johns Shipping. The service sheet states that the order was sent to claimant, claimant's attorney, St. Johns Shipping and TriState. At a calendar call held on April 24, 2001, claimant's counsel was present and stated that a hearing needed to go forward. Neither employer was represented at the calendar call and there was nothing stated about employers or any counsel they might have. Tr. 1 at 10-11.

The formal hearing was convened on April 26, 2001. Neither employer was represented at the hearing. Claimant testified and introduced documentary evidence into the record. On May 7, 2001, claimant filed a post-hearing brief, with service thereof on St. Johns Shipping at the address used by the administrative law judge in his pre-hearing order. In his decision, filed on October 9, 2001, the administrative law judge noted that neither employer was represented at the hearing. The administrative law judge reviewed the evidence submitted by claimant, and found that claimant is unable to perform his usual work. He awarded claimant temporary total disability benefits from May 22, 1998 until November, 15, 1999, and from January 1, 2001 until January 13, 2001. 33 U.S.C. '908(b). Claimant obtained employment with other employers from November 15, 1999 through December 31, 2000, and continuing from January 15, 2001. The administrative law judge awarded

claimant temporary partial disability benefits for these periods, based on the wages he earned in those jobs. 33 U.S.C. '908(e), (h). Claimant also was awarded medical benefits. 33 U.S.C. '907. The administrative law judge summarily found St. Johns Shipping liable for the benefits awarded, stating that it was claimant's actual employer and that TriState provided only payroll services.

Claimant's counsel subsequently requested an attorney's fee. By Supplemental Decision and Order filed on January 8, 2002, the administrative law judge awarded claimant attorney's fees of $30,992.50 and expenses of $667. The administrative law judge noted that St. Johns Shipping did not file objections to the fee petition, and he summarily awarded the fee requested.

On appeal, St. Johns Shipping (employer) contends that its right to due process of law was abridged as it did not receive actual notice of the hearing and thus was denied the right to be heard.[1] In this regard, employer argues that service of the notice of hearing was not effected pursuant to Section 19(c) of the Act, 33 U.S.C. '919(c). Employer therefore contends that the administrative law judge erred in entering a default judgment against it. For these reasons employer also contends that the entry of the fee award was improper. Employer further contends the fee award should be set aside because it is error to enter a fee award while an appeal is pending, the administrative law judge failed to hold a hearing to determine the amount of the attorney's fee, and the administrative law judge failed to determine that the amount of the fee request is reasonable.

In response, claimant urges affirmance of the awards of compensation and attorney's fees. Claimant contends that employer had sufficient knowledge that claimant was proceeding under the Longshore Act and that employer does not allege it did not receive other documents associated with claim;[2] claimant thus maintains that if in fact employer did not receive the notice of hearing, employer nevertheless was under an obligation to inquire based on its knowledge from TriState's counsel that a longshore claim would ensue. Employer replies that not only did it not receive statutory notice of the hearing, it did not receive actual notice

[1]By Order dated March 13, 2002, the Board denied employer's motion for a stay of payments. 33 U.S.C. '921(b)(3); 20 C.F.R. '802.105.

[2]2St. Johns Shipping does not contend it did not receive any of the other filings, nor does it contend that any document, including the notice of hearing was sent to the wrong address.

by regular mail either.[3]

In his response brief, the Director, Office of Workers' Compensation Programs (the Director), contends the case must be remanded for a determination on the issue of whether employer was provided with notice of the hearing as provided by Section 19(c) of the Act. The Director maintains, however, that the Board should not vacate the award of benefits pending resolution of this issue, but should direct the administrative law judge to vacate his award should he determine that notice to employer was not properly given.

It is well established that procedural due process requirements are applicable to administrative proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richardson v. Perales,* 402 U.S. 389 (1971). Failure to give notice of a proceeding to an interested party violates Athe most rudimentary demands of due process of law.@ *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965). A[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.@ *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). With regard to notice of a formal hearing under the Act, Section 19(c) states, in pertinent part:

> If a hearing on such claim is ordered the [administrative law judge] shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail,... .

[3]In this regard, employer references affidavits filed with its motion for a stay of payments. The affidavit of Augusto Moldonado, President of St. Johns Shipping, attests to the veracity of the information contained in the motion for stay of payments. The motion refers to lack of statutory notice of the hearing. The affidavit of Gary Miller, Esq., TriState's counsel, attests to the fact that he did not represent St. Johns Shipping in this longshore claim.

33 U.S.C. '919(c);[4] *see also* 33 U.S.C. '919(d) (transferring adjudicatory functions from deputy commissioners to administrative law judges), (e);[5] *Gravel Products Corp. v. McManigal*, 14 F.Supp. 414, 416 (W.D. N.Y. 1936) (if notice was not given under Section 19(c), the aggrieved party Ashould not be denied the opportunity of being heard and having the case disposed of on the merits@); *Salvatore v. Locke*, 6 F.Supp. 560 (E.D. N.Y. 1934), *aff'd*, 72 F.2d 1012 (2d Cir. 1934) (deputy commissioner violated Section 19(c) in permitting an *ex parte* hearing, after the issuance of a compensation order, without the presence of the claimant on the issue

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[4]The regulation implementing Section 19(c), 20 C.F.R. '702.335, is silent as to service of the notice of hearing. It states that the

> Office of the Chief Administrative Law Judge shall notify the parties (See ' 702.333 [identifying who are the parties]) of the place and time of the formal hearing not less than 30 days in advance thereof.

The general Office of Administrative Law Judges regulation governing a notice of hearing states, in pertinent part:

> Service of such notice shall be made by regular, first-class mail, unless under the circumstances it appears to the administrative law judge that certified mail, mailgram, telephone, or any combination of these methods should be used instead.

29 C.F.R. '18.27(a). This general regulation, however, is inapplicable to this case, as a specific statutory provision applies. *See* 29 C.F.R. '18.1(a).

[5]Section 19(e) of the Act also requires that action be taken by certified or registered mail. This section states:

> The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

33 U.S.C. '919(e); *see generally Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993); *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); *Ins. Co. of N. Amer. v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983).

of whether claimant inflicted an injury on himself in order to fraudulently obtain compensation). In addressing whether a responsible operator was denied due process based on the date it was notified of its potential liability for a black lung claim, the Fourth Circuit stated, AMost modern cases are like this one, involving a real or alleged breakdown of a prescribed process that, if followed reasonably well, would provide far more than the constitutional minimum@ of due process. *Lane Hollow Coal Co. v. Director*, *OWCP*, 137 F.3d 799, 806-807 (4th Cir. 1998); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999); *Tazco, Inc. v. Director, OWCP*, 895 F.2d 949 (4th Cir. 1990). Furthermore, A[t]he law disfavors default judgments as a general matter. . .@ *Tazco, Inc.,* 895 F.2d at 950.

We agree with the Director that this case must be remanded for a hearing on the limited issue of whether employer was served with the notice of the hearing by certified mail, as required by Section 19(c) of the Act. *See Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993) (remanding case for hearing on whether claimant was served by certified mail, pursuant to Section 19(e), with administrative law judge's decision). We reject claimant's contention that employer was obligated to inquire about any proceedings based merely on its knowledge from TriState's counsel that claimant was pursuing his claim under the Longshore Act; this knowledge does not indicate that employer was aware of the scheduled formal hearing. As discussed above, the administrative law judge sent a ANotice of Hearing and Pre-Hearing Order@ on December 19, 2000. This notice stated that a calendar call would be held on April 24, 2001, and that the hearing time and date would be set at the calendar call (for the same week).[6] The service sheet, signed by a legal technician, states, AI certify that a copy of the above document was sent to the following.@ Claimant, claimant's attorney, St. Johns Shipping, and TriState are listed on this service sheet. Elsewhere in the document it is noted that neither employer has an attorney of record. The service sheet does not state that the order was sent by certified or registered mail. On remand, therefore, the administrative law judge must hold a hearing and receive evidence as to whether employer received notice of the hearing by certified or registered mail. If the administrative law judge determines that notice was not given to employer as provided by Section 19(c), then he must vacate the award of benefits

[6]6This document only sets forth the date of the calendar call. In his initial brief, employer states that it did not receive notice of the April 26, 2001 hearing. In its reply brief, employer states it did not receive notice of the April 24, 2001 hearing (calendar call). The Director states that the notice of the April 24, 2001 proceeding is the relevant document. On the facts of this case, we agree that the April 24, 2001 proceeding is the one to which the statutory service requirement attached.

and hold a new hearing in which employer is permitted to introduce evidence and to examine or cross-examine any witnesses. Moreover, if a new hearing is held and St. Johns Shipping alleges that it is not claimant's statutory employer, and that TriState is, TriState should be joined in the proceeding.[7] *See generally Sans v. Todd Shipyards Corp.*, 19 BRBS 25 (1986).

With regard to the fee award, we reject employer's contention that the administrative law judge was without jurisdiction to issue a fee award after employer filed an appeal with the Board. Employer correctly contends that the fee award is not final and enforceable until all appeals are exhausted, but the administrative law judge is not prevented from issuing a fee award during the pendency of an appeal on the merits. *See Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). Employer's argument that the administrative law judge was required to hold a hearing to determine the reasonableness of the fee request is without merit. *See generally Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). The cases cited by employer requiring a hearing on a fee petition arise under Florida law, and are not controlling in this case.

Nonetheless, we agree with employer that the fee award must be vacated. If the employer was not provided with notice of the hearing, then this due process violation taints the fee award, as well as the award of disability compensation. Moreover, there is merit in employer's contention that, regardless of any due process problems, the administrative law judge erred in summarily awarding the fee requested and in failing to state why the fee is reasonable under the regulatory criteria, 20 C.F.R. '702.132(a). AIt is the administrative law judge's responsibility to review the fee petition and determine whether the fee requested is reasonably commensurate with the necessary work done.@ *Bazor v. Boomtown Belle Casino*, 35 BRBS 121, 128 (2001). This analysis should occur whether or not employer objected to the fee petition. Therefore, on remand, the administrative law judge

[7]Claimant contends that as TriState did not appeal the administrative law judge's decision, the decision can be affirmed as to TriState. The administrative law judge did not find TriState to be claimant's statutory employer. *See* Decision and Order at 6. Thus, there is nothing to affirm as to TriState.

must reconsider the fee award in conformance with the regulation and any applicable case law.

Accordingly, the case is remanded to the administrative law judge for a hearing on the issue of whether employer was provided with notice of the hearing, pursuant to Section 19(c). The administrative law judge's fee award is vacated; on remand, any fee awarded must take into account the regulatory criteria for such awards.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge