

H.H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUDWORTH MARINE,	)	DATE ISSUED: 11/19/2008
INCORPORATED	)	
	)	
and	)	
	)	
TEXAS MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Canceling Hearing and Order Granting Motion to Dismiss of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Ernest M. Powell, III (Kratovich & Powell), Houston, Texas, for claimant.

Peter Thompson (Thompson & Reilly, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Canceling Hearing and Order Granting Motion to Dismiss (2007-LHC-01008) of Administrative Law Judge Clement J. Kennington 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 allegedly sustained an injury to his back while in the course of his employment as a welder for employer on September 18, 2003. Claimant subsequently sought benefits under the Act, and employer controverted the claim. After a protracted procedural history,<sup>1</sup> the case was forwarded to the Office of Administrative Law Judges (OALJ) on March 12, 2007, reassigned to Administrative Law Judge Clement J. Kennington (the administrative law judge), and set for a formal hearing on November 9, 2007.<sup>2</sup> On September 20, 2007, employer filed a motion to dismiss the claim with prejudice, asserting that claimant had abused the discovery process and failed to comply with various orders issued in this case; in the alternative, employer moved to compel claimant to fully comply with employer’s discovery requests and, in addition, moved for a continuance and for sanctions.<sup>3</sup> In an Order issued on October 18, 2007, the administrative law judge rescheduled the hearing to January 8, 2008, and ordered

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<sup>1</sup> The case was first forwarded to the Office of Administrative Law Judges (OALJ) in 2004, but was subsequently remanded to the district director for further development of the claim. In 2006, the case was again forwarded to the OALJ, but subsequently the scheduled hearing was continued for claimant to respond to employer’s discovery requests. Following the issuance of an Order to Show Cause by Administrative Law Judge C. Richard Avery on May 17, 2006, claimant filed responses to employer’s discovery requests. Thereafter, pursuant to employer’s requests, claimant submitted supplemental responses to employer’s discovery requests. Employer filed an unopposed motion for a continuance on October 24, 2006, on the basis that several of claimant’s discovery responses remained deficient. In an Order of Remand issued on October 30, 2006, Administrative Law Judge Avery remanded the case to the district director until such time as discovery was complete.

<sup>2</sup> On July 2, 2007, employer served claimant with interrogatories, requests for admissions and production; on July 31, 2007, claimant submitted responses to employer’s discovery requests. Thereafter, by letter dated August 15, 2007, employer requested that claimant supplement his responses to various specified interrogatories and requests for production.

<sup>3</sup> Pursuant to an October 2, 2007 telephone conference conducted by the administrative law judge, claimant filed a supplemental response to employer’s discovery requests on October 12, 2007; on the same date, he also filed an objection to the continuance of the hearing. On November 7, 2007, employer advised that claimant’s discovery responses remained inadequate and reiterated its position that a continuance was warranted.

claimant to fully respond within 14 days of the Order to Interrogatory Nos. 1-4, 12, and 15 and to Request for Production Nos. 5, 8, 14, 15, 17, 22, 28, and 29.

On November 2, 2007, employer renewed its motion to dismiss and motion for sanctions, averring that claimant's October 12, 2007 supplemental response failed to adequately respond to Interrogatory Nos. 1, 2, 4 and 12, and to Request for Production Nos. 5, 8 and 17. On November 13, 2007, claimant filed a second supplemental response to employer's discovery requests; on the same date, he also filed an opposition to employer's motion to dismiss, representing that he had now responded to all of employer's discovery requests to the best of his ability.<sup>4</sup> A telephone conference was conducted on November 14, 2007, and on the following day, claimant filed a third supplemental response to employer's discovery requests and again opposed the motion to dismiss, maintaining that he had now fully satisfied employer's concerns with respect to his previous discovery responses. On November 16, 2007, employer filed a supplement to its motion to dismiss, contending that dismissal of the claim was warranted by claimant's failure to supplement his discovery responses within the time frame specified in the administrative law judge's October 18, 2007 Order. In further support of its motion, employer argued that claimant's untimely supplemental responses should not be considered or, alternatively, that they did not adequately respond to Interrogatory Nos. 1(c), 2 and 4(c), and to Request for Production Nos. 5, 8 and 17.<sup>5</sup>

In an Order issued on December 19, 2007 (Dismissal Order), the administrative law judge cancelled the formal hearing scheduled for January 8, 2008, and granted employer's motion to dismiss the case with prejudice, citing Section 18.29(a) of the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. §18.29(a), and Rule 41(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 41(b), as support for his authority to dismiss the claim. The administrative law judge observed that, although Interrogatory 1(c) was the only remaining discovery request to which claimant had not fully responded, dismissal of the claim was warranted by claimant's failure to prosecute his claim in a timely manner as well as by claimant's disregard of Administrative Law Judge Avery's May 17, 2006 Order to Show Cause and

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<sup>4</sup> In addition, claimant submitted the 84-page curriculum vitae of Dr. Esses in response to Interrogatory No. 1(c).

<sup>5</sup> Employer's supplement to its motion to dismiss apparently was filed prior to employer's review of claimant's third supplemental response. On December 17, 2007, employer filed a second supplement to its motion to dismiss, arguing that claimant's third supplemental response was untimely and, alternatively, that this response remained inadequate. Employer thus renewed its request that the claim be dismissed with prejudice.

the administrative law judge's October 18, 2007 Order compelling claimant to fully comply with employer's specified discovery requests within 14 days.

Claimant appeals, contending that the administrative law judge erred in dismissing his claim.<sup>6</sup> Employer responds, urging affirmance.

For the reasons stated in *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003), we hold that the administrative law judge erred in dismissing claimant's claim. In *Goicochea*, 37 BRBS at 6-7, the Board held that an administrative law judge may not dismiss a claim with prejudice for failure to comply with a discovery order since the Act contains a specific sanction for the failure to comply with a lawful order of the administrative law judge. Specifically, Section 27(b) of the Act, 33 U.S.C. §927(b), provides that if any person disobeys or resists a lawful order of the administrative law judge or neglects to produce documents after having been ordered to do so, the administrative law judge may certify to the district court the facts concerning the misbehavior.<sup>7</sup> The Board held in *Goicochea* that as the Act contains a specific

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<sup>6</sup> Claimant's counsel filed a Petition for Review and brief on behalf of claimant on March 10, 2008. Subsequently, in a letter dated June 27, 2008, claimant advised the Board of his decision to dismiss his attorney from his case. In this letter, claimant also requested that he be granted a hearing before a jury. Claimant's request is denied as there is no provision in the Act for a hearing before a jury. The Board's review authority is limited to consideration of the evidence which is part of the record developed before the administrative law judge. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301.

<sup>7</sup> Section 27(b) states:

If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, . . . or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, . . . the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such district) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

provision governing the manner in which to sanction the failure to comply with a lawful discovery order,<sup>8</sup> neither the general Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18, nor the Federal Rules of Civil Procedure apply to permit the administrative law judge to dismiss the claim with prejudice. *Id.*; see *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9<sup>th</sup> Cir. 1993); 29 U.S.C. §18.1(a); see also 33 U.S.C. §923(a). The Board therefore vacated the administrative law judge's dismissal, pursuant to Fed. R. Civ. P. 37(b)(2) and 41(b), of the claimant's claim due to his failure to respond to the administrative law judge's orders. *Goicochea*, 37 BRBS at 7.

As in *Goicochea*, the administrative law judge's dismissal of claimant's claim cannot be affirmed. First, the administrative law judge erred in dismissing the claim based on claimant's failure to comply with Administrative Law Judge Avery's Order to Show Cause and the administrative law judge's order to compel claimant to fully comply with employer's discovery requests. As previously discussed, any failure by claimant to comply with the administrative law judges' discovery orders or any untimely responses to such orders by claimant may be sanctioned only in accordance with the mechanism set forth at Section 27(b) of the Act.<sup>9</sup> 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 7.

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33 U.S.C. §927(b). In 1972, the Act was amended to add Section 19(d), which provides for the transfer of adjudicative functions to the Office of Administrative Law Judges. 33 U.S.C. §919(d). Thus, since 1972, administrative law judges, rather than deputy commissioners (now referred to as district directors), conduct formal hearings, and hold the powers and duties granted deputy commissioners under Section 27 of the Act. See *Percoats v. Marine Terminals Corp.*, 15 BRBS 151, 153-154 (1982).

<sup>8</sup> Under Section 27(b), the district court may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act. See *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9<sup>th</sup> Cir. 1999), citing *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9<sup>th</sup> Cir.), cert. denied, 505 U.S. 1230 (1992).

<sup>9</sup> The Board lacks jurisdiction to address claimant's conduct in response to the administrative law judges' orders. *A-Z Int'l v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9<sup>th</sup> Cir. 1999); *Goicochea*, 37 BRBS at 8 n.5. Thus, we do not consider the question of whether claimant's conduct in this case represents non-compliance with the lawful discovery orders issued by the administrative law judge in this case.

Next, the administrative law judge found that claimant was dilatory in the pursuit of his claim and that this conduct also warranted dismissal of the claim pursuant to 29 C.F.R. §18.29(a), which affords the administrative law judge all necessary powers to conduct fair and impartial hearings and, where applicable, to take any appropriate action authorized by the Federal Rules of Civil Procedure, and Fed. R. Civ. P. 41(b), which provides for the involuntary dismissal of a claim for, *inter alia*, failure to prosecute the claim.<sup>10</sup> We are unable to affirm this alternate basis for dismissal of the claim. Although the administrative law judge stated that less drastic sanctions had proven to be unavailing, Dismissal Order at 5, he did not consider, in accordance with law, the imposition of lesser sanctions available under Section 27(b) for any dilatory responses on the part of claimant to the administrative law judge's discovery orders. 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 7.

In addition, there are other actions an administrative law judge may take to discharge the duties of his office and exercise control over the proceedings before him. 5 U.S.C. §556(c); 33 U.S.C. §927(a). In particular, the administrative law judge retains control over the admission of evidence and the direction of discovery. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). For example, if a party does not submit evidence within his control, the administrative law judge may draw an adverse inference against that party and conclude that the evidence is unfavorable to that party. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). If a party does not act with due diligence in obtaining evidence, the administrative law judge can close the record and exclude the evidence. *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *see also Ezell*, 33 BRBS 19. An administrative law judge also may dismiss claims that have been abandoned, *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989), and may deny a claim for failure of the proponent to present credible evidence establishing a basis for an award. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge found that claimant had complied with all but one of employer's discovery requests. Dismissal Order at 5. As claimant had expressed his desire that a hearing be held, it would have been appropriate for the

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<sup>10</sup> The courts have interpreted this rule as permitting a case's dismissal with prejudice only where there is a clear record of delay or contumacious conduct, and where less drastic sanctions have proven unsuccessful. *See Dorsey v. Scott Wetzel Service, Inc.*, 84 F.3d 170 (5<sup>th</sup> Cir. 1996); *see also Penny Theatre Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7<sup>th</sup> Cir. 1987); *Donnelly v. Johns Manville Sales Corp.*, 677 F.2d 339 (3<sup>d</sup> Cir. 1982); *Davis v. Williams*, 588 F.2d 69 (4<sup>th</sup> Cir. 1978); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

administrative law judge to proceed with the hearing scheduled for January 8, 2008. If, at that time, the administrative law judge deemed the information supplied by claimant regarding Dr. Esses's professional qualifications in response to Interrogatory No. 1(c) to be incomplete, *see id.*, the administrative law judge could have appropriately employed less drastic sanctions such as those discussed in the foregoing paragraph.

Thus, as the Act provides an available sanction less severe than that imposed by the administrative law judge, we hold that he erred in dismissing this claim pursuant to the Federal Rules of Civil Procedure. 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 6-7; 29 C.F.R. §18.1. Consequently, we vacate the administrative law judge's order dismissing claimant's claim and we remand the case to the administrative law judge for further appropriate action.

Accordingly, the administrative law judge's Order Canceling Hearing and Order Granting Motion to Dismiss is vacated, and this case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge