

BRB No. 01-0213

JOHN McCAMBRIDGE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SELECT CARGO SERVICES,)	DATE ISSUED: <u>10/30/01</u>
INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher, LLP), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order of Dismissal and Order Denying Reconsideration (99-LHC-1771) of Administrative Law Judge Ralph A. Romano 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The parties to this matter agreed that the administrative law judge would first determine whether claimant's hand injury arose in the course of his employment. By "Interim Order on Jurisdiction" dated March 9, 2000, the administrative law judge found that claimant's injury arose in the course of his employment. At the end of this decision, the administrative law judge told the parties to advise him within 10 days whether they intended to file briefs regarding the remaining issues or any other suggested disposition of the claim. On March 28, 2000, employer's counsel wrote to the administrative law judge that the parties were negotiating a Section 8(i) settlement, and he requested a 30-day extension in which to file briefs or that the administrative law judge set a second hearing date. On April 12, 2000, employer's counsel advised the administrative law judge that the parties had completed their settlement negotiations, and that the stipulations would soon be forwarded to the administrative law judge. On April 20, 2000, employer's counsel advised the administrative law judge that the stipulations had been prepared and were circulating for signatures; he stated the signed stipulations would be forwarded to the administrative law judge within two weeks.

Having received nothing from the parties, the administrative law judge issued an order on July 17, 2000 to show cause why the claim should not be dismissed. Claimant's counsel replied by letter dated July 20, 2000. He stated that when the stipulations circulated for signature, claimant advised him he was having second thoughts about the settlement; counsel stated, however, that claimant had not finally advised him either way regarding the proposed settlement. Counsel stated that he had contacted claimant upon receipt of the show cause order, and was awaiting claimant's response. Counsel requested an additional 10 days to submit the settlement to the administrative law judge.

By Order filed on September 7, 2000, the administrative law judge dismissed claimant's claim, as he had not received any filings from claimant. Claimant filed a motion for reconsideration, advising the administrative law judge that claimant did not wish to proceed with the settlement as it was inadequate in light of the amount he owed to a health care provider. Claimant's counsel requested that the order of dismissal be vacated and that the case be restored to the hearing calendar. The administrative law judge summarily denied the motion for reconsideration. Claimant appeals the dismissal of his claim. Employer responds, urging affirmance.

The Board has addressed the authority of the administrative law judge to dismiss claims, and the propriety of doing so, in several cases. In *Taylor v. B. Frank Joy*, 22 BRBS 408 (1989), the Board affirmed the administrative law judge's dismissal of a claim based on her determination that the claim had been abandoned by virtue of claimant's actions. The record showed that claimant's counsel was unable to contact claimant for many months, and neither claimant nor his attorney appeared at the hearing. The administrative law judge

subsequently dismissed the request for a hearing pursuant to 29 C.F.R. §18.39(b),¹ and then refused counsel's request to remand the case to the district director.

¹Section 18.39(b) states:

A request for hearing may be dismissed upon its abandonment or settlement by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his or her representative appears at the time and place fixed for the hearing and either (a) prior to the time for hearing such party does not show good cause as to why neither he or she nor his or her representative can appear or (b) within ten (10) days after the mailing of a notice to him or her by the administrative law judge to show cause, such party does not show good cause for such failure to appear and fails to notify the administrative law judge prior to the time fixed for hearing that he or she cannot appear. A default decision, under Sec. 18.5(b), may be entered against any party failing, without good cause, to appear at a hearing.

The Board affirmed the administrative law judge's actions, which, in effect, resulted in the dismissal of the claim. The Board first held that the 29 C.F.R. Part 18 regulations applied, as the Longshore Act and its regulations do not address the issue of dismissal of claims due to actions of a party or counsel. *Taylor*, 22 BRBS at 411. Section 18.39(b) allows for the entry of a default decision against a party who does not appear at the scheduled hearing. See n.1, *supra*. Section 18.29(a), 29 C.F.R. §18.29(a), affords an administrative law judge "all powers necessary to the conduct of fair and impartial hearings, including... where applicable, [the authority to] take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts." Rule 41(b) of the Federal Rules of Civil Procedure (FRCP) allows for the involuntary dismissal of a claim for failure to prosecute the claim or for failure of the plaintiff to comply with any order of the court. *Taylor*, 22 BRBS at 411; Fed. R. Civ. P. 41(b). Finally, the Board stated that "the availability of dismissal as a procedural tool obviously should be restricted to prevent prejudice to parties and to protect their right to a fair hearing," but that there is a "countervailing policy of allowing administrative law judges to exercise those powers necessary to conduct fair and impartial hearings, as well as the policy against encouraging protracted litigation." *Id.* The Board affirmed the administrative law judge's action as a proper exercise of her discretion, as counsel did not know where the claimant was and there was no indication of claimant's intent to pursue the claim.²

In *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989), the administrative law judge dismissed claimant's claim pursuant to Rule 41(b) of the FRCP. The Board cited case law stating that Rule 41(b) permits dismissal "only where there is a clear record of delay or contumacious conduct, or when less drastic sanctions have proved unsuccessful." *Twigg*, 23 BRBS at 121, citing *3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337 (7th Cir. 1987); *Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175 (7th Cir. 1987); and *Donnelly v. Johns Manville Sales Corp.*, 677 F.2d 339 (3d Cir. 1982). The administrative law judge in *Twigg* dismissed the claim based on claimant's failure to attend medical examinations and two depositions. The administrative law judge did not, however, consider claimant's explanations for his failure to appear, which included allegations that employer's doctor was not available when claimant went to his office for a scheduled examination, that employer's attorney canceled an appointment, and that his counsel informed him a deposition was canceled. The Board remanded the case for the administrative law judge to consider whether claimant's behavior was contumacious in view

²The Board limited a prior case, *Brown v. Reynolds Shipyard*, 14 BRBS 460 (1981), to its facts. In *Brown*, the Board held that the administrative law judge cannot dismiss a claim, but must either award or deny benefits. In *Taylor*, the Board noted that *Brown* was decided before the promulgation of the 29 C.F.R. Part 18 regulations.

of claimant's "excuses." *Twiggs*, 23 BRBS at 122. Moreover, in relying on claimant's failure to comply with the administrative law judge's orders, the administrative law judge did not consider whether claimant was represented by counsel at the relevant times, whether his conduct prejudiced employer, or whether claimant's delay was deliberate. The administrative law judge also did not consider a motion to compel claimant to attend his deposition or to answer interrogatories, pursuant to Section 27 of the Longshore Act, 33 U.S.C. §927, which is a less drastic sanction than that imposed.

In *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989), the Board reversed the administrative law judge's dismissal of the claimant's claim, and remanded for a hearing and decision on the merits. The first hearing was canceled at employer's request due to claimant's failure to attend a scheduled medical examination. The administrative law judge issued an order to compel claimant to attend an examination, and claimant did so. The second hearing was continued at claimant's request because his physician was unable to testify on the scheduled date; this continuance was granted. Subsequently, claimant's counsel filed a motion to withdraw from the case. The administrative law judge issued an order 11 days before the hearing stating that absent a showing of good cause, the hearing date would remain the same, and that if claimant appeared, he would be granted a continuance to obtain new counsel and if he did not appear, absent a showing of good cause, employer's motion to dismiss would be considered. Claimant apparently was out of the country at this time the order was issued. At the hearing, the administrative law judge granted claimant's counsel's motion to withdraw; claimant was not present at the hearing. The administrative law judge received into evidence a copy of a certificate, handwritten in French and accompanied by an English translation, from a Greek psychiatric neurologist regarding claimant. The administrative law judge stated that the certificate failed to establish good cause for claimant's failure to appear at the hearing. The administrative law judge then concluded, based upon claimant's past actions, that claimant had displayed persistently "dilatatory and contumacious" conduct in deliberate disregard of her order and, consequently, she dismissed the claim. The Board held that claimant missed only the last hearing due to circumstances within his control, and that dismissal was too severe a sanction based on the facts presented. The case was remanded for a hearing and decision on the merits. *See also French v. California Stevedore & Ballast*, 27 BRBS 1 (1993) (Board vacated dismissal of Kaiser's claim for reimbursement due to its counsel's failure to attend the hearing where administrative law judge did not give any reasons for the dismissal and counsel was not informed of the court's rulings).

In contrast, the Board affirmed the administrative law judge's dismissal of a claim in *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff'd mem. sub nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993). In *Harrison*, there was a clear record of contumacious conduct that was prejudicial to the numerous employers against which claimant had filed. Specifically, the claimant, who was without counsel, filed over 100

motions, refused to cooperate with employers' discovery requests despite the administrative law judge's orders that he do so, refused to submit to a medical examination, and demanded compensation before he would comply with any orders.

We hold that the administrative law judge abused his discretion in dismissing claimant's claim, and we reverse this decision. It is clear from the cases described above that the dismissal of a claim is warranted only for conduct that is extremely contumacious or based on the clear absence of intent to prosecute the claim. This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, which has stated the following criteria for consideration of dismissal pursuant to Rule 41(b):

Factors pertinent to the exercise of discretion in considering a failure to prosecute motion include: (1) the personal responsibility of the plaintiff; (2) prejudice to the defendants; (3) a history of dilatoriness; (4) the willfulness or bad faith of the plaintiff's conduct; (5) the adequacy of sanctions less drastic than dismissal; and (6) the meritoriousness of the plaintiff's claims.

U.S. v. USX Corp., 68 F.3d 811, 818-819 (3d Cir. 1995). The Third Circuit also has stated, "Because [an order of dismissal] deprives a party of its day in court, our precedent requires that we carefully review each such case to ascertain whether the district court abused its discretion in applying such an extreme sanction," *Scarborough v. Eubanks*, 747 F.2d 871, 875 (3d Cir.1984), and in this review 'doubts should be resolved in favor of reaching a decision on the merits,' *id.* at 878." *Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 870 (3d Cir. 1994). The Board's decisions discussing dismissal thus comport with the Third Circuit's view of dismissal as an extreme sanction.

We note, initially, that the administrative law judge in this case gave no rationale for his summary dismissal of the claim, which is contrary to law. *French*, 27 BRBS at 6. More importantly, however, "the punishment does not fit the crime" committed in this case. While perhaps the failure of claimant and his attorney to keep the administrative law judge apprised of claimant's reservations about proceeding with the settlement can be considered "dilatory," the conduct of claimant and his counsel does not rise to the level of the willful contumacious behavior that warrants dismissal. *See generally Harrison*, 24 BRBS 257. Furthermore, the administrative law judge's authority to dismiss the instant claim cannot stem from 29 C.F.R. §18.39 as claimant did not fail to appear at a scheduled hearing, or from FRCP 41(b) and 29 C.F.R. §18.29(a) because there has been no failure to prosecute the claim or to comply with an order from the administrative law judge. *See generally Taylor*, 22 BRBS 408. Although the parties did not comply with the time frames in which *they* stated they would file documents, the administrative law judge did not order that any action be taken within a specific time frame. When the administrative law judge did not receive the parties' stipulations in support of the settlement agreement within the expected time frame, it was not

appropriate for him to issue an order to show cause why the claim should not be dismissed. Rather, the proper course of action would have been to inform the parties that the case was being restored to the hearing calendar. This action would not have foreclosed the parties from attempting to complete their settlement, but would have moved the claim along to resolution consistent with the Act and its regulations. *See generally* 33 U.S.C. §919(c), (d); 20 C.F.R. Part 702, Subpart C. The administrative law judge cannot deprive the claimant of his right to a hearing due to his failure to agree to the proposed settlement in this case, as such is not tantamount to a failure to prosecute the claim; indeed, in seeking reconsideration of the summary dismissal, claimant explicitly stated he wanted the claim to go forward to a hearing as he considered the settlement amount to be inadequate. Thus, as the record would not support a finding that the claimant and his counsel engaged in willfully contumacious conduct and as claimant stated his intention to proceed with his claim, we reverse the administrative law judge's dismissal of the claim, and we remand this case to the administrative law judge for a hearing and decision on the merits.³

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Reconsideration are reversed. The case is remanded to the administrative law judge for a hearing and decision on the merits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³We note that employer has not alleged prejudice due to the delay in reaching a settlement. *See generally Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir.1984).