

PASQUALE PONTORIERO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE	)	DATE ISSUED: <u>APR 29, 2005</u>
CORPORATION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Order Certifying Facts to the United States District Court for the District of New Jersey, the Order on Remand, and the Denial of Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Certifying Facts to the United States District Court for the District of New Jersey, the Order on Remand, and the Denial of Motion for Reconsideration (2001-LHC-01125) 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 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).

Claimant, a checker, injured his left knee and back at work in 1993 and 1996. Upon appeal, the Board affirmed the administrative law judge’s 1999 award of compensation for temporary total disability and scheduled permanent partial disability. *Pontoriero v. Universal Maritime Serv. Corp.*, BRB Nos. 99-0769/A (April 6, 2000)(unpub.). Claimant requested modification on January 17, 2001, alleging a worsening in his condition. On August 9, 2001, employer requested that claimant produce certain documents. Claimant did not respond to employer’s request. Upon employer’s filing a motion to compel and a motion for sanctions, the administrative law judge twice ordered claimant to produce the documents. Due to claimant’s failure to respond to employer’s document request and the administrative law judge’s orders compelling the production of the documents, the administrative law judge dismissed claimant’s claim for modification. Subsequently, the administrative law judge denied claimant’s motion for modification and stated he was dismissing claimant’s claim due to his failure to prosecute it.

Upon claimant’s appeal, the Board vacated the administrative law judge’s dismissal of the claim. The Board remanded the case to the administrative law judge to determine whether certification of facts to the district court concerning claimant’s noncompliance with the orders to compel, pursuant to Section 27(b) of the Act, 33 U.S.C. §927(b), was appropriate. *Pontoriero v. Universal Maritime Serv. Corp.*, BRB No. 02-0746 (June 30, 2003)(unpub.), slip op. at 5. The Board also vacated the administrative law judge’s order on reconsideration dismissing claimant’s claim under Rule 41(b), Fed. R. Civ. P. 41(b). The Board remanded the case to the administrative law judge for a determination of the factors relevant to the appropriateness of a dismissal pursuant to Rule 41(b). *Id.* at 7.

On remand, the administrative law judge again dismissed claimant’s claim pursuant to Rule 41(b) due to claimant’s failure to prosecute it. The administrative law judge issued a separate order in which he certified to the district court pursuant to Section 27(b) the facts concerning claimant’s failure to respond timely to employer’s document requests and the administrative law judge’s orders compelling production of the documents. The administrative law judge subsequently denied claimant’s motion for reconsideration of the dismissal order, despite claimant’s current and complete compliance with employer’s document requests.

In the instant appeal, claimant challenges the administrative law judge’s orders dismissing his claim and certifying facts to the district court. Employer responds in support of the administrative law judge’s orders.

The Board lacks jurisdiction to review the administrative law judge's certification of facts to the district court pursuant to Section 27(b). *A-Z Int'l v. Phillips [Phillips I]*, 179 F.3d 1187, 33 BRBS 59(CRT)(9<sup>th</sup> Cir. 1999); *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003). The Board, however, has jurisdiction to review the administrative law judge's dismissal of claimant's modification claim. *See generally French v. California Stevedore & Ballast*, 27 BRBS 1 (1993); *Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989). 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. Consequently, we vacate the administrative law judge's dismissal order.

In *Goicochea*, the Board held that an administrative law judge may not dismiss a claim with prejudice for failure to comply with a lawful discovery order since the Act contains a specific sanction for this inaction. 37 BRBS at 6-7. Specifically, Section 27(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>1</sup> The Board held that since the Act contained a specific provision addressing a party's failure to comply with a lawful order of the administrative law judge, neither the general Office of Administrative Law Judges regulations nor the Federal Rules of Civil Procedure applies. *Id.* at 7. 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.

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<sup>1</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.

33 U.S.C. §927(b).

As in *Goicochea*, the administrative law judge’s dismissal of claimant’s claim cannot be affirmed. The administrative law judge purported to dismiss claimant’s claim because claimant was “not serious about pursuing” it. Order on Remand at 8. The administrative law judge, however, cited no facts regarding claimant’s prosecution of his request for modification, and his findings support only the conclusion that he dismissed claimant’s claim because claimant was dilatory in responding to employer’s discovery requests and the administrative law judge’s orders to compel.<sup>2</sup> See Order on Remand at 8. The only sanction for this conduct is that set forth in Section 27(b). *Goicochea*, 37 BRBS at 7.<sup>3</sup> Consequently, we vacate the administrative law judge’s orders dismissing claimant’s claim, and we remand this case to the administrative law judge to address the merits of claimant’s claim that his condition has deteriorated.<sup>4</sup> 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

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<sup>2</sup> For example, the administrative law judge cited the harm to employer of the delay caused by the lack of cooperation with discovery, Order on Remand at 7, and observed that the time for claimant to have complied with discovery “was over two years ago.” Denial of Motion for Reconsideration at 2.

<sup>3</sup> The Board stated in its previous decision in this case that “claimant’s counsel’s dilatory response to the administrative law judge’s discovery orders cannot be sanctioned by dismissing the claim.” *Pontoriero*, BRB No. 02-0746, slip op. at 6. In addition, having issued an order certifying facts to the district court pursuant to Section 27(b), which is a “lesser sanction,” the administrative law judge was not free to impose the harsher sanction of dismissing the claim.

<sup>4</sup> In light of our disposition of this case, we need not address claimant’s remaining challenges to the administrative law judge’s decisions.

Accordingly, the administrative law judge's Order on Remand and Denial of Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge