



BRB No. 18-0530

ARTHUR JOYNER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: 12/20/2018
CERES MARINE TERMINALS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Not Approving Lay Representative and the Order Amending Order Not Approving Lay Representative of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Lamarr Brown, Princess Anne, Maryland, lay representative, for claimant.

Lawrence P. Postol (Postol Law Firm, P.C.), McLean, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Not Approving Lay Representative and the Order Amending Order Not Approving Lay Representative (2018-LHC-00923) of Administrative Law Judge Dana Rosen 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 will review the administrative law judge's Orders for abuse of discretion and compliance with law. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009).

Claimant injured his left knee at work on September 18, 2011, for which he received an award under the schedule. He continued to work for employer until his knee pain forced him to retire. Claimant thereafter sought additional benefits under the Act, and a Notice of Docketing was issued by the Office of Administrative Law Judges (OALJ) on May 1, 2018.¹ On May 4, 2018, Lamarr Brown, a lay representative, submitted a letter which the administrative law judge interpreted as his request for approval to serve as claimant's lay representative in the proceedings before the OALJ. Mr. Brown stated:

This is to certify that I Lamarr Brown in accordance with Title 29 Code of Federal Regulations Section 18.22(a)(2) do hereby enter my initial appearance in the above-mentioned matters on behalf of the Claimant Mr. Arthur Joyner.

I have familiarized myself with the laws, rules, and regulations of the U.S. Department of Labor's Office of Administrative Law Judges and will honor and abide by these rules these rules [sic] to the best of my ability.

Brown Corr. (May 4, 2018).

The administrative law judge addressed Mr. Brown's request in an Order Not Approving Lay Representative, issued on July 5, 2018. Citing Section 18.22(b)(2) of the Rules of Practice and Procedure for the Office of Administrative Law Judges (OALJ Rules),² the administrative law judge observed that she may require a lay representative to

¹ This notice marked the commencement of formal discovery and directed the parties to, within 21 days from the date of the notice and without awaiting a formal discovery request, provide the other parties with documentation and contact information of individuals with information that may be used to support the disclosing party's claims. Notice of Docketing at 2; *see* 29 C.F.R. §18.50.

² Section 18.22(b)(2) of the OALJ Rules states in relevant part:

Non-attorney representative. An individual who is not an attorney [] may represent a party [] upon the judge's approval. The individual must file a written request to serve as a non-attorney representative that sets forth the name of the party [] represented and certifies that the party [] desires the representation. The judge may require that the representative establish that he or she is subject to the laws of the United States and possesses communication skills, knowledge, character, thoroughness and preparation reasonably necessary to render appropriate assistance. The judge may inquire as to the qualification or ability of a non-attorney representative to render assistance at any time. The judge may deny the request to serve as

establish his ability to render appropriate assistance. The administrative law judge denied Mr. Brown's request to serve as claimant's lay representative, summarily finding that, "[b]ased on previous claims where this individual appeared at the hearing as a lay representative before the undersigned, this lay representative has not demonstrated sufficient knowledge and qualifications to represent the Claimant under the Longshore Act." Order at 2 (July 5, 2018).

On July 20, 2018, based upon the Board's decision in *Palmer v. Huntington Ingalls Ind., Inc.*, BRB No. 18-0203 (July 12, 2018), in which the Board directed the administrative law judge to explain her disqualification of Mr. Brown from serving as the claimant's lay representative, the administrative law judge, in this case, issued an Order Amending Order Not Approving Lay Representative. The administrative law judge explained that her disqualification of Mr. Brown was predicated on the quality of his representation in *Sawyer v. CP&O, LLC*, Case No. 2014-LHC-00290 (June 17, 2015);³ *Ricks v. CP&O, LLC*, Case No. 2017-LHC-01364 (decision not yet issued);⁴ *Copeland v. Ceres Marine Terminals, Inc.*, 2017-LHC-01657 (Dec. 29, 2017),⁵ as well as his representation of claimant in this

non-attorney representative after providing the party or subpoenaed witness with notice and an opportunity to be heard.

29 C.F.R. §18.22(b)(2). The OALJ Rules apply in proceedings under the Act to the extent they are not inconsistent with either the Act itself or the Act's regulations. 29 C.F.R. §18.10(a).

³ In *Sawyer*, the administrative law judge stated that Mr. Brown: did not timely file his pre-hearing statement or exchange exhibits with the employer; did not comply with subpoena request requirements and resubmitted the same requests that had been denied, as improper, by the judge; argued issues that had been dismissed by the judge; and, attempted to testify as a fact witness.

⁴ In *Ricks*, the administrative law judge found Mr. Brown demonstrated ignorance regarding when to file a timely claim. Amended Order at 4. Mr. Brown appealed the administrative law judge's disqualification of him as claimant's lay representative. The Board decided the interlocutory appeal and remanded the case for the administrative law judge to explain the basis for the disqualification. *Ricks v. CP&O, LLC*, BRB No. 18-0202 (July 18, 2018).

⁵ In *Copeland*, the administrative law judge found Mr. Brown demonstrated ignorance regarding the statutes of limitations for filing claims and requests for modification. On appeal, the Board affirmed the denial of benefits on the ground that the claimant's petition for modification was untimely filed, and did not reach the issue of Mr.

case. *See* Amended Order at 3-5. With respect to this case, the administrative law judge found Mr. Brown did not comply with employer's request for production of documents and interrogatories, which resulted in employer's filing a Motion to Compel on June 27, 2018.⁶ In response to employer's motion, Mr. Brown stated that he was awaiting records from the Department of Veterans Affairs and that, as a veteran, claimant did not have to provide documents until he had all of them in his possession. As the Rules of Practice and Procedure do not exempt veterans from timely responding to production requests and interrogatories, the administrative law judge found that Mr. Brown's response demonstrated his lack of knowledge of applicable discovery rules. The administrative law judge therefore denied Mr. Brown's request to serve as claimant's lay representative in this case.

On July 23, 2018, claimant, without representation, appealed the administrative law judge's Orders disapproving Mr. Brown's request to serve as his representative.⁷ In a pleading dated August 24, 2018, entitled "Initial Appearance of Non-Attorney Representative in Accordance with 20 C.F.R. §802.202(a)," Mr. Brown sought to appear and represent claimant in the proceedings before the Board.⁸ Subsequently, Mr. Brown filed a brief in support of claimant's appeal.⁹ Employer responds to claimant's appeal, contending the administrative law judge properly denied Mr. Brown's request.

Claimant's appeal is of a non-final, or interlocutory, order. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Newton v. P & O Ports Louisiana,*

Brown's disqualification. *Copeland v. Ceres Marine Terminals*, BRB No. 18-0188 (Sep. 13, 2018) (motion for reconsideration pending).

⁶ Employer served fourteen interrogatories and requested that all supporting documents and medical records be produced on May 7, 2018. After giving Mr. Brown additional time to respond, and informing him that he could produce what was in his possession and supplement the rest later, employer still had not received any response by June 25, 2018. It filed a Motion to Compel two days later.

⁷ By Order issued on August 2, 2018, the administrative law judge stayed further proceedings until the Board issues a decision on claimant's interlocutory appeal.

⁸ Although Mr. Brown has not submitted a proper application, 20 C.F.R. §802.202(d)(2), we grant his request for the sole purpose of this interlocutory appeal.

⁹ We decline to address Mr. Brown's contention that claimant has been denied medical treatment for his work injury, as this issue is not the subject of an order issued by the district director or the administrative law judge.

Inc., 38 BRBS 23 (2004); *Tignor v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 135 (1995). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable. First, the order must conclusively determine the disputed question. Second, 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 (1988) (collateral order doctrine). If the order at issue fails to satisfy any one of these requirements, it is not appealable. *Id.* at 276. While the Board is not bound by the formal or technical rules of procedure governing litigation in federal courts, *see* 33 U.S.C. §923(a), it has relied on such rules for guidance where the Act and its regulations are silent. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16, 15 BRBS 11, 21 n.16(CRT) (1st Cir. 1982). Thus, where the appealed order does not satisfy the three-prong test, the Board ordinarily will not grant interlocutory review, unless, in its discretion, the Board finds it necessary to direct the course of the adjudicatory process. *See Pensado v. L-3 Communications Corp.*, 48 BRBS 37 (2014); *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989).

The administrative law judge's procedural orders do not satisfy the three-prong test of the collateral order doctrine. Although the orders conclusively determined Mr. Brown's capacity to serve as claimant's lay representative in this case, and this issue is collateral to the merits of the claim, the orders are not unreviewable at a later date, as claimant may challenge the administrative law judge's procedural ruling after a decision on the merits has been issued and any error may be addressed. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *see generally Richardson Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (disqualification of attorney-representative in civil case is not appealable on an interlocutory basis); *Flanagan v. United States*, 465 U.S. 259 (1984). Nonetheless, we will entertain claimant's appeal at this time to direct the course of the adjudicatory process. *See, e.g., Pensado*, 48 BRBS 37; *Baroumes*, 23 BRBS 80. We review an administrative law judge's procedural orders for an abuse of discretion and compliance with law. *See generally Armani v. Global Linguist Solutions*, 46 BRBS 63 (2012); *Tignor*, 29 BRBS 135; *Duran v. Interport Maint. Corp.*, 27 BRBS 8 (1993).

Upon consideration of the administrative law judge's findings and the contentions raised on appeal, we find no reversible error in the administrative law judge's decision to deny Mr. Brown's request to serve as claimant's lay representative. Contrary to Mr. Brown's assertion, there is no constitutional right to "effective representation" in administrative proceedings. *See generally Clark v. Schweiker*, 652 F.2d 399 (5th Cir. 1981). Moreover, the administrative law judge is afforded broad discretion in the conduct of pre-hearing matters and may deny a person's request to serve as a lay representative. 29 C.F.R. §§18.12, 18.22(b)(2), 18.43; *see also* 5 U.S.C. §554 *et seq.*; *Butler v. Ingalls*

Shipbuilding, Inc., 28 BRBS 114 (1994); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). The OALJ Rules specify that a party may seek discovery any time after the notice of docketing has been issued. 29 C.F.R. §18.50(a)(1). Additionally, these rules mandate that a party fully respond or object to interrogatories within 30 days, and supplement any materially incomplete or incorrect response in a timely manner. 29 C.F.R. §§18.53(a)(1), 18.60(b)(2), (3).

Although Mr. Brown declared his knowledge and familiarity with these rules, he failed to demonstrate this knowledge in failing to respond or object to employer's interrogatories and request for production within the applicable timeframe. Further, as the administrative law judge found, Mr. Brown's response to employer's Motion to Compel, stating that claimant is not obligated to file a response if the response would be incomplete, demonstrates his lack of knowledge regarding discovery deadlines, a party's obligation to timely answer interrogatories and to respond to requests for production of documents, and the requirement to supplement incomplete discovery responses. Amended Order at 6. The administrative law judge provided the basis for her conclusion that Mr. Brown failed to demonstrate he has sufficient knowledge and qualifications to represent claimant, and claimant has not established an abuse of her discretion in this matter. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Consequently, we affirm the administrative law judge's denial of Mr. Brown's request to serve as a lay representative for claimant.

Accordingly, the administrative law judge's Order Not Approving Lay Representative and the Order Amending Order Not Approving Lay Representative are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge