



ANTHONY T. TAFT) BRB Nos. 17-0618 and
) 17-0618A
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
 LOCKHEED MARTIN CORPORATION)
)
 and) DATE ISSUED: Feb. 13, 2018
)
 ACE AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
 Cross-Respondents)
)
 ANTHONY T. TAFT) BRB No. 18-0006
)
 Claimant-Petitioner)
)
 v.)
)
 LOCKHEED MARTIN CORPORATION)
)
 and)
)
 ACE AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) ORDER

In response to the Board's December 4, 2017, Order to Show Cause for failure to file a Petition for Review and brief in BRB No. 17-0618A, claimant has filed a motion to dismiss employer's appeal in BRB No. 17-0618 and claimant's cross-appeal in BRB No. 17-0618A as having been prematurely filed. Employer opposes claimant's motion to dismiss. Claimant filed a reply brief in support of his motion.

The following procedural history is relevant to the disposition of claimant's motion:

1. On July 24, 2017, the administrative law judge's Decision and Order was filed by the district director.
2. On August 3, 2017, the 10th day after July 24, employer faxed a motion to the administrative law judge seeking an extension of 14 days in which to file its motion for reconsideration.
3. On August 16, 2017, employer filed its substantive motion for reconsideration of the administrative law judge's Decision and Order.
4. On August, 22, 2017, employer filed with the Board a notice of appeal of the administrative law judge's Decision and Order, noting that its motion for reconsideration was pending. This appeal was assigned the Board's docket number 17-0618.
5. On August 29, 2017, claimant filed a notice of cross-appeal, *see* 20 C.F.R. §802.205(b), also noting that employer's motion for reconsideration was pending. This appeal was assigned the Board's docket number 17-0618A.
6. On September 13, 2017, the administrative law judge's Order Denying Employer's Motion for Reconsideration was filed by the district director.
7. On October 3, 2017, claimant filed another appeal, which was assigned the Board's docket number 18-0006.
8. On October 30, 2017, employer filed its Petition for Review and brief in BRB No. 17-0618.
9. On December 4, 2017, the Board ordered claimant to show cause why his appeal in BRB No. 17-0618A should not be dismissed for failure to file a Petition for Review and brief. Claimant responded with the present motion to dismiss the appeals in BRB Nos. 17-0618 and 17-0618A.

Pursuant to 20 C.F.R. §802.206(a), a timely motion for reconsideration to the administrative law judge tolls the 30-day period for filing an appeal with the Board. *See* 33 U.S.C. §921(a); 20 C.F.R. §§702.393, 802.205(a). Section 802.206(b)(1), (f) states:

(b)(1) In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see § 802.101(b)(1)-(5)), a

timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the [District Director].

* * *

(f) If a timely motion for reconsideration of a decision or order of an administrative law judge . . . is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. Following decision by the administrative law judge . . . a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. . . .

20 C.F.R. §802.206(b)(1), (f). Application of Section 802.206(f) is mandatory when an appeal has been prematurely filed. *Aetna Casualty & Surety Co. v. Director, OWCP*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996).

Claimant contends the appeals in BRB Nos. 17-0618 and 17-0618A of the administrative law judge's Decision and Order were unquestionably filed while a motion for reconsideration was pending before the administrative law judge.¹ Thus, he asserts the appeals were premature and must be dismissed. In response, employer contends that its August 16, 2017, motion for reconsideration was not timely filed under Section 802.206(b)(1), as it was filed more than 10 days after July 24, such that the time for filing a notice of appeal was not tolled and its appeal was not premature.

We grant claimant's motion to dismiss the appeals in BRB Nos. 17-0618 and 17-0618A. On the 10th day after the administrative law judge's Decision and Order was filed, August 3, 2017, employer notified the administrative law judge of its intent to file a motion for reconsideration within 14 days, and sought leave to do so. Employer filed its substantive pleading on August 16, 2017. We view the August 3, 2017 extension request, and administrative law judge's acceptance of the subsequent pleading which identified the issue on which reconsideration was sought, as constituting a timely motion for reconsideration under Section 802.206(b)(1). Thus, the appeals filed with the Board before the administrative law judge ruled on employer's motion for reconsideration must be dismissed as premature.² *Aetna Casualty & Surety Co.*, 97 F.3d 815, 30 BRBS

¹ Claimant correctly notes that both parties identified the pending motion for reconsideration in their notices of appeal.

² We acknowledge that acceptance of claimant's contention premised on the unpublished decision of the United States Court of Appeals for the Ninth Circuit in *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir.

81(CRT); 20 C.F.R. §802.206(f). Employer did not file a new notice of appeal after the administrative law judge ruled on its motion for reconsideration. *See* 20 C.F.R. §802.206(e). Thus, employer’s challenge to the administrative law judge’s Decision and Order and Order Denying Employer’s Motion for Reconsideration is now foreclosed. Claimant’s timely-filed appeal in BRB No. 18-0006 remains pending before the Board.

Accordingly, employer’s appeal, BRB No. 17-0618, and claimant’s cross-appeal, BRB No. 17-0618A, are dismissed with prejudice.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

2017), also would result in dismissal of the appeals in BRB Nos. 17-0618 and 17-0618A. In *Shah*, the court held that if an administrative law judge “entertains” an untimely motion for reconsideration on its merits, the time for filing an appeal is tolled until the order on reconsideration is filed by the district director. Assuming, *arguendo*, that employer’s motion for reconsideration was, in fact, untimely filed, the administrative law judge addressed the motion on its merits such that, pursuant to *Shah*, the appeals filed prior thereto would be premature. We note, however, that this case arises within the jurisdiction of United States Court of Appeals for the Fifth Circuit and the Ninth Circuit designated the *Shah* decision as not precedential “except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.” *See* 9th Cir. R. 36-3(a).