BRB No. 98-0551

HERMENEGILDO RODRIGUEZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN TECHNICAL ENTERPRISES	)	DATE ISSUED:
	)	
and	)	
	)	
MINAMI MACHINE & FABRICATING, INCORPORATED	)	
	)	
Employers-Respondents	)	DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Motion to Vacate Dismissal 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.

John F. Karpousis (Freehill, Hogan & Mahar), New York, New York, for employers.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order of Dismissal and Order Denying Motion to Vacate Dismissal (95-LHC-2789) 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).

Claimant allegedly sustained an injury to his back while lifting an engine on a ship. On April 15, 1996, the case was set for hearing in front of Administrative Law Judge Romano. Claimant appeared with his counsel and a paid interpreter.[1] No representative appeared for employer. The administrative law judge granted claimant's motion to change the responsible employer from Eastern Technical Enterprises to Minami Machine and Fabricating, Incorporated. Hearing Transcript of April 15, 1996 at 8. On April 17, 1996, claimant again appeared with his attorney for the hearing.[2] An attorney appeared for an insurance carrier, CNA; he stated that claimant was an employee of Minami, a subcontractor, and that CNA provided coverage to Minami only for injuries covered by state law, not for injuries covered by the Act. The administrative law judge granted claimant's motion to restore Eastern Technical as a named employer, in addition to Minami.

On May 1, 1996, the administrative law judge entered a show cause order against the named employers, Minami and Eastern Technical, for failure to appear at the duly noticed April 17, 1996 hearing, where claimant was present and prepared to proceed. The order provided fifteen days for the employers to show cause why a default decision awarding benefits should not be entered against them. ALJX 4.

On May 14, 1998, Christopher Field of the firm Gallagher and Field entered an appearance for Minami indicating that employer was unaware until May 10, 1996, that its carrier, CNA, was denying Longshore coverage. ALJX 6. On May 28, 1996, Richard Cooper of the firm Fischer Brothers entered an appearance on behalf of Eastern Technical and its carrier ITT/Hartford. ALJX 7. Mr. Cooper stated that Minami did not have Longshore coverage and was no longer in existence. On November 19, 1996, Mr. Cooper wrote to Mr. Field, stating that ITT/Hartford did not provide coverage under the Act to Eastern Technical's Brooklyn facility, and that it was his position that it could not be held liable under Section 4(a) of the Act, 33 U.S.C. §904(a). ALJX 10.

On December 16, 1996, claimant's counsel and Mr. Field, who indicated that

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[1]Claimant apparently does not speak English.

[2]Counsel had an interpreter on call.

he now represented both named employers, appeared before Judge Romano. Mr. Field stated on the record that an agreement had been reached with claimant wherein Eastern Technical, as a self-insured, would pay claimant temporary total disability benefits effective December 16, 1995, and continuing at the rate of $285 a week, and past and future medical benefits, while the self-insured employer investigated the claim and had claimant examined. December 16, 1996 Hearing Transcript at 8. It appears that claimant unsuccessfully attempted to embody the parties' agreement as a settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). At the parties' request, the administrative law judge remanded the case to the district director.

Sometime thereafter, employer ceased payment of benefits, and claimant requested that the claim be transferred to the Office of Administrative Law Judges (OALJ) to be scheduled for hearing. On August 25, 1997, John Karpousis of the firm Freehill, Hogan & Mahar, entered an appearance as substitute counsel for employers, and he made several futile requests to claimant's counsel in an effort to obtain medical records and information about the work accident. Claimant failed to attend a rehabilitation examination in September 1997 scheduled by employer. On October 19, 1997, employer's counsel served claimant with Employer's First Set of Interrogatories containing sixteen interrogatories, and a Request for Production of Documents, including claimant's medical records and work visa.

On November 5, 1997, employer filed a three part motion, requesting a four week adjournment until January 2, 1998, so that its rehabilitation specialist could examine claimant, an order compelling compliance with its outstanding discovery requests and submission to the rehabilitation examination, and a partial adjournment of the scheduled hearing to allow live testimony from one of employer's experts represented to be unavoidably in Greece for three months. On November 6, claimant submitted his opposition to employer's motion stating that employer's substituted counsel was attempting to duplicate discovery by submitting interrogatories when employer's previous counsel had deposed claimant, and claimant opposed adjournment because claimant was no longer receiving benefits from employer.

On November 12, 1997, the administrative law judge entered an order granting employer's motion to compel answers to interrogatories and production of documents, and he granted employer's motion to compel claimant's attendance at the rehabilitation examination scheduled for November 25, 1997. The administrative law judge denied employer's adjournment request but stated he would entertain reasonable requests from employer to leave the record open post-hearing for further submission of evidence. Claimant thereafter attempted to answer the

interrogatories, including providing the name of an eyewitness to the accident, claimant signed the certificate of service indicating that the answers were sent to employer on November 17, 1997. Claimant failed to appear for the scheduled rehabilitation examination.

On November 25, 1997, employer again filed a motion seeking dismissal of claimant's claim for his failure to comply with the administrative law judge's order compelling discovery, or alternatively, an adjournment of the hearing and an order compelling claimant to comply with the discovery requests and to reimburse employer for the cost of the canceled rehabilitation evaluation. Claimant did not file an opposition to this motion.

On December 10, 1997, without citing any precedent, the administrative law judge entered an order dismissing the claim based on claimant's failure to comply with the administrative law judge's November 12, 1997, order compelling discovery and failure to attend the vocational examination with employer's expert on November 25, 1997. The administrative law judge denied claimant's subsequent motion to vacate the dismissal, concluding that employer established that full response was not made to the November 12, 1997, discovery order, and that on the face of the record, claimant and/or counsel had simply ignored the administrative law judge's November 12, 1997, Order and thereafter failed to oppose employer's motion to dismiss the case.

The sole contention raised in claimant's appeal is that the administrative law judge erred in dismissing his claim. Employer responds, urging affirmance of the dismissal.

An administrative law judge's authority to dismiss a claim with prejudice stems from 29 C.F.R. §18.29(a), which affords the administrative law judge all necessary powers to conduct fair and impartial hearings and to take appropriate action authorized by the Federal Rules of Civil Procedure. *Taylor v. B. Frank Joy Co.*, 22 BRBS 408, 411 (1989). In *Twigg v. Maryland Shipbuilding & Dry Dock Co.,* 23 BRBS 118 (1990), the Board held that, consistent with case law interpreting Rule 41(b) of the Federal Rules of Civil Procedure, dismissal of a case filed under the Act is appropriate only where there is a clear record of delay or contumacious conduct, or where less drastic sanctions have proved unsuccessful. *Twigg*, 23 BRBS at 121. The Board noted that a clear record of intentional misconduct must be shown and the factfinder must consider whether lesser sanctions would serve the interests of justice or have proved unavailing. *Id.; see 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); *Bogdis v. Marine Terminals Corp.,* 23 BRBS 136 (1989).

We agree with claimant that the dismissal of his claim cannot be upheld. The OALJ regulations, 29 C.F.R. Part 18, apply only to the extent that they are not inconsistent with the Act or its implementing regulations, 20 C.F.R. Part 702. *See* 29 C.F.R. §18.1(a); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). In *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981), the Board held that the appropriate action to be taken where a party refuses to answer interrogatories or produce documents is a motion to compel pursuant to Section 27(a) of the Act, 33 U.S.C. §927(a). If an order is issued for the production of documents or to compel answer to interrogatories, and that order is resisted, Section 27(b) of the Act, 33 U.S.C. §927(b), provides that the facts relating to such disobedience shall be certified to the appropriate United States District Court for the imposition of sanctions. In the instant case, the administrative law judge did not consider, in accordance with law, the imposition of lesser sanctions available under Section 27 for claimant's failure to comply with his order compelling discovery.[3] *See Twigg*, 23 BRBS at 121. Moreover, he did not consider the reasons for claimant's failure to comply, or the existence of any mitigating factors, given the tortuous history of this case, before taking the drastic sanction of dismissing the claim.[4] We therefore vacate the administrative law judge's dismissal of the claim, and we remand the case for further proceedings. If the administrative law judge concludes, after consideration of any mitigating factors, that sanctions are warranted for claimant's failure to comply with his order compelling discovery, he must first follow the specific procedures contained in Section 27(b) of the Act.

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Motion to Vacate Dismissal are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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[3]In his Order Denying Motion to Vacate Dismissal, the administrative law judge stated that employer apparently abandoned its motion to dismiss based on claimant's failure to submit to a rehabilitation examination, as claimant submitted to such an examination on December 17, 1997.

[4]For example, the administrative law judge did not consider that claimant appeared at scheduled hearings in 1996 when employer's representative was either absent or unwilling to represent it in this proceeding. *See generally Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). Claimant also was deposed prior to the submission of employer's interrogatories, and the administrative law judge did not consider whether employer's request was in any way duplicative of the information already discovered.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge