BRB No. 05-0522

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| MICHELLE MOORE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| INTERNATIONAL TRANSPORTATION SERVICE, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| AMERICAN LONGSHORE MUTUAL ASSOCIATION | ) | |
| | ) | |
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| MARINE TERMINALS CORPORATION | ) | |
| | ) | |
| and | ) | |
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| MAJESTIC INSURANCE COMPANY | ) | |
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| CENTENNIAL STEVEDORING SERVICES | ) | DATE ISSUED: 10/07/2005 |
| | ) | |
| and | ) | |
| | ) | |
| HOMEPORT INSURANCE COMPANY | ) | |
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| APM TERMINALS, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | |
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| Employer/Carriers-Respondents | ) | |
| | ) | |

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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | |
| | ) | ORDER |

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion for Summary Vacatur and Remand in this case, in which claimant has appealed the Decision and Order Granting Motion for Dismissal of All Claims With Prejudice (2004-LHC-2107, 2108, 2109, 2110) issued by Administrative Law Judge Jennifer Gee. Employers ITS, Centennial, and APM Terminals, have filed responses in opposition to the Director's motion. In addition, claimant has filed her Petition for Review and brief, to which employers have responded.

This case was first forwarded to the Office of Administrative Law Judges in 2002, and subsequently was continued several times. In September 2003, one of the employers moved to dismiss claimant's claim pursuant to Federal Rule of Civil Procedure 41(b) due to claimant's failure to attend her scheduled deposition and a neurological examination. Administrative Law Judge Etchingham issued an Order on October 9, 2003, denying the motion to dismiss, continuing the hearing, and warning claimant that further delay without just cause could result in the claim's dismissal.

Claimant subsequently missed additional medical appointments and her attorney was unable to attend claimant's deposition due to a scheduling conflict. ITS, joined by Centennial and Marine Terminals, filed a motion to dismiss claimant's claim, pursuant to Judge Etchingham's Order. Administrative Law Judge Gee (the administrative law judge) issued an Order directing claimant's counsel to respond, which he did, offering explanations for his own unavailability (illness, conflicts in scheduling) and claimant's missed appointments (pain killers due to March 2004 carpal tunnel surgery, miscommunications about which doctor she was to see).

The administrative law judge subsequently dismissed claimant's claim pursuant to Rule 41(b)[1] after she evaluated five factors: (1) the public's interest in expeditious

[1] Rule 41(b) states:

> **(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other

resolution of the litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. Decision and Order at 6-7. With regard to the first factor, the administrative law judge noted the case had been continued four times over four years and she therefore found that there is a strong public interest in favor of dismissal. With regard to the second factor, the administrative law judge found that the case has been scheduled for five calendars calls before five different judges over several years, and that this factor favors dismissal. The administrative law judge found that there is prejudice to employers due to the passage of time, and specifically the effect of an award of benefits would have on the responsible employer's liability for interest on compensation due. Thus, she found that the third factor weighs in favor of dismissal. With regard to lesser sanctions, the administrative law judge found that Judge Etchingham already provided a lesser sanction by stating that any award claimant ultimately received must be reduced by the legal fees and costs incurred by employers in the discovery efforts that were frustrated by claimant. He had also warned claimant of the risk of dismissal, yet the administrative law judge found that claimant's conduct remained dilatory after the issuance of the October 9, 2003, Order. The administrative law judge did not accept the excuses offered by claimant and her attorney for their conduct. Thus, she found that factor four weighs in favor of dismissal. The administrative law judge thus concluded that the first four factors outweigh the fifth, which favors a decision on the merits. Therefore, she dismissed claimant's claim with prejudice.

In his motion to vacate and remand, the Director contends that the administrative law judge erred in dismissing the claim pursuant to Rule 41(b), as resort to the Federal Rules of Civil Procedure is inappropriate as a specific provision of the Act, 33 U.S.C. §927(b), applies. The Director cites *Goicochea v. Wards Cove Packing Co., 37* BRBS 4 (2003), in support of his contention. The employers respond that *Goicochea* and Section 27(b) are not applicable because claimant did not disobey a lawful order or process, but was dilatory in pursuing her claim to their prejudice.

The regulation at 29 C.F.R. §18.1(a), applicable to proceedings before the Office of Administrative Law Judges, states, in pertinent part, that, "The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or

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> than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. Pro. 41(b).

regulation." In *Goicochea*, 37 BRBS 4, the administrative law judge, citing Rules 41(b) and 37(b)(2)(C) of the Federal Rules of Civil Procedure, entered an order dismissing the claim based on the claimant's failure to comply with his discovery orders and on what he deemed to be the claimant's recalcitrance with respect to the discovery process, the claimant's disregard of warnings about potential sanctions, and the claimant's failure to respond to employer's motion to dismiss the claim. In its decision, the Board agreed with the Director's position that the administrative law judge could not dismiss a claim under the Federal Rules of Civil Procedure, as a provision of the Act, Section 27(b), provided a sanction for claimant's conduct and thus precluded resort to the Federal Rules of Civil Procedure.[2] The Board explained that, pursuant to Section 18.1(a), the general OALJ rules of procedure and the Federal Rules of Civil Procedure do not apply when a specific provision of the Act applies. *Goicochea*, 37 BRBS at 6, citing *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); *see also* 33 U.S.C. §923(a) (administrative law judge not bound by technical or formal rules of procedure). The Board thus held that as Section 27(b) of the Act provides the sanction for a party's failure to obey an administrative law judge's lawful order, the administrative law judge erred in relying upon the Federal Rules of Civil Procedure to dismiss the claimant's claim. *Goicochea*, 37 BRBS at 7.

[2] Section 27(b) of the Act 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, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, 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).

We agree with the Director that the administrative law judge erred in dismissing this claim pursuant to Rule 41(b), and we reject employers' contention that Section 27(b) and the holding in *Goicochea* are inapplicable in this case because claimant did not disobey any lawful orders of the administrative law judge. As claimant did not resist any lawful orders of the administrative law judge, her conduct was less egregious than that of the claimant in *Goicochea,* yet employers would have a greater sanction applied to her merely due to the lack of a "lawful order." In this regard, we cannot agree with the administrative law judge that lesser sanctions have failed. Judge Etchingham was without authority to order claimant to pay employers' fees and costs associated with the missed depositions and appointments. The Act does not provide a basis for claimant to pay employers' fees and costs. 33 U.S.C. §§926, 928; Brickner, 11 F.3d 887, 27 BRBS 132(CRT); *see also Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995). Moreover, employers are not prejudiced by any potential award of interest as the liable employer has had the use of the funds during the pendency of the claim. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). In addition, no employer has demonstrated that it has been prejudiced by the mere passage in time. *See generally Jones v. Reagan*, 748 F.2d 1331 (9th Cir. 1984), *cert. denied*, 472 U.S. 1029 (1985).

In fact, what failed to occur in this case is the application of available, lesser sanctions. *See Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). If claimant and/or her attorney persistently failed to attend depositions and medical appointments, the proper course of action is the filing a motion to compel by one or more of the employers. *Id.* at 122-123; *Creasy v. J.W. Bateson Co.*, 14 BRBS 434 (1981). The administrative law judge could then issue an Order to Compel, and if claimant failed to obey this lawful order, the Section 27(b) sanction would be available.[3] *Goicochea*, 37 BRBS at 6-7. In addition, other available sanctions include denying continuances and scheduling a hearing. If claimant failed to attend the hearing without good cause, a default judgment could be entered against her, *see McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002); 29 C.F.R. §18.39(b), or the case could be decided on employers' evidence alone. *Id.*; *see also Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). The administrative law judge also may draw adverse inferences from the absence of evidence or from claimant's conduct. *See generally Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

[3] The Board lacks jurisdiction to review orders certifying facts to the district court issued pursuant to Section 27(b). *A-Z International v. Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999)

Thus, as the Act provides an available sanction less severe than that imposed by the administrative law judge, we hold that she erred in dismissing this claim pursuant to the Federal Rules of Civil Procedure. 33 U.S.C. §927(b); *Goicochea*, 37 BRBS at 6-7; 29 C.F.R. §18.1. We vacate the dismissal of the claim and we remand the case to the administrative law judge for further appropriate action.

Accordingly, the Director's Motion for Summary Vacatur and Remand is granted. The administrative law judge's dismissal of claimant's claim is vacated, and the case is remanded for further appropriate action.

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