BRB No. 06-0255

STEVEN P. SCRUDATO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RIVER PILE AND FOUNDATION COMPANY	)	DATE ISSUED: 09/27/2006
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Attorney Fee Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

John J. Hession (Dougherty, Ryan, Giuffra, Zambito & Hession), New York, New York, for claimant.

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

PER CURIAM:

Employer appeals the Decision and Order and the Attorney Fee Order (05-LHCA-1368) of Administrative Law Judge Paul H. Teitler rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In an Order dated January 7, 2000, the administrative law judge awarded claimant reasonable and necessary medical expenses, as well as six months of disability benefits following the date on which claimant underwent back surgery, pursuant to the Act. On October 15, 2003, claimant filed an LS-18 Pre-Hearing Statement alleging that employer had not complied with the administrative law judge's January 2000 Order. Thereafter, on May 6, 2005, a notice of hearing and pre-hearing order was issued by the administrative law judge, stating that the calendar call for the instant case would be held on October 17, 2005. On October 14, 2005, employer's counsel contacted the administrative law judge seeking an adjournment of the October 17, 2005, hearing. As claimant's counsel opposed employer's request, the administrative law judge denied that request.

On October 17, 2005, a formal hearing was convened with neither employer nor its counsel present. Claimant submitted eleven exhibits into the record, and then requested that a default order be issued and the case remanded to the district director for enforcement; the administrative law judge thereafter stated that such an order would be granted once it was submitted by claimant. In his Decision and Order dated November 3, 2005, the administrative law judge noted that neither employer nor its counsel appeared at the hearing despite having received notice of the hearing. Next, the administrative law judge found that claimant's application for the payment of three medical charges, which claimant alleges have not been paid by employer, was unopposed, and he consequently ordered employer to pay those charges.

Claimant's counsel subsequently requested an attorney's fee. In an Attorney Fee Order issued on December 12, 2005, the administrative law judge noted that employer had filed no objections to counsel's fee petition, and he summarily awarded claimant's counsel his requested fee of $7,500, representing 25 hours of services performed at an hourly rate of $300.

On appeal, employer contends that its right to due process of law was abridged as it did not receive proper notification of the October 17, 2005, hearing and thus was denied the right to be heard. Claimant has not responded to this appeal.

It is well established that procedural due process requirements are applicable to administrative proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richardson v. Perales*, 402 U.S. 389 (1971). Failure to give notice of a proceeding to an interested party violates "the most rudimentary demands of due process of law." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). "[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). With regard to notice of a formal hearing under the Act, Section 19(c) states, in pertinent part:

> If a hearing on such claim is ordered the [administrative law judge] shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail,... .

33 U.S.C. §919(c);[1] *see also* 33 U.S.C. §919(d) (transferring adjudicatory functions from deputy commissioners to administrative law judges), (e); *Gravel Products Corp. v. McManigal*, 14 F.Supp. 414, 416 (W.D. N.Y. 1936) (if notice was not given under Section 19(c), the aggrieved party "should not be denied the opportunity of being heard and having the case disposed of on the merits"); *Salvatore v. Locke*, 6 F.Supp. 560 (E.D. N.Y. 1934), *aff'd*, 72 F.2d 1012 (2d Cir. 1934) (deputy commissioner violated Section 19(c) in permitting an *ex parte* hearing, after the issuance of a compensation order, without the presence of the claimant on the issue of whether claimant inflicted an injury on himself in order to fraudulently obtain compensation). The Board has accordingly held that notice of a hearing must, pursuant to Section 19(c) of the Act, be sent to the parties by certified or registered mail. *See Sullivan v. St. Johns Shipping Co., Inc.*, 36 BRBS 127 (2002).

In the instant case, employer contends that since notice of the administrative hearing scheduled by the administrative law judge for October 17, 2005 was sent to its former address, it did not receive proper notice of that scheduled hearing. For the reasons that follow, we agree with employer that the administrative law judge's decision in this case cannot be affirmed, and that the case must be remanded to allow employer the opportunity to be heard. As set forth above, the administrative law judge issued a "Notice of Hearing and Pre-Hearing Order" on May 6, 2005, stating that a calendar call would be held regarding the case on October 17, 2005. The service sheet accompanying this order, signed by a legal assistant, states that the "Hard Copy" of this document was sent by "Regular Mail" to the district director, claimant, claimant's attorney, employer, and employer's attorney. The record reflects thus that notice of the hearing scheduled for October 17, 2005, was not sent to the requisite parties by certified or registered mail as required by Section 19(c) of the Act. Furthermore, the service sheet indicates that

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[1]The regulation implementing Section 19(c), 20 C.F.R. §702.335, is silent as to service of the notice of hearing. It states that the

> Office of the Chief Administrative Law Judge shall notify the parties (See §702.333 [identifying the parties]) of the place and time of the formal hearing not less than 30 days in advance thereof.

The general Office of Administrative Law Judges regulation governing a notice of hearing states, in pertinent part:

> Service of such notice shall be made by regular, first-class mail, unless under the circumstances it appears to the administrative law judge that certified mail, mailgram, telephone, or any combination of these methods should be used instead.

29 C.F.R. §18.27(a). This general regulation, however, is inapplicable to this case, as a specific statutory provision applies. *See* 29 C.F.R. §18.1(a).

employer's notice was sent to its former address. The envelope addressed to employer at its prior address was, on June 9, 2005, stamped "Return to Sender Forwarding Order Expired," and returned to the administrative law judge's office. Upon receipt by that office, the envelope, as well as the documents contained therein, was placed in the administrative file accompanying this case. The record contains no indication of any further attempt to notify employer.

As notice of the scheduled October 17, 2005, hearing was not sent to the parties by either certified or registered mail, and as employer's notice was sent to an improper address and was subsequently returned to the administrative law judge's office and placed in the administrative file, it is apparent that employer did not receive notice of the scheduled hearing as required by the Act. We therefore vacate the administrative law judge's decision regarding claimant's entitlement to reimbursement for medical charges, and his subsequent fee award to claimant's counsel,[2] and we remand the case for the administrative law judge to hold a new hearing in which employer is permitted to introduce evidence and examine or cross-examine any witnesses.[3]

[2] As employer was not provided with notice of the hearing as required by Section 19(c) of the Act, this due process violation also taints the fee award. *See Sullivan v. St. Johns Shipping Co., Inc.*, 36 BRBS 127 (2002).

[3] As claimant is the proponent of an award, the Board has held that an award of benefits must be supported by substantial evidence and therefore cannot be based solely on employer's default. *McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002). Thus, even if a properly notified employer is not represented at a hearing, the administrative law judge must admit claimant's evidence and make findings based upon that evidence in order to issue an award. *Id.*

Accordingly, the administrative law judge's Decision and Order and Attorney Fee Order are vacated, and the case is remanded for a hearing on the merits.

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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REGINA C. McGRANERY
Administrative Appeals Judge