

GERTRUDE FRENCH	)	
(Widow of TYRUS FRENCH)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CALIFORNIA STEVEDORE &	)	
BALLAST	)	
	)	
and	)	DATE ISSUED:
	)	
MARINE TERMINALS CORPORATION	)	
	)	
Employers-Respondents	)	
	)	
PERMANENTE MEDICAL GROUP/	)	
KAISER FOUNDATION HOSPITAL	)	
	)	
Intervenor-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Kathryn E. Ringgold, San Francisco, California, for Permanente Medical Group/Kaiser Foundation Hospital.

Albert Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for California Stevedore & Ballast.

B. James Finnegan (Finnegan & Marks), San Francisco, California, for Marine Terminals Corporation.

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

PER CURIAM:

Permanente Medical Group/Kaiser Foundation Hospital (Kaiser) appeals the Decision and Order and Order (89-LHCA-2329, 2330) of Administrative Law Judge Steven E. Halpern

dismissing its interest as an intervenor in 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, widow of decedent who died of a heart attack on April 4, 1986, filed a claim for temporary total disability and death benefits under the Act, alleging that decedent suffered cumulative injury while working for employers Marine Terminals Corporation (Marine Terminals) and California Stevedore & Ballast (Cal Stevedore) from 1971 through January 20, 1986.<sup>1</sup> Marine Terminals and Cal Stevedore controverted the claim, and the case proceeded to the administrative law judge level. On July 17, 1989, Kaiser, seeking payment for \$14,042.25 in medical expenses accumulated by decedent, filed a Motion for Intervention in this case, which the administrative law judge granted on July 19, 1989. A formal hearing was scheduled for January 16-18, 1990.

On January 9, 1990, Kaiser's attorney, Kathryn Ringgold, wrote a letter to the administrative law judge, stating she would not make an appearance on the first day of the hearing, January 16, 1990, but would be appearing on behalf of Dr. Wagner, a witness who had been subpoenaed to testify by employers, on the following day, January 17. Prior to the hearing, however, on the evening of Saturday, January 13, 1990, claimant and employers reached an agreement to settle the case. An attorney for Marine Terminals telephoned Ms. Ringgold on Monday, January 15, and informed her of the settlement with claimant. He also tendered an offer of \$5000 in settlement of Kaiser's interest, but Ms. Ringgold demurred and said she "would get back to him." The following morning, January 16, claimant and employers appeared at the hearing,<sup>2</sup> which was shortened to one day's length because its sole purpose was for the administrative law judge to consider whether the parties' agreement was reasonable and in claimant's best interest. The administrative law judge attempted to telephone Ms. Ringgold at her office prior to the hearing, but was informed that she was not in the office. The administrative law judge then advised that the hearing and settlement would proceed without Ms. Ringgold "since she had voluntarily and unilaterally determined not to appear today." Tr. at 5.<sup>3</sup>

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<sup>1</sup> Decedent was employed by Marine Terminals from 1971 until January 19, 1986, and with Cal Stevedore from January 19-20, 1986, when he suffered a myocardial infarction. Claimant sought temporary total disability benefits from January 20, 1986 through April 4, 1986, in addition to death benefits. She alleged decedent's injury and death resulted from cumulative stress in decedent's workplace culminating in his myocardial infarction and his eventual death from cardiac arrest due to arteriosclerotic heart disease.

<sup>2</sup> The Director, Office of Workers' Compensation Programs (the Director), who opposed employers' claim for Section 8(f), 33 U.S.C. §908(f), relief, also made an appearance at the hearing. Because the settlement eliminated the Section 8(f) issue, however, the Director did not participate further in the case.

<sup>3</sup> The administrative law judge also stated at the hearing that he did not come into possession of Ms. Ringgold's letter indicating her inability to attend the January 16 hearing until the morning of the hearing because he had been out of town "on a docket." Tr. at 4-5.

At the hearing's conclusion, the administrative law judge stated he would rule on the parties' proposed settlement as soon as he received a completed, written copy of it. *See* Tr. at 12. In addition, Marine Terminals' attorney made a motion that Kaiser be dismissed based on its failure to appear at the hearing and on Kaiser's alleged failure to comply with a pre-trial order. The administrative law judge took this motion under advisement. *See* Tr. at 13. That evening, Mr. Finnegan, an attorney for Marine Terminals, contacted Ms. Ringgold at her office, informing her of what had transpired at the hearing, including its motion to dismiss, and that the settlement offer for \$5000 was still in effect; Ms. Ringgold, however, rejected the offer, and Mr. Finnegan rejected her counterdemand of \$7000.

In his subsequent Decision and Order, the administrative law judge formally approved the parties' settlement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i)(1988). The settlement states, *inter alia*: "Defendants, and each of them, agree to indemnify and hold harmless Claimant, Gertrude French from any and all liability with respect to the claim of reimbursement sought by Kaiser Permanente Medical Group; it being understood at all times that Defendants deny that Kaiser Permanente has any such right to reimbursement." The administrative law judge's Decision and Order states that "The Party in interest designated hereinabove shall respond to the Motion made at trial (copy appended hereto) no later than 10 days after service of this Decision and Order." Decision and Order at 2. The only "party-in-interest" listed in the heading, however, was the Director, whose interest in this case had been the issue of Section 8(f) relief. Kaiser was not listed as an intervenor or party-in-interest in the heading.

Kaiser did not respond to the motion to dismiss, but did timely respond to the Decision and Order by filing a motion for reconsideration, claiming that the settlement provided a *prima facie* basis for reimbursement for medical treatment, and seeking an award of reimbursement of medical expenses paid on decedent's behalf. The administrative law judge, in an Order dated March 24, 1990, approved Marine Terminals' motion to dismiss Kaiser's claim, stating that "intervenor (Kaiser) having been fully apprised of the intention of the parties to settle this matter in advance of trial, and having slept on its rights, has no further standing." Order at 1. The administrative law judge stated that the procedural history depicted by Kaiser at page 3 of its motion for reconsideration was "grossly incomplete," and he therefore denied Kaiser's motion. The administrative law judge did not state upon which grounds alleged by Marine Terminals he relied in dismissing the claim. Kaiser appeals this Order.

On appeal, Kaiser seeks a reversal of the Order dismissing its claim for reimbursement for decedent's medical expenses, and a remand for the administrative law judge to consider the merits of this claim. Kaiser notes that the administrative law judge did not state the grounds for the dismissal of its claim, and contends that although it did not file a formal pre-trial disclosure statement in accordance with the administrative law judge's pre-trial Order of June 1989, it eventually produced, in its July 1989 motion to intervene and January 1990 letter to the administrative law judge, all of the information pertinent to a pre-hearing statement, including: a) all of the applicable law pertaining to this issue; b) the name of a witness it would represent at the hearing, Dr. Wagner; and c) the fact that the only issue it was raising was its entitlement to reimbursement for decedent's medical treatment. Kaiser asserts that it essentially complied with the pre-hearing order and was not trying to enter into evidence any information that was not being submitted by another party. Kaiser thus contends that the claim cannot be dismissed on this ground.

Kaiser further contends that its claim cannot be dismissed due to abandonment simply because its counsel was unable to appear at the hearing. Kaiser asserts that its attorney had a hearing scheduled with another tribunal and that the administrative law judge was timely apprised of this scheduling conflict. Kaiser additionally contends that the administrative law judge violated 29 C.F.R. §18.6 by failing to serve Kaiser with a copy of employer's motion to dismiss. Kaiser argues that while the Decision and Order required "the Party in Interest designated herein" to respond to the motion within 10 days, it was not designated as the "party-in-interest" and no motion was attached or served upon Kaiser. Lastly, Kaiser contends that the administrative law judge's Order violated 29 C.F.R. §18.39(b), which allows an administrative law judge to order a default judgment in the event any party fails to appear at a hearing without good cause, by failing to allow Kaiser's counsel an opportunity to explain whether she had good cause for failing to appear at the January 16 hearing.

Marine Terminals and Cal Stevedore respond to Kaiser's appeal, urging affirmance of the administrative law judge's Order dismissing Kaiser's intervenor claim. In its response brief, Marine Terminals asserts that its motion to dismiss was supported by Kaiser's failure to file a pre-trial statement as required under the administrative law judge's June 23, 1989 pre-trial order and by Kaiser's failure to appear at the hearing. Marine Terminals further states that Kaiser was on notice of the consequences for failing to respond to this order because it stated that "(f)ailure to fully comply with this Order will subject the offending party to sanctions." Finally, Marine Terminals rejects Kaiser's contention that it was denied due process by failing to receive service of the motion to dismiss, stating that Kaiser, having obviously received a copy of the Decision and Order, could have requested a copy of the motion. Marine Terminals notes that the letter from Mr. Finnegan dated January 18, 1990 put Kaiser on notice of the motion to dismiss. Kaiser replies that while it knew of the motion to dismiss it still had no actual knowledge of the contents of the motion; because it could not respond, Kaiser filed a motion for reconsideration. Cal Stevedore's brief in response to Kaiser's appeal essentially reiterates Marine Terminals' arguments.

We hold that the administrative law judge's dismissal of Kaiser's claim constitutes an abuse of his discretion on the facts presented in this case. *See generally Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989); *Bachich v. Seatrail Terminals of California*, 9 BRBS 184 (1978). Initially,

the administrative law judge erred in failing to state the grounds upon which he based his dismissal of Kaiser's claim. The administrative law judge merely stated in the Order that "Kaiser slept on its rights," and failed to explain his rationale or any authority in support of his determination. Contrary to the argument raised by Marine Terminals in its response brief, dismissal was not warranted because of Kaiser's alleged failure to comply with the administrative law judge's pre-trial order.<sup>4</sup> Kaiser did not violate the pre-trial order, as it at no time stated its intention to present evidence independent of that to be presented by claimant. The pre-trial order stated that witnesses and evidence should be identified; Kaiser was relying on claimant's evidence, as the major issue regarding reimbursement in this case appears to be the causal relationship between the injury, death and employment. In addition, Kaiser appended medical bills to its motion to intervene, and cited cases in support of its position. Moreover, nowhere in the record or on the face of the decision is there any indication that the administrative law judge was concerned with or based his dismissal on Kaiser's alleged failure to comply with his pre-trial order. Thus, Marine Terminals' assertion that the dismissal is supported by Kaiser's failure to comply with the pre-trial order is without merit.

We further hold that Kaiser's failure to appear at the hearing was not a sufficient ground on which to base dismissal of its claim. The Board has held that dismissal for failing to appear at a hearing, deposition, or medical appointment is an extreme sanction and the administrative law judge must consider whether lesser sanctions would better serve the interests of justice. *See Bogdis*, 23 BRBS at 136; *Twigg v. Maryland Shipbuilding & Dry Dock*

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<sup>4</sup> The administrative law judge's pre-trial order of June 23, 1989, orders the parties to serve a statement on the other parties no later than 20 days before the hearing indicating the issues to be resolved, the relevant law and the evidence to be offered. We note that a dismissal of its claim based on a Kaiser's alleged failure to comply with a pre-trial order is not necessarily supported by the relevant caselaw. *See Picinich v. Seattle Stevedoring Co.*, 19 BRBS 63 (1986); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986); *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732-733 (1981). It can be inferred from these cases that a party's failure to comply with such pre-hearing orders may result in the exclusion of evidence sought to be admitted, but does not warrant the dismissal of a party's claim.

*Co.*, 23 BRBS 118 (1990).<sup>5</sup> *Cf. Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989). In the instant case, the administrative law judge's dismissal was too extreme a sanction based on the facts presented herein. Ms. Ringgold gave advance notice to the administrative law judge that she would not attend the first day of the hearing because of a scheduling conflict, and she received no formal notice that the hearing on January 17 would be cancelled. Thus, as Kaiser provided, in advance of the hearing, good cause as to why it would not be represented on January 16, the administrative law judge erred in dismissing its claim. *See generally* 29 C.F.R. §§18.5(b), 39(b).<sup>6</sup>

Moreover, the administrative law judge erred by dismissing Kaiser's claim in light of the misleading language used by the administrative law judge in his decision, which directed the "party-in-interest" to respond to an unspecified motion made at trial within 10 days. The only "party-in-interest" designated in the decision is the Director, and the decision's reference to a motion does not explicitly refer to a motion to dismiss. This decision thus could not put Kaiser on notice that it was required to respond to a motion to dismiss. Furthermore, there is no written copy of a motion to dismiss in the file before the Board,<sup>7</sup> and although oral motions may be made, 29 C.F.R. §18.6(a), the dismissal of Kaiser's claim based on its failure to respond to an unspecified oral motion denied Kaiser due process as notice was not given and the motion was not properly served. Section 18.6(a), 29 C.F.R. §18.6(a), states that all parties shall be given a reasonable opportunity to object to a motion. That Kaiser had actual notice of a motion to dismiss through correspondence with Marine Terminals' attorney is insufficient to put it on notice of the contents of such a motion given the deficiencies on the face of the administrative law judge's Decision and Order and the lack of proper service.

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<sup>5</sup> In *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1990), citing *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978), the Board listed several factors to be considered by the administrative law judge in considering whether to dismiss a claim. These factors included:

- 1) the degree of personal responsibility on the part of plaintiff;
- 2) amount of prejudice to defendant caused by the delay;
- 3) presence/absence of drawn out history of deliberately proceeding in a dilatory fashion;
- 4) effectiveness of sanctions less drastic than dismissal.

23 BRBS at 121. *See also Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991).

<sup>6</sup> The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, apply to the extent 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).

<sup>7</sup> Although the decision indicates that a copy of the motion is attached, no copy is attached to the decision in the file transmitted to the Board and Kaiser asserts that it was not served with a copy.

Lastly, Kaiser did respond to the administrative law judge's Decision and Order by timely filing a motion for reconsideration, in which it is clear that it did not intend "to sleep on its rights." Although not directly responsive to the motion to dismiss, the motion was nevertheless a sufficient response by Kaiser given the lack of notice and improper service of the motion. At this point the administrative law judge should have been cognizant that Kaiser intended to pursue its claim, and he was obligated to resolve the issues presented. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); 20 C.F.R. §702.338.

For the foregoing reasons, we reverse the administrative law judge's dismissal of Kaiser's claim. The case is remanded for the administrative law judge to consider Kaiser's claim that it is entitled to reimbursement for \$14,000 in medical bills, noting that Kaiser's right to reimbursement is derivative of claimant's right to medical benefits. *See generally Ozene v. Crescent Wharf and Warehouse Co.*, 19 BRBS 9 (1986).

Accordingly, the administrative law judge's Order dismissing Kaiser's claim is reversed, and the case is remanded for consideration of the merits of Kaiser's claim in accordance with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge