



BRB Nos. 17-0048
and 17-0048A

CHARLES ZUMWALT)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	DATE ISSUED: <u>June 13, 2018</u>
v.)	
)	
NATIONAL STEEL AND SHIPBUILDING)	
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	DECISION and ORDER on
)	RECONSIDERATION EN
Respondent)	BANC

Appeals of the Fee Award and the Order Denying Reconsideration of the Fee Award of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Lara D. Merrigan (Merrigan Legal), San Rafael, California, and Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

Ann Marie Scarpino (Kate S. O’Scannlain, Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers’ Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.¹

PER CURIAM:

Claimant has filed a timely motion for reconsideration en banc of the Board's April 26, 2017, Order dismissing the appeals in the captioned case. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407. Employer and the Director, Office of Workers' Compensation Programs (the Director), have each responded, with employer seeking to preserve its appeal rights and the Director urging denial of claimant's motion for reconsideration. We grant the motion for reconsideration en banc, but deny the relief requested and affirm the Board's Order.

This case arises out of a claim for benefits for work-related knee and psychological injuries filed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* The administrative law judge awarded claimant benefits. Claimant appealed and employer cross-appealed. The Board remanded the case for the administrative law judge to reconsider the date on which claimant's psychological condition reached maximum medical improvement but affirmed his decision in all other respects. *Zumwalt v. National Steel & Shipbuilding Co.*, BRB Nos. 14-0378/A (July 16, 2015). On remand, the parties stipulated that claimant's psychological condition reached maximum medical improvement on February 13, 2007, and the administrative law judge modified the award of benefits to accord with this stipulation.

Thereafter, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. The administrative law judge awarded an attorney's fee and costs of \$65,745.90 to Jeffrey Winter and \$23,900 to Kim Ellis, payable by employer.² The district director filed the administrative law judge's decision on September 23, 2016, and served the parties and their counsel by mail on that date. 33 U.S.C. §919(e); 20 C.F.R. §702.349.

On October 6, 2016, 13 days after the Fee Award was filed by the district director, claimant faxed a motion for reconsideration to the administrative law judge, which was docketed on October 7.

¹ Administrative Appeals Judge Jonathan Rolfe has recused himself from this matter.

² The administrative law judge stated that "if the Board holds that all of Mr. Winter's time must be calculated at his current hourly rate," employer is liable for a fee of \$69,165.90. Fee Award at 28.

The administrative law judge denied claimant's motion for reconsideration, holding that it was untimely filed pursuant to 20 C.F.R. §802.206(b)(1) because it was not filed within 10 days of the filing of the decision by the district director.³ Order Denying Reconsideration of Fee Award at 2. The administrative law judge stated further that if he were to address the motion for reconsideration on the merits, he also would deny it. The district director filed and served the Order Denying Reconsideration of Fee Award on October 24, 2016.

Claimant filed an appeal with the Board on October 26, 2016. 33 U.S.C. §921(a); 20 C.F.R. §802.205(a). Employer filed a cross-appeal on November 30, 2016. 20 C.F.R. §802.205(b). In an Order dated April 26, 2017, the Board dismissed the appeals as untimely because they were filed more than 30 days after the district director filed the administrative law judge's September 23 decision awarding attorney's fees. The Board stated that claimant's October 6 motion for reconsideration was not filed within 10 days of the date the district director filed the administrative law judge's Fee Award on September 23, 2016, and thus the time for filing an appeal with the Board was not tolled pursuant to 20 C.F.R. §802.206(a), (b)(1), which, the Board held, takes precedence over 29 C.F.R. §18.93, as it is the more specific program regulation. *Zumwalt v. National Steel & Shipbuilding Co.*, BRB Nos. 17-0048/A (Apr. 26, 2017); 29 C.F.R. §18.10; see discussion, *infra*. As claimant's appeal was untimely with respect to the September 23 date of filing, the Board dismissed claimant's appeal. 20 C.F.R. §802.205(c). Because employer's cross-appeal also was untimely filed, the Board dismissed it as well. 20 C.F.R. §802.205(b), (c).

Claimant has filed a timely motion for reconsideration of the Board's dismissal order. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant contends his motion for reconsideration to the administrative law judge is governed by the regulations at 29 C.F.R. §§18.32, 18.93 and was timely filed. In the alternative, if the motion for reconsideration is governed by 20 C.F.R. §802.206, claimant maintains the motion also was timely under the holding in *Galle v. Director, OWCP*, 246 F.3d 440, 448-450, 35 BRBS 17, 22-24(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001).

In order to be timely, an appeal to the Board must be filed within 30 days of the date the administrative law judge's decision or order is filed in the district director's office. 33 U.S.C. §921(a); 20 C.F.R. §§702.349, 702.350, 802.205(a). Section 802.206(a) of the Board's Rules of Practice and Procedure provides that "[a] timely motion for reconsideration of a decision or order . . . shall suspend the running of the time

³ September 23, 2016 was a Friday. Ten calendar days later was Monday, October 3, 2016.

for filing a notice of appeal.” 20 C.F.R. §802.206(a). Section 802.206(b)(1) provides that a motion for reconsideration in a case arising under the Longshore Act or its extensions is timely when it is “filed not later than 10 days from the date the decision or order was filed” in the district director’s office. 20 C.F.R. §802.206(b)(1).⁴ After the motion for reconsideration is ruled on, the parties have 30 days from the date that decision or order is filed in the district director’s office in which to file an appeal. 20 C.F.R. §§802.205(a), 802.206(d), (e).

In *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 144-145 (1999), *aff’d sub nom. Galle v. Director, OWCP*, 246 F.3d 440, 448-450, 35 BRBS 17, 22-24(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001), the Board and the United States Court of Appeals for the Fifth Circuit addressed the issue of how to count the 10-day period for filing a motion for reconsideration with an administrative law judge, pursuant to Section 802.206(b)(1). In short, the Board and the court held that the 10-day period must be calculated using the method set forth in Federal Rule of Civil Procedure 6(a), which, at the time, excluded intermediate Saturdays, Sundays, and holidays from the computation.⁵ See discussion, *infra*. At the time the court issued its decision, it noted that, “§ 802.206 is the only [Department of Labor] regulatory provision recognizing the right to seek reconsideration of an ALJ’s benefit determination.” *Galle*, 246 F.3d at 446, 35 BRBS at 21(CRT).

⁴ If a timely motion for reconsideration is filed, any appeal pending with the Board must be dismissed as premature, without prejudice to the right to file a timely appeal after the motion for reconsideration is ruled on. 20 C.F.R. §802.206(f); see *Aetna Casualty & Surety Co. v. Director, OWCP [Jourdan]*, 97 F.3d 815, 822, 30 BRBS 81, 86(CRT) (5th Cir. 1996) (noting this regulation may be a “trap for an unsuspecting litigant”).

⁵ At the time, Federal Rule of Civil Procedure 6(a) stated that:

Computation. In computing any period of time prescribed or allowed by these rules, . . . the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation

(emphasis added).

In 2009, Federal Rule of Civil Procedure 6(a) was amended to require that intermediate Saturdays, Sundays, and holidays be counted in computing time periods.⁶ In June 2015, new Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules), 29 C.F.R. Part 18, went into effect. Relevant to the current proceedings, 29 C.F.R. §18.93, entitled “Motion for Reconsideration,” states, “A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.”

In its unpublished decision in *Shah v. Worldwide Language Resources, Inc.*, 50 BRBS 82(UBD) (2016), *rev'd*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017), the Board addressed the effect of the 2009 amendment to Federal Rule of Civil Procedure 6(a). In *Shah*, the administrative law judge's Attorney Fee Order was filed by the district director on May 14, 2015. Claimant's counsel filed a motion for reconsideration with the administrative law judge, dated June 1, 2015 and received on June 4, 2015. The administrative law judge summarily denied the motion for reconsideration but did not address the employer's contention that the motion was untimely. Claimant's counsel then appealed the fee award to the Board. The Board held, under both the pre-2009 and the current versions of Rule 6(a), that the motion for reconsideration was untimely filed and, accordingly, could not toll the period for filing an appeal with the Board under 20 C.F.R. §802.206(a).⁷ *Shah*, 50 BRBS at 87-88(UBD). The Board therefore dismissed claimant's appeal as untimely. *Id.* at 88(UBD).

⁶ Federal Rule of Civil Procedure 6(a) now states:

Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(emphasis added).

⁷ Under the prior version of Rule 6(a), the last day for filing the motion for reconsideration was Friday, May 29, 2015. Under the current version of Rule 6(a), the

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case also arises, reversed the Board's decision in an unpublished decision. *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624, 51 BRBS 37(CRT) (9th Cir. 2017). Citing the Supreme Court's decision in *Bowman v. Lopereno*, 311 U.S. 262 (1940),⁸ the Ninth Circuit held that because the administrative law judge "entertained or considered" the motion for reconsideration on the merits, the time for filing an appeal was tolled until the date the administrative law judge's Order Denying Reconsideration was filed with the district director, i.e., June 19, 2015. *Id.*, 703 F. App'x at 625, 51 BRBS at 38(CRT).

Applicability of *Bowman* and *Shah*

Claimant, citing *Bowman*, 311 U.S. 262, avers that, because the administrative law judge addressed his motion for reconsideration substantively, the time for filing an appeal was tolled. We disagree. The facts of this case differ from those in *Shah* and, thus, *Bowman* is not applicable.⁹ Unlike *Shah*, the administrative law judge here specifically denied claimant's motion for reconsideration on the ground that it was untimely filed. Order Denying Reconsideration at 2. That he also stated he would have denied the motion on the merits does not supplant his primary finding that the motion was untimely filed. Thus, the time for filing an appeal was not tolled under the holdings in *Bowman* or *Shah*.

20 C.F.R. §802.206 vs. 29 C.F.R. §18.93

last day was Tuesday, May 26, 2015, as the tenth day was a holiday. *Shah*, 50 BRBS at 87(UBD). The new OALJ regulation governing motions for reconsideration did not apply because the filings in *Shah* occurred prior to its effective date. *Id.* at 86 n.2(UBD).

⁸ In *Bowman*, a bankruptcy case, the Supreme Court addressed the filing of an untimely petition for rehearing which is entertained or considered on its merits. The Court held that if "the court allows the filing and, after considering the merits, denies the petition," the time to appeal runs from the date of the denial of rehearing on the merits. *Bowman*, 311 U.S. at 266. Conversely, if the untimely motion "is not entertained or considered on the merits," it "cannot operate to extend the time for appeal." *Id.*

⁹ *Shah* was decided by the Ninth Circuit after the parties filed their pleadings in this case and none of the parties filed supplemental briefs addressing its applicability. We note that *Shah* is an unpublished decision and, according to Ninth Circuit Rule 36-3, is "not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." 9th Cir. R. 36-3.

Claimant contends the Board erred in assessing the timeliness of his motion for reconsideration pursuant to 20 C.F.R. §802.206, asserting that timeliness should be determined pursuant to 29 C.F.R. §18.93, in conjunction with 29 C.F.R. §§18.30 and 18.32. According to claimant, Sections 18.30 and 18.32 provide three additional days for filing a motion for reconsideration with an administrative law judge, rendering his motion, filed on the 13th day, timely. We reject this contention.

As discussed, Section 802.206(b)(1) states that a timely motion for reconsideration is one that is filed not later than 10 days from the date the underlying decision or order “was filed” in the office of the district director. Section 18.93 states that a motion for reconsideration of a decision and order must be filed no later than 10 days “after service of the decision on the moving party.” Section 19(e) of the Act states that:

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the [district director], and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

33 U.S.C. §919(e). In *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31(CRT) (9th Cir. 1993), the Ninth Circuit held that “filing” under Section 19(e) of the Act is not accomplished until service has been effected on the parties, i.e., claimant and employer.¹⁰ *Id.*, 996 F.2d at 970, 27 BRBS at 35(CRT). In this case, claimant concedes that the administrative law judge’s decision was “filed” and “served” on the same day, September 23, 2016; that date therefore applies in determining whether claimant’s motion for reconsideration was timely. Cl. Mot. for Recon. at 2.

We hold that the 10-day period for filing a motion for reconsideration is controlled by the Board’s regulation at Section 802.206(b)(1), pursuant to Section 18.10(a) of the OALJ Rules. This regulation states:

In general. These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation

¹⁰ *Contra Carillo v. Louisiana Ins. Guaranty Ass’n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009) and *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994) (filing and mailing are two distinct procedures); *see also Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); 20 C.F.R. §702.349(a), (b).

governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

(emphasis added). The Board’s regulation at Section 802.206(b)(1) is a “governing regulation” promulgated to apply specifically to appeals under the Longshore Act and extensions thereof, whereas the more general OALJ Rule applies to other statutes over which the OALJ has jurisdiction and which do not have a “governing regulation.”¹¹ See, e.g., *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132(CRT) (9th Cir. 1993); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Thus, in this case, the 10-day period for filing a motion for reconsideration with the administrative law judge commenced on September 24, 2016, the day after the compensation order was filed in the district director’s office and served on the parties.¹² 33 U.S.C. §919(e); 20 C.F.R. §§702.249, 802.206(a), (b)(1).

Galle

Finally, we return to *Galle* and claimant’s contention that if Section 802.206(b)(1) applies,¹³ *Galle* affords three additional days in which to file a motion for

¹¹ In proposing Section 18.93, the Department of Labor

recognizes that governing statutes, regulations, and executive orders, such as the Black Lung regulations, may provide a different time for filing motions for reconsideration. In those circumstances, the rule of special application will apply.

77 Fed. Reg. 72142, 72174 (Dec. 4, 2012).

¹² Similarly, in cases arising in circuits in which “service” is not part of “filing,” see n.10, *supra*, the 10-day period commences on the date after the compensation order was “filed” in the office of the district director. 33 U.S.C. §919(e); 20 C.F.R. §§702.249, 802.206(a), (b)(1).

¹³ We also reject claimant’s contention that, pursuant to a combination of 29 C.F.R. §§18.30(a)(2), 18.32(c) and 18.93, he would be afforded a total of 13 days to file a

reconsideration. The Director responds that *Galle* is properly understood as looking to the Federal Rules of Civil Procedure, specifically Rule 6(a), to answer the question of how to calculate the 10-day period and that since Rule 6(a) has been revised, Rule 6(a), as revised, is now the appropriate reference. We agree and hold that to the extent *Galle* might be understood as requiring exclusion of intermediate Saturdays, Sundays, and holidays from computation, that understanding is no longer valid pursuant to amended Rule 6(a).

As discussed above, Rule 6(a) was amended in 2009 so that intermediate weekends and holidays are no longer excluded from the 10-day calculation. *See* n.6, *supra*. This amendment was accompanied by the lengthening of the period in Rule 59(e) (motion to alter the judgment). Fed. R. Civ. P. 59(e). However, as Rule 59(e) does not apply to proceedings under the Act in view of the specific reconsideration provisions discussed above, amended Rule 6(a) has the incongruous effect of shortening the time for filing a motion for reconsideration under the Act. This effect, however, cannot overcome the plain language of Rule 6(a).¹⁴ *See, e.g., Andrepont v. Murphy Exploration & Prod.*

motion for reconsideration if the OALJ regulation were applicable. We agree with the Director that the regulations are not susceptible to claimant's interpretation. The service by mail provision of Section 18.30(a)(2)(ii)(C), (D), as referenced in Section 18.32(c), applies to service *on the parties* of items filed *with* the OALJ. It does not refer to service *by* either the district director or the administrative law judge. *See* 77 Fed. Reg. 72142, 72156 (Dec. 4, 2012) (Section 18.30(a) addresses *service on parties* by other parties; Section 18.30(b) addresses *filing with* the OALJ).

In addition, the OALJ Rules were specifically modeled on and intended to conform to the Federal Rules of Civil Procedure. *See* 80 Fed. Reg. 28768 (May 19, 2015). Federal case law interpreting Fed. R. Civ. P. 6(d), on which 29 C.F.R. §18.32(c) is modeled, has held that this rule does not enlarge by three days the time for filing a motion to amend or alter the judgment pursuant to Fed. R. Civ. P. 59(e). Rule 6(d) is inapplicable to a time period running from the date of entry of a judgment. *See, e.g., Williams v. Illinois*, 737 F.3d 473 (7th Cir. 2013); *Albright v. Virtue*, 273 F.3d 564 (3d Cir. 2001); *Parker v. Bd. of Public Utils. of Kansas City, Kan.*, 77 F.3d 1289 (10th Cir. 1996).

Therefore, even if 29 C.F.R. §18.93 were the controlling regulation, claimant's motion for reconsideration to the administrative law judge was untimely filed.

¹⁴ The Advisory Committee Notes to the 2009 Amendment to Section 6 state: "Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed." Fed. R. Civ. P. 6 advisory committee's note. The Board's

Co., 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009) (policy considerations do not override the plain language of a statute). Accordingly, we hold that in determining the timeliness of a motion for reconsideration filed with the administrative law judge, the 10-day period under Section 802.206(b)(1) counts calendar days, unless the last day falls on a weekend or a holiday, in which case the period will run until the next business day. *See* 20 C.F.R. §802.221(a).

In sum, we affirm the administrative law judge’s finding that claimant’s motion for reconsideration was untimely filed pursuant to Section 802.206(b)(1) because it was not filed within 10 calendar days of September 23, 2016, the date the administrative law judge’s Fee Award was filed in the office of the district director and served on the parties.¹⁵ An untimely motion for reconsideration does not suspend the time for filing an appeal with the Board. 20 C.F.R. §802.206(a), (f). As claimant’s notice of appeal was not filed within 30 days of September 23, 2016,¹⁶ and employer’s cross-appeal was not timely filed under 20 C.F.R. §802.205(a) or (b), the Board properly dismissed the appeals. 20 C.F.R. §§802.205(c).

“counting” regulation at 20 C.F.R. §802.221(a) and the OALJ “counting” regulation at 29 C.F.R. §18.32(a) are now aligned with each other and Rule 6(a).

¹⁵ Claimant’s motion for reconsideration should have been filed by October 3, 2016. 20 C.F.R. §§802.206(b)(1), 802.221(a).

¹⁶ The 30th day after September 23, 2016 was Sunday, October 23, 2016. Thus, the appeal had to be filed by October 24, 2016. 20 C.F.R. §§802.205(a), 802.221(a).

Accordingly, claimant's motion for reconsideration en banc is granted, but the relief requested is denied. 20 C.F.R. §§801.301(c), 802.409. The Board's April 26, 2017 Order dismissing the appeals is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge