BRB Nos. 94-3985
and 94-3985A
Case No. 87-LHC-588
OWCP No. 07-0102944

EVA JOURDAN (Widow of E. ELLIOTT JOURDAN)	)	
Claimant-Respondent	)	
v.	)	
EQUITABLE EQUIPMENT COMPANY, A SUBSIDIARY OF TRINITY INDUSTRIES, INCORPORATED	)	DATE ISSUED:
Employer-Respondent Cross-Petitioner	)	
and	)	
FIDELITY & CASUALTY COMPANY OF NEW YORK	)	
Carrier-Respondent	)	
and	)	
AETNA CASUALTY & SURETY COMPANY	)	
Carrier-Petitioner Cross-Respondent	)	
and	)	
WAUSAU INSURANCE COMPANY	)	
Carrier-Respondent	)	

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

McGRANERY, Administrative Appeals Judge:

On September 14, 1994, carrier Aetna Casualty and Surety Company (Aetna) filed a Notice of Appeal of the administrative law judge's Decision and Order filed August 16, 1994. By letter dated September 20, 1994, the Board acknowledged receipt of Aetna's Notice of Appeal and assigned it BRB No. 94-3985. On October 3, 1994, the Board received a Notice of Cross-Appeal from employer Equitable Equipment Company (employer) dated September 28, 1994. Employer stated that a Motion for Reconsideration had been filed by the Director, Office of Workers' Compensation Programs (the Director), and attached a copy of the motion, noting that it appeared that the administrative law judge had issued a decision on the motion. Employer's appeal was assigned BRB No. 94-3985A and was acknowledged by the Board on November 1, 1994.

By motion dated November 21, 1994, employer requested that Aetna's appeal, BRB No. 94-3985, be dismissed as premature. In support of the motion, employer noted that the Director filed a timely motion for reconsideration with the administrative law judge, that on September 28, 1994, the administrative law judge's Decision and Order on Motion for Reconsideration was filed, and that Aetna did not file a new appeal within 30 days of this decision.

Section 802.206(f) of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.206(f), provides that if a timely motion for reconsideration of a decision or order of an administrative law judge or district director is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. A new appeal shall be filed by any party who wishes to appeal after the administrative law judge issues a decision on reconsideration. The regulation further provides that the parties are to advise the Board when a timely motion for reconsideration is filed.

Employer asserts that pursuant to this regulation, Aetna's appeal filed prior to the issuance of the administrative law judge's decision on reconsideration must be dismissed. On December 30, 1994, Aetna responded to employer's motion, asserting that its appeal should not be dismissed, as such a dismissal would not be "without prejudice" since the time for filing a new appeal has expired and as the motion filed by the Director did not seek reconsideration of the merits of the decision.

We grant the motion to dismiss. To do otherwise would contravene the clear dictate of Section 802.206(f) of the Board's regulations. Section 802.206(f) is mandatory and requires dismissal of an appeal when a timely motion for reconsideration is filed with the administrative law

judge. The Director clearly filed a timely motion for reconsideration in this case. Once she did so, the administrative law judge retained jurisdiction over the case until his decision on reconsideration was issued.

The mandatory nature of Section 802.206(f) is clear: "any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, *shall* be dismissed without prejudice as premature." 20 C.F.R. §802.206(f)(emphasis added). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has held that Section 802.206(f) requires dismissal of an appeal when a timely motion for reconsideration is filed. *Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122 (CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). In *Sawyer*, employer sought a stay of payments ordered by an administrative law judge in a November 25, 1986, decision from the Board in early December 1986. The Board construed this motion as a notice of appeal of the administrative law judge's decision and denied the stay on December 8, 1986. In the meantime, claimant also challenged the administrative law judge's award, filing a motion for reconsideration with the administrative law judge on December 5, 1986. Claimant subsequently filed a motion to withdraw the motion for reconsideration and filed an appeal with the Board on January 6, 1987. The administrative law judge granted the motion to withdraw on January 13, 1987.

The Board dismissed claimant's appeal, as it was timely neither from the date of the administrative law judge's initial decision or the decision on withdrawal of the motion for reconsideration. The Board reasoned that where a motion for reconsideration is withdrawn, the time runs from the initial decision and is not tolled by Section 802.206(f). Thus, the Board did not dismiss employer's appeal, as it was timely from the administrative law judge's initial decision. Subsequently, the Board denied Director's motion for reconsideration, seeking dismissal of employer's appeal pursuant to Section 802.206(f); the Board reviewed the merits of the case, affirming the administrative law judge's decision. Employer appealed to the Fifth Circuit, and the Director renewed the argument that employer's appeal was premature under Section 802.206(f).

The court agreed with the Director, holding that the Board was required to dismiss employer's appeal as it was not filed within 30 days of the administrative law judge's order granting withdrawal of the motion for reconsideration. The court held that the language of Section 802.206(f) contains no exceptions and requires that an appeal filed during the pendency of a motion for reconsideration "shall" be dismissed as premature. Since claimant's motion for reconsideration was perfected, detailing several grounds of alleged error by the administrative law judge, the court held that Section 802.206(f) applied and required dismissal of appeals filed prior to the date the decision on reconsideration issued and the filing of a new appeal within 30 days of this date. The court stated that the Board

is obligated to follow its rules and found that it had not done so by failing to dismiss employer's appeal in that case.

In the present case, our dissenting colleague would similarly fail to follow the rules, creating

an exception which simply does not exist. The regulation does not state that it applies only to motions for reconsideration on the merits of a decision; it applies whenever a motion for reconsideration is filed. The fact that the Director in this case sought reconsideration of only one sentence of the administrative law judge's decision is irrelevant to the inquiry under Section 802.206(f). The Director's motion was not frivolous or lacking in substance and requires application of Section 802.206(f) to this case. *See Sawyer*, 881 F.2d at 160, 22 BRBS at 125 (CRT).

That Aetna is now precluded from filing a new appeal, as the 30-day period from issuance of the Decision and Order on Reconsideration has elapsed, also cannot alter the result. The same was certainly true in *Sawyer* at the time that the Director filed its motion for reconsideration before the Board seeking dismissal of employer's appeal and moved for dismissal before the Fifth Circuit. While the dismissal is to be without prejudice to the timely filing of a new appeal, the fact that a party fails to act after issuance of a decision on reconsideration does not alter the requirement that the Board dismiss an appeal filed while a motion for reconsideration is pending. Dismissal without prejudice provides the parties with an opportunity to file a new appeal after the initial appeal is dismissed as premature; it does not excuse a failure to do so.

The parties are charged with awareness of the Board's procedural rules, and the Board is required to follow those rules. Dismissal of Aetna's appeal is required by the clear language of the Board's regulation. Accordingly, Aetna's appeal, BRB No. 94-3985, is dismissed as premature pursuant to Section 802.206(f). In view of the dismissal of Aetna's appeal, employer's cross-appeal, BRB No. 94-3985A, is also dismissed. The remaining motions filed by the parties are moot.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I cannot agree with my colleagues' decision in this case, as I do not believe that Section 802.206(f) can be applied or that it compels dismissal of the appeals in this case. My colleagues find dismissal necessary today, depriving a party of review of the merits of its case, where the Board's

own actions in accepting Aetna's appeal, granting extensions of time and setting a briefing schedule did nothing to alert the party of the need for further action. The Board's dismissal is not "without prejudice" as the regulation contemplates, but is with great prejudice to the private parties involved.

Section 802.206(f) of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.206(f),[1] provides that if a timely motion for reconsideration of a decision or order of an administrative law judge or district director is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed *without prejudice* as premature. (emphasis added). The regulation further provides that a new appeal shall be filed after the administrative law judge issues a decision on reconsideration. Finally, Section 802.206(f) requires the parties to advise the Board when a timely motion for reconsideration is filed.

Initially, I do not believe that the Director's motion here is properly characterized as a motion for reconsideration under this section. Rather, the motion sought clarification of one sentence of the administrative law judge's Decision and Order. The Decision and Order in this case addressed employer's petition for modification on the issue of the carrier responsible for the payment of benefits following remand by the Board. *See Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting). Aetna wishes to appeal the decision on remand holding it responsible for the payment of benefits to the claimant. In her motion to the administrative law judge, the Director did not seek reconsideration of the merits of the administrative law judge's Decision and Order regarding the responsible carrier. Rather, she filed the motion for reconsideration solely seeking clarification of paragraph 3 of the Order, which stated, "[e]mployer is hereby discharged of liability for current and future benefits due claimant." The Director asserted that this statement is incorrect because, while the insurer is primarily liable, employer remains liable if the insurer becomes insolvent. The administrative law judge agreed and deleted the offending language in his Decision on Reconsideration.

As Aetna asserts, the motion filed by the Director and the ensuing Order by the administrative law judge, although captioned as a reconsideration, did not address any aspect of the merits of the Decision on Remand or the issues encompassed by the Board's remand Order. I would hold that this motion is not a motion for reconsideration of the decision within the terms of Section 802.206(f), as it is more akin to a motion for a clerical correction under Rule 60(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 60(a). Under similar circumstances, the Board has held that, where an administrative law judge issues a subsequent decision to clarify or correct a clerical mistake, the appeal time runs from the date of the original Decision and Order on the merits. *Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981). In *Graham-Stevenson*, the administrative law judge issued a Decision in which he neglected to multiply claimant's average weekly wage by 66 2/3 in order to compute his compensation rate. Subsequently, the administrative law judge *sua sponte* issued a Supplemental Decision and Order amending his decision to correct that error. Claimant attempted to appeal the supplemental decision, and the Board dismissed the

[1]The specific applicable section falls under Part B, which is entitled Part 802--Rules of Practice and Procedure.

appeal. The Board analogized the case to Rule 60(a), finding that a motion pursuant to that rule did not stay the finality of a decision or the running of the time to file an appeal.

In this case, since the Director's motion sought only a technical clarification of one sentence and did not address the merits of the appeal, I would hold that it was not a motion for reconsideration within Section 802.206(f). I do not believe that this position is at odds with the Board's requirement that it follow its Rules of Procedure. *See Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122 (CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990). In *Sawyer*, the court found that claimant's motion for reconsideration was perfected, stating several grounds of perceived error by the administrative law judge, and noted that it was not lacking in substance. In this case, the motion lacked any substantive arguments regarding the merits of Aetna's appeal. On these facts, I believe it is consistent with sound practice to hold that Section 802.206(f) does not apply.

In this case, moreover, the procedures contemplated by Section 802.206(f) cannot be followed. The regulation sets forth procedures that protect the rights of all parties when followed in its entirety. It requires that the parties notify the Board when a timely motion for reconsideration is filed. When this occurs, the Board is to then dismiss any appeals filed. The regulation states that this dismissal is without prejudice and once the administrative law judge issues his decision on reconsideration, any aggrieved party may refile. This procedure is efficient and necessary to preserve orderly processing of cases through the administrative tribunals involved in the review of a case, particularly since the administrative law judge may, through reconsideration, remove the necessity for appellate review.

The present case, however, did not follow the steps contemplated by the regulation. Initially, employer notified the Board of the Director's motion in its notice of cross-appeal dated September 28, 1994, the same day the administrative law judge issued his decision; the Board received this appeal on October 3, 1994, and routinely acknowledged it on November 1, 1994, without taking any action on the information regarding the Director's motion. Employer did not file its motion to dismiss until November 25, 1994, almost 60 days after the Decision on Reconsideration was filed on September 28, 1994. In the meantime, the Board had proceeded to accept the appeals and set the briefing schedule. The Board received a Motion for Extension of Time from Aetna on October 21, 1994. The extension was granted on October 27, 1994. These actions by the Board could lead the most diligent party to believe that no further action was necessary to preserve its appeal rights.

Under the circumstances here, there is no way that Aetna's appeal can be dismissed without prejudice. Any dismissal now would be with great prejudice. Section 802.206(f) is a rule of procedure and provides only for a dismissal without prejudice. The substantive rights of Aetna, which arose when it filed a timely appeal under Section 21(a) of the Act, 33 U.S.C. §921(a), should not be defeated by a procedural provision under a regulation. The time for filing a new appeal after the administrative law judge's second decision expired in October, ironically coinciding with the Board's grant of an extension of time to Aetna.

While *Sawyer* indicates that the fact that a new appeal cannot be timely filed after the Board's dismissal cannot prevent dismissal of an appeal, I believe that the dismissal provision of

Section 802.206(f) should not apply to a motion for reconsideration which lacks substance in addressing the merits of the case, especially in a serious case, such as this one, where the petition was filed by the Director, as a party-in-interest, and not by one of the parties, who have a substantial financial interest in the outcome. The motion by the Director here had no relation to the merits of Aetna's appeal and could not affect the need for appellate review. As the motion sought only a clarification of one sentence of the Order, I would hold that it is not a motion for reconsideration of the decision within Section 802.206(f). *See Graham-Stevenson, supra.* Therefore, the time for filing an appeal ran from August 16, 1994, and Aetna's timely appeal and employer's timely cross-appeal were properly acknowledged by the Board.

Justice Brandeis was famous for studying in detail the facts of a case and for developing a pragmatic solution guided above all by the facts of the situation. The various procedural steps in this case are set forth in the opening paragraphs of the majority's decision. There is the administrative law judge's decision of August 16, 1994, followed timely by Aetna's appeal of September 14, 1994. Employer cross-appealed on September 28, 1994. The Director filed a motion for reconsideration with the administrative law judge on August 23, 1994, and a decision on this motion was filed on September 28, 1994. On November 21, 1994, employer filed a motion to dismiss Aetna's appeal as premature pursuant to 20 C.F.R. §802.206(f), which is the motion that is presently under consideration by this panel of the Board.

What we have here is an appeal timely filed by Aetna pursuant to Section 21(a) of the Longshore Act, 33 U.S.C. §921(a). Aetna, as a substantive right, is requesting a review of the case by the Board. As of this point of time, the matter is before the Board. On the other hand, the Director filed a motion for reconsideration before the administrative law judge, that was acted on by a decision on September 28, 1994. No appeal was taken from that order. Employer, consequently, filed a motion with the Board on November 21, 1994, to dismiss Aetna's appeal as *premature*. This motion to dismiss was pursuant to Section 802.206(f) of the Board's regulation. This provides that an appeal is to be *dismissed* "without prejudice" as *premature*. This regulation is a procedural provision coming under Part B of the Board's regulations which is entitled Part 802 - Rules of Practice and Procedure. It is not a substantive provision as is Section 21(a) of the Act. There is no comparable provision in the Act providing for the dismissal of an appeal in the event a motion for reconsideration is filed. We thus have a direct conflict. The regulation is premised on the theory that the appeal is *premature*. The obvious fact is this case is that the appeal was not premature. It was filed after the administrative law judges Decision and Order and was done so within the specified time limit. The regulation further states that the dismissal shall be filed *without prejudice*. It does not give the Board authority to simply dismiss the case; the authority is to dismiss it *without prejudice*. There is no way that can be done, given the facts and timing of this case. Since that is our limited authority, we really do not have authority to dismiss. This is especially so since any dismissal at this time, based on a procedural regulation over a substantive statutory provision, would be at great prejudice. It could not be looked upon as a pragmatic disposition.

Accordingly, I would deny employer's motion to dismiss in this case and address the merits of the appeals. I therefore respectfully dissent from the Board's decision.

JAMES F. BROWN
Administrative Appeals Judge

Note to Board:

Draft revised in view of shift in votes. With new majority for dismissal, I had to decide what to do with the cross-appeal. It appears to be a true cross-appeal and therefore, I recommend dismissal. Note that it could be timely from the D&O on reconsideration, as it was received by the Board after the decision issued. Employer, however, does not assert that it wishes the appeal to be accepted on this basis, and I think it is cleaner to dismiss it. (I suspect employer filed to protect its rights to go after another insurer if Aetna were successful on appeal). If employer wishes to pursue an independent appeal, it can seek reconsideration of the order.

Language is included in the draft dismissing the appeal.

P.S. Note also that OEC set this up to give employer's appeal a new BRB number in the event the cross-appeal was dismissed. Even if we were keeping the cross-appeal, I'm not sure that this would be necessary--we took one notice of appeal and gave it two numbers, the "A" designation on 94-3985 and a 95 number. In any event, the 95 number can be deleted, as no parties were ever notified of it, if you agree the cross-appeal should be dismissed.