BRB No. 05-0929

LEE KLEIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABB SUSA, INCORPORATED	)	DATE ISSUED: 07/25/2006
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion to Dismiss Claimant's Claim of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Lee Klein, Bangkok, Thailand, *pro se.*

Michael W. Thomas (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order Granting Motion to Dismiss Claimant's Claim (2004-LHC-02697) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In an appeal by a claimant without legal representation, we will review the administrative law judge's findings of fact and conclusions of law to determine if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed.

33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 20 C.F.R. §802.211(e).

Claimant sustained a back injury while he was employed in Egypt. By Order filed February 19, 2004, Administrative Law Judge Daniel Solomon approved a settlement between the parties for $20,000 to claimant and $6,000 to claimant's attorney. 33 U.S.C. §908(i). Claimant lives in Bangkok, Thailand. He claimed that the settlement agreement required that employer wire the settlement funds to his bank account in Bangkok. Employer instead issued a check, which it sent to claimant by international courier. The check was delivered to claimant's apartment building on February 28, 2004, within 10 days after February 19, 2004. Claimant contended he never received the check and did not endorse it. Nevertheless, the check was endorsed with claimant's name and deposited on March 3, 2004, into a bank account in claimant's name in Stuart, Florida. Claimant filed a pre-hearing statement on July 29, 2004, raising as issues: (1) whether Judge Solomon's order approving the settlement required the funds to be wired to claimant's Bangkok account; and (2) whether claimant is entitled to a Section 14(f) assessment because he did not receive the check within 10 days after the compensation became due. 33 U.S.C. §914(f).[1] The case was assigned to Administrative Law Judge Gee (the administrative law judge). Claimant has not been represented by counsel during the proceedings before the administrative law judge. The administrative law judge issued 14 orders during the course of the proceedings before her.

Employer agreed to investigate the circumstances surrounding the negotiation of the check. In order to effectuate a fraud investigation, claimant was required to fill out and return an "Affidavit of Check Fraud" form. Claimant failed to respond to employer's request that he do so. The administrative law judge issued several orders addressing claimant's motions concerning the form, yet compelling claimant to comply with employer's request. *See* Orders dated February 17, 2005, March 18, 2005, April 7, 2005, April 14, 2005.

---

[1] Section 14(f) of the Act states:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. §914(f).

Claimant contended that the administrative law judge should vacate Judge Solomon's Order approving the settlement, as there was no meeting of the minds regarding the settlement terms, specifically the method of payment of the settlement proceeds. The administrative law judge found this motion to be untimely. The administrative law judge also found that there was a meeting of the minds as to the settlement amount and that the method of payment was not a condition of the settlement. Rather, the administrative law judge found that the method of payment was a "request" by claimant made after the terms were set out and approval sought, and not a condition of the settlement agreement itself. *See* Orders dated April 14, 2005, June 1, 2005.

On May 2, 2005, employer filed a motion seeking dismissal of claimant's claim for a Section 14(f) penalty or the drawing of an adverse inference that the check endorsement was not a forgery. Finally, claimant returned the Affidavit of Check Fraud, having redacted parts of the form, and without having it notarized.[2] Employer alleged that the affidavit was worthless for its intended purpose of investigating the alleged fraud. Moreover, in responding to employer's request for admissions, claimant admitted that he has a bank account in Florida bearing the number on the back of the endorsed check.

In a decision dated July 13, 2005, the administrative law judge granted employer's motion to dismiss the claim. She described the full sequence of events in this case. The administrative law judge then drew an adverse inference against claimant due to his failure to complete the Affidavit of Check Fraud, and his admission that he has an account at a Florida bank bearing the number on the back of the endorsed settlement check. The administrative law judge concluded, as a matter of fact, that claimant received the settlement check in a timely manner, that his signature was not forged on the check, and that no issue remained for adjudication as claimant is not entitled to a Section 14(f) penalty. Thus, she dismissed claimant's claim.

Claimant appeals the dismissal of his claim and some of the administrative law judge's interlocutory rulings. Employer responds, urging affirmance of the administrative law judge's orders and dismissal of claimant's claim.

Claimant contends that the terms of the settlement agreement were not fulfilled as employer did not wire the proceeds to his bank account in Bangkok and that employer perpetrated fraud on Judge Solomon by sending him the settlement application without the instructions as to the wiring of the proceeds. Claimant also contends that the

[2] Claimant redacted statements such as "I did not receive any benefit or value from the proceeds of the check(s) listed above," and "I will cooperate in any investigation, promptly disclose any information requested by the Bank, and if necessary, prosecute the wrongdoer."

administrative law judge erred in finding that his motion to set aside the settlement under Federal Rule of Civil Procedure 60(b) was untimely, and in ruling on employer's motions without awaiting claimant's response to the motions. Claimant further contends that the dismissal of his claim was based on an "illegal" order that he fill out the Affidavit of Check Fraud, and that the administrative law judge erred in finding that he received the settlement proceeds within 10 days of the date the Order approving the settlement was filed.[3]

We first hold that the administrative law judge properly declined to address any direct attack on the settlement agreement. Claimant did not file a motion for reconsideration of Judge Solomon's approval of the settlement agreement, nor did he file an appeal with the Board within 30 days of the Order's filing. 33 U.S.C. §921(b). The first document claimant filed concerning whether the terms of the settlement were fulfilled is dated July 29, 2004, more than five months after the settlement was approved. The approval of the settlement itself cannot be challenged after the period for appeal to the Board has expired. *Porter v. Kwajalein Services, Inc*., 31 BRBS 112 (1997), *aff'd on recon*., 32 BRBS 56 (1998), *aff'd sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir. 1999) (table), *cert. denied*, 528 U.S.1052 (1999). Moreover, a Section 8(i) settlement is not subject to modification proceedings pursuant to Section 22, 33 U.S.C. §922, so claimant's pleadings cannot be construed as a petition for modification. *See, e.g., Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998). Thus, we decline to address claimant's challenge to the substance of the parties' settlement agreement.

Claimant next contends that the settlement should be set aside pursuant to Federal Rule of Civil Procedure 60(b).[4] The administrative law judge found that claimant's

---

[3] Claimant also alleges unethical conduct on the part of employer's attorney. At some point, claimant initiated complaint proceedings against employer's attorney before the California Bar Association, which subsequently found no basis to pursue any action. We will not entertain any contentions on this point.

[4] Pursuant to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules), the Federal Rules of Civil Procedure apply "in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a). Federal Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3)

motion under this Rule was pursuant to subsections 1 and 3 concerning mistake, fraud or misconduct, and that therefore the motion was not timely filed, as it was not made within one year of the judgment, as required for a motion based on mistake, fraud or misconduct. *See* n. 4, *supra.* Claimant first filed a formal motion pursuant to Rule 60(b) on April 4, 2005, which was received by the administrative law judge on April 11, 2005. As this is more than one year after the settlement was approved on February 19, 2004, the administrative law judge properly found the motion was untimely filed. *Greenhouse v. Ingalls Shipbuilding, Inc.*, 31 BRBS 41 (1997).

Claimant next alleges that the administrative law judge ruled on employer's motions prior to her receipt of claimant's response. Assuming, *arguendo,* that this occurred, we cannot discern any resultant prejudice. The administrative law judge accounted for difficulties with international mail, and she ruled on the merits of all of claimant's motions for reconsideration. Moreover, with respect to reply briefs, the administrative law judge appropriately noted that, pursuant to 29 C.F.R. §18.6(b),[5] she may act on a motion without awaiting a reply. *See* Order dated May 20, 2005. Thus, the timing of the administrative law judge's rulings did not prejudice claimant.

With regard to claimant's motions for summary decision, we hold that the administrative law judge properly denied them. The purpose of the summary decision procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Dunn v.*

> fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .*

Fed. R. Civ. P. 60(b). (emphasis added).

[5] The OALJ Rules are applicable to proceedings under the Longshore Act unless they are "inconsistent with a rule of special application as provided by statute, executive order, or regulation." 29 C.F.R. §18.1(a). Section 18.6(b) provides, in pertinent part, "Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed." 29 C.F.R. §18.6(b).

Lockheed Martin Corp., 33 BRBS 204 (1999); 29 C.F.R. §§18.40, 18.41. The administrative law judge properly found that the central issue in this case was one of fact: did claimant timely receive and endorse the settlement check. As claimant had not cooperated with employer's fraud investigation when he made his motions for summary decision, the administrative law judge appropriately found that an issue of material fact remained. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). Thus, use of the summary decision tool would have been inappropriate. *Id.*

Claimant also challenges the administrative law judge's authority to order him to comply with employer's efforts to investigate what happened to the settlement check and the denial of his motion for a protective order. In essence, employer's request that claimant supply the Affidavit of Check Fraud was a discovery motion. In addition, employer filed with claimant a request for admissions. This request included questions concerning the normal method of package delivery at claimant's apartment building, the name of the receptionist at the desk of the building, and the deposit of the settlement check into a Florida bank account.

The OALJ rules state that:

> Unless otherwise limited by order of the administrative law judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter

29 C.F.R. §18.14(a). In addition, 29 C.F.R. §18.20 allows any party to serve another party with a request for admissions. The administrative law judge has the authority to issue orders to compel discovery, which includes the production of documents and the answering of requests for admissions. 33 U.S.C. §§919(d), 927(a); *Sledge v. Sealand Terminal, Inc.*, 14 BRBS 334 (1981); 29 C.F.R. §18.21. The administrative law judge also has the authority to issue a protective order limiting discovery. *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); 29 C.F.R. §18.15.

The seminal issue in claimant's claim for a Section 14(f) penalty was whether claimant received the settlement check within 10 days of the date compensation was due. Resolution of this issue required that claimant cooperate with the fraud investigation. Thus, the "Affidavit of Check Fraud" and employer's request for admissions were "relevant" to this inquiry within the meaning of 29 C.F.R. §18.14(a). Therefore, the administrative law judge did not abuse her discretion in ordering claimant to comply with employer's investigation efforts and in denying claimant's motion for a protective order

on the ground of irrelevancy.[6] *See* 33 U.S.C. §927(a); *Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989).

The final issue is whether the administrative law judge was empowered to draw an adverse inference against claimant and to use that inference and claimant's admissions to dismiss the claim for a Section 14(f) assessment. The "adverse inference rule" has been described thusly:

> The theory behind the rule is that, all other things being equal, a party will of his own volition introduce the strongest evidence available to prove his case. If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.

International Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1338 (D.C. Cir. 1972). Moreover,

> the adverse inference rule plays a vital role in protecting the integrity of the administrative process in cases where a subpoena is ignored. It is, of course, always possible for the opposing party to seek enforcement of the subpoena in court. But enforcement against a really intransigent party can be costly and time consuming, particularly in administrative proceedings where the enforcement process is of necessity collateral to the main case. [Citations omitted] The adverse inference rule allows a tribunal to attach weight to a party's intransigence without resorting to the awkward enforcing process.

Id. at 1338-1339. "The decision to draw an adverse inference lies within the sound discretion of the trier of fact." *Underwriters Laboratories, Inc. v. N.L.R.B.*, 147 F.3d 1048, 1054 (9th Cir. 1998). The Board has held that an administrative law judge may draw an adverse inference against a party when that party does not submit evidence

---

[6] The administrative law judge also acted within her discretion in denying claimant's motion that employer be required to respond to his interrogatories and production requests. The administrative law judge found that the information claimant sought was irrelevant to the proceeding. The administrative law judge may deny a motion to compel on this basis. *See generally Olsen v. Triple A Machine Shop*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); *see* Order dated January 6, 2005.

within his control. *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *aff'd on recon.*, 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *see also Cioffi v. Bethlehem Steel Corp*., 15 BRBS 201 (1982). The OALJ regulations also address adverse inferences and other sanctions that may be imposed due to a party's failure to comply with discovery. Section 18.6(d)(2), 29 C.F.R. §18.6(d)(2), states in relevant part:

> If a party . . . fails to comply with a subpoena or with an order, including, but not limited to, an order for . . . the production of documents, . . . or requests for admissions, . . . the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> (i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;
>
> (ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party; . . .

In this case, claimant clearly had the power to fully complete the Affidavit of Check Fraud and to submit it to employer. Instead, claimant redacted some of the critical information, including the statements that "he did not receive any benefit . . . from the proceeds of the check" or that he "[has] not arranged. . . to be reimbursed for any portion of the proceeds." The administrative law judge found that the redactions lead to the inference that claimant received the settlement funds. The administrative law judge found that claimant's redaction of the statements concerning cooperation with any investigation to prosecute the wrongdoer or "to testify to the truth of the affidavit" leads to the inference that the endorsement on the check was not a forgery and that claimant negotiated the check himself. Finally, the administrative law judge found these inferences bolstered by claimant's admission that he owns the account in the Florida bank into which the settlement funds were deposited on March 3, 2004.

We affirm the adverse inferences drawn by the administrative law judge, as they rationally follow from claimant's failure to fully complete the "Affidavit of Check Fraud" and from his admission that he has a bank account in Florida corresponding to the number on the back of the endorsed check. *Cioffi*, 15 BRBS at 202-203. Based on these rational inferences the administrative law judge thus found as fact that claimant received the settlement check within 10 days of the date compensation was due, as the check was

delivered to claimant's building on February 28, 2004. These facts preclude the application of Section 14(f).[7] *See generally Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989). The administrative law judge therefore properly granted employer's motion for summary decision as there remained no issues of material fact and as employer was entitled to judgment as a matter of law. *See generally Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990). Thus, as the administrative law judge's denial of claimant's claim for a Section 14(f) assessment is rational, supported by substantial evidence and in accordance with law, it is affirmed. *See generally Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Granting Motion to Dismiss Claimant's Claim is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[7] Section 14(f) provides a sanction for the untimely payment of benefits. Thus, even assuming, *arguendo*, that payment should have been made by wire transfer, there is no penalty under that section for employer's making payment by an alternative means, *i.e.*, a check, so long as payment was timely made.