

**U.S. Department of Labor**

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**Issue Date: 19 January 2012**

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*In the Matter of:*

JOHN F. GRAY, JR.,  
*Claimant,*

Case No.: 2011 LHC 01856  
OWCP No.: 07-191641

v.  
GULF INTERCOASTAL CONTRACTORS/  
SPECIALTY RISK SERVICES,  
*Employer/Carrier,*  
and  
DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
*Party in Interest.*

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Before: Stuart A. Levin  
Administrative Law Judge

**Order Dismissing Claim**

**I.**

This matter involves a claim for benefits filed under the Longshore Act by Claimant, John Gray, Jr. In October, 2011, Claimant's counsel moved to withdraw as his attorney in this matter, and the Employer moved for a continuance of the hearing scheduled to convene on November 14, 2011, on the ground that Claimant had declined to participate in discovery or respond to his own counsel's inquiries. On October 27, 2011, an Order issued granting both motions. The Order further advised Claimant: "... the rules regarding discovery set forth at 29 C.F.R. Part 18 apply in this matter. Claimant is hereby urged to expeditiously obtain new counsel to assist him with the prosecution of his claim, but he is, hereby, advised that should he elect to proceed without counsel, he must, under the applicable rules, either respond to discovery timely or seek a protective order and explain why he declines to respond. **Failure to comply with the applicable rules may result in the imposition of sanctions which may include dismissal of the claim.**" (emphasis in original).

The claim was then rescheduled for hearing on January 23, 2012; however, on December 13, 2011, Employer moved to dismiss it on the ground that Claimant had refused to participate in discovery and otherwise failed to cooperate in the development of his claim. Employer' counsel reported that he had made numerous efforts to contact Claimant and had left him numerous messages, but Claimant failed to respond. As a result, a Show Cause Order issued on December 16, 2011, requiring Claimant to: "show cause, on or before, December 23, 2011, why he has not participated in discovery and explain why he has not cooperated with efforts to resolve his claim." As in the previous Order, Claimant was specifically advised: "**Claimant is again urged to seek the assistance of counsel, and is hereby advised that if he fails to respond to this Order he will be subject to sanctions which may include dismissal of the claim.**" (emphasis in original). As of this date, Claimant has not responded to the Show Cause, and Employer has requested that this matter be dismissed.

## II.

It must be noted at the outset, the Board has cast doubt on the premise that a claim may be dismissed solely because a claimant has failed to cooperate in discovery or failed to respond to the Show Cause Order. *See, H.H.v. Bludworth Marine, Inc.*, BRB No. 08-0320 (Nov. 19, 2008). The Board in *Bludworth* reasoned that the Act contains a specific sanction, i.e., certification of the misbehavior to a district court, and that any failure by claimant to comply with a discovery order or any untimely response to such order by claimant "may be sanctioned only in accordance with the mechanism set forth at Section 27(b) of the Act." *H.H.v. Bludworth Marine, Inc.*, BRB No. 08-0320 (Nov. 19, 2008); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (2003).<sup>1</sup> It appears, however, that *Bludworth* is distinguishable from the circumstances involved here.

In this instance, we are confronted with a claimant who not only refuses to comply with a Show Cause Order; but, has declined to communicate in any way with his own former counsel, opposing counsel, or the court. I am, of course, mindful that Claimant is now acting, or, more

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<sup>1</sup> It should be noted that Board in *Bludworth*, having found that Section 27 provides the "only" remedy against a person who fails or refuses to comply with a discovery order, authorized additional sanctions in other circumstances:

... other actions an administrative law judge may take to discharge the duties of his office and exercise control over the proceedings before him. 5 U.S.C. §556(c); 33 U.S.C. §927(a). ... *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). For example, if a party does not submit evidence within his control, the administrative law judge may draw an adverse inference against that party and conclude that the evidence is unfavorable to that party. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982). If a party does not act with due diligence in obtaining evidence, the administrative law judge can close the record and exclude the evidence. *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *see also Ezell*, 33 BRBS 19. **An administrative law judge also may dismiss claims that have been abandoned, *Taylor v. B. Frank Joy Co.*, 22 BRBS 408 (1989)**, and may deny a claim for failure of the proponent to present credible evidence establishing a basis for an award. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). (emphasis added)

accurately, failing to act, *pro se*; but he has been urged, without success, to seek the assistance of counsel. He has, moreover, been afforded every accommodation his *pro se* status will permit consistent with the requirements of the applicable rules and due process.

Nevertheless, by his past refusals to respond to any inquiry, including proper discovery requests, and by his refusal to respond to a Show Cause Order which sought his input, Claimant has manifested a complete absence of motivation to pursue his claim. A district court, upon certification, may cite him for contempt, but to what end and what real purpose. To invoke the cumbersome procedure of certification and involve a district court in a proceeding to force this Claimant to participate in an administrative process he initiated, but now ignores, and pursue the claim he filed, but in which he has apparently lost interest, would not seem a prudent demand on the district court's limited resources. This would seem a particularly cogent consideration in this instance since Section 27(b) of the Act does not require a district court's intervention in this proceeding.

Claimant did not merely "disobey or resist" a lawful order as described in Section 27(b) of the Act and the Board's decision in Bludworth. His refusal to participate in this proceeding encompasses every aspect of cooperation needed to advance his claim, and Section 27(b) was not designed to engage the district courts in every aspect of the day to day management of the claims adjudication process. To the contrary, the Rules of Practice provide ample administrative authority to deal with instances in which a claimant stymies the progress of his own claim by failing to participate in or respond to any of the basic communications required by the processes he invoked. Under such circumstances, the Rules clearly permit the dismissal of a claim due to its abandonment. *See*, 29 C.F.R. Sections 18.39(b) and 18.29(a); Taylor v. Franke Joy Co., 22 BRBS 408 (1989).

### III.

For all of the foregoing reasons, I find and conclude that sanctions less drastic than dismissal would not likely better serve the interests of justice because Claimant has eschewed every opportunity to participate in this matter and has, thereby, manifestly abandoned his claim. Accordingly, the claim will be dismissed in accordance with the applicable Rules of Practice. 29 C.F.R. Sections 18.39(b) and 18.29(a). Therefore:

### ORDER

IT IS ORDERED that Employer's Motion to Dismiss be, and it hereby is, granted, and;

IT IS FURTHER ORDERED that the claim filed in this matter be, and it hereby is, dismissed.

**A**

Stuart A. Levin  
Administrative Law Judge

