IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENN TERMINALS, INC. and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,	:	**CIVIL ACTION**
Petitioners,	:	
v.	:	
JOHN J. MCTAGGART, in his capacity as District Director for the Third Compensation District of the United States Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, Longshore and Harbor Workers' Compensation Division,	:	**No. 99-2899**
Respondent.	:	

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 6th day of April, 2000, upon consideration of Respondent's Motion to Dismiss For Lack of Subject-Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted and Request for Hearing (Doc. No. 6, filed October 18, 1999), Response of Petitioners to Respondent's Motion to Dismiss (Doc. No. 7, filed November 16, 1999), and Respondent's Notice of Supplemental Authority (Doc. No. 8, filed February 10, 2000), it is **ORDERED** that Respondent's Motion to Dismiss For Lack of Subject-Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted is **GRANTED** and the Petition for Writ of Mandamus is **DISMISSED**.

It is **FURTHER ORDERED** that Respondent's Request for Hearing is **DENIED AS MOOT.**

MEMORANDUM

Petitioners Penn Terminals, Inc. ("Penn Terminals") and Signal Mutual Indemnity Association, Ltd. ("Signal Mutual" and, together with Penn Terminals, "petitioners") have filed a petition for writ of mandamus asking this Court to order respondent John McTaggart, the District Director of the Third Compensation District, Office of Workers Compensation Programs of the United States Department of Labor ("respondent"), to refer a matter that is before him to the Office of Administrative Law Judges ("OALJ"). Presently before the Court is respondent's motion to dismiss.

I. BACKGROUND

Michael Weaver ("claimant"), an employee of Penn Terminals, filed an action under the Longshoreman and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq., arising out of an injury that he allegedly incurred in the course and scope of his employment on February 13, 1996. The parties agreed to settle the case for $75,000, and an Administrative Law Judge ("ALJ") issued a compensation order pursuant to the LHWCA. Under that order, Signal Mutual, Penn Terminals' indemnity carrier, was required to pay claimant $75,000 within ten days. The LHWCA, § 914(f), provided for addition of a 20% penalty if the compensation award was not paid within ten days.

Petitioners selected a private courier to deliver this payment, but the private courier was unable to locate claimant's residence, and payment was not made within ten days. Respondent subsequently initiated an investigation as to why petitioners had not paid the agreed-upon

compensation award in a timely fashion. Petitioners argued that claimant did not provide them with a valid United States Postal Service address, and that he therefore knew or should have known that payment could not be made in a timely fashion. Petitioners further argued that they were entitled to an equitable exception to the LHWCA's 10-day requirement, based on their good faith attempt to comply with the LHWCA. Respondent rejected this argument, and, on August 19, 1998, ordered petitioners to pay an additional $15,000--20 percent of the $75,000 settlement (the " 1998 supplementary compensation award").

Petitioners then requested that respondent refer their case to the Office of Administrative Law Judges ("OALJ") for hearing on their claims. By letter dated October 7, 1998, respondent refused to refer the matter to the OALJ.

Petitioners then filed a petition for writ of mandamus in this Court on November 5, 1998, asking the Court to order respondent to refer the case to the OALJ. On December 1, 1998, respondent vacated the supplementary compensation award in order to reconsider petitioners' position. At petitioners' request, on December 10, 1998, this Court marked petitioners' petition for writ of mandamus voluntarily withdrawn.

On March 17, 1999, respondent rejected petitioners' arguments, and issued an order reinstating the supplementary compensation award (the "March supplementary compensation award"). On March 23, 1999, petitioners requested that respondent refer the matter to the OALJ for a formal hearing. By letter dated April 22, 1999, respondent rejected petitioners' request. Petitioners requested reconsideration of this decision, and, in an order dated May 26, 1999, respondent rejected this request.

Petitioners filed a second petition for writ of mandamus in this Court on June 7, 1999. In their petition, petitioners again ask this Court to order respondent to refer their case to the OALJ. On October 18, 1999, respondent filed a motion to dismiss the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioners filed a response to this motion on November 16, 1999. On February 10, 2000, respondent filed a notice of supplemental authority.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the federal rules of civil procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishin v. King & Spaulding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

28 U.S.C. § 1361 gives district courts original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.A. § 1361 (West Supp. 1999). The remedy of mandamus is a drastic one which courts should grant only in extraordinary circumstances. See Allied Chemical Corp. v. Daiflon, 449 U.S. 33, 34 (1980). In order to ensure that the writ will only issue in appropriate circumstances, the Supreme Court has held that a party seeking issuance

of such a writ must demonstrate (1) that a public official has a well-defined and mandatory duty to perform a certain act, and the petitioner has a clear and indisputable right to have that act performed, and (2) that no other adequate remedy is available. See id. at 35; Aerosource v. Slater, 142 F.3d 572, 582 (3d Cir. 1998). In addition, the petitioner generally must show irreparable injury caused by the error. See Aerosource, 142 F.3d at 582.

33 U.S.C. § 914(f) provides, in relevant part, "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 ...." 33 U.S.C.A. § 914(f) (West Supp. 1999) ("§ 914(f)"). In the instant case, respondent imposed such a penalty on petitioners, and petitioners sought to challenge this award in front of an ALJ.

Respondent argues that petitioners have not shown that they had a clear and indisputable right to have their matter referred to the OALJ. Petitioners respond that, upon receiving their request for a hearing before an ALJ, respondent had a clear, non-discretionary duty to refer the matter to the OALJ pursuant to 33 U.S.C. § 919(c). The Court disagrees with petitioners. Because petitioners' dispute did not involve issues of fact, but rather involved determinations of law, the Court concludes that petitioners had no clear, indisputable right to have their claim referred to the OALJ.

33 U.S.C. § 919(c) provides, in relevant part, "The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C.A. § 919(c) (West Supp. 1999) ("§ 919(c)"). Petitioners rely on the mandatory language of § 919(c)--"shall order a

hearing thereon"-- to support their argument that respondent had a clear, non-discretionary duty to refer their claim to the OALJ. Indeed, the Fifth Circuit has held that this section creates a clear, non-discretionary duty on the part of a district director. See Ingalls Shipbuilding v. Asbestos Health Claimants, 17 F.3d 130, 133 (5th Cir. 1994). However, the Fifth Circuit has also held that referral to the OALJ is not necessary when the material facts of a case are undisputed. See Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1222 (5th Cir. 1985) ("Lauzon II").

Petitioners' interpretation of § 919(c) ignores one important factor which other courts, in addressing the mandatory language of this section, have considered--whether the matter involves questions of fact. In Healy Tibbits v. Cabral, 201 F.3d 1090 (9th Cir. 2000), the Ninth Circuit recently held that "section 919(d) cannot confer an absolute right to a hearing before an ALJ on all contested issues.... Accordingly, we hold that the Act does not ipso facto confer an absolute right to a hearing before an ALJ on all contested issues." Id. at 1093-94. The Healy Tibbits court further held that "[p]urely legal disputes or those that did not require fact-finding obviously did not necessitate an evidentiary hearing conducted by the deputy commissioner [prior to the 1972 amendments]; accordingly, such disputes are not within the jurisdiction of the OALJ." Id. at 1094.

Similarly, a court in the Southern District of Texas has held that a "hearing is necessary only when there exists a genuine issue of disputed fact." Lauzon v. Strachan Shipping Co., 602 F. Supp. 661, 665 (S.D.Tex. 1985) ("Lauzon I"). In interpreting these provisions of the LHWCA, the Benefits Review Board held that the procedure prescribed by § 914(f) is as follows: "Claimant applies to the deputy commissioner for a supplemental order. The deputy

commissioner then investigates the allegation of default. If there is a factual dispute, that is, if the employer claims it has made timely payment of compensation, the matter is referred to the [OALJ] for a hearing.... If there is no factual dispute the deputy commissioner makes the supplemental order.... Purely legal issues arising under these sections are not to be decided by an [ALJ] when there is no necessity for a fact finding hearing." Lawson v. Atlantic and Gulf Stevedores, 9 BRBS 855, 858 (1979).

In the instant case, there is no factual dispute as to whether petitioners made payment in a timely fashion--that is, within ten days. Petitioners do not dispute that they did not make payment in a timely manner, arguing instead that, because they made a good-faith effort to make payment, and could not find claimant's house, they are entitled to an equitable exception to § 914(f). The Court concludes such a dispute involves no questions of fact, but rather requires a legal interpretation of § 914(f) and the regulations promulgated under the LHWCA.[1] Under those circumstances, petitioners have no clear, nondiscretionary right to have their claim referred to the OALJ, and, accordingly, the Court grants respondent's motion to dismiss.

[1]In connection with petitioners' substantive claims, the Court notes that the Third Circuit has held that § 914(f) provides for no equitable exceptions, and that none should be read into the statute. See Sea-Land Service, Inc. v. Barry, 41 F.3d 903, 910 (3d Cir. 1994). Moreover, in Lauzon I, the court noted that "unlike Section 914(e), Section 914(f) imposes a stricter standard, leaving no room for equitable consideration." 602 F. Supp. at 661.

IV. CONCLUSION

Petitioners were not entitled to have their claim referred to the OALJ. Therefore, petitioners have no right to mandamus, and the Court grants respondent's motion to dismiss and dismisses the petition for writ of mandamus.

BY THE COURT:

_____

JAN E. DUBOIS, J.