

BRB No. 13-0340
Case No. 2012-LHC-01403
OWCP No. 06-0208286

PERCY BURROUGHS)
)
Claimant-Respondent)
)
v.)
)
SSA/COOPER STEVEDORING)
)
and)
)
HOMEPORT INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
MILA MANAGED HEALTH CARE TRUST) DATE ISSUED: 08/22/2013
FUND)
)
and)
)
GEORGIA STEVEDORE ASSOCIATION/)
INTERNATIONAL LONGSHOREMEN'S)
ASSOCIATION WELFARE FUND)
)
Parties-in-Interest)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)
) ORDER

Employer/Carrier appeals the Decision and Order (2012-LHC-01403) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*

(the Act). Mila Managed Health Care Trust Fund and Georgia Stevedore Association/International Longshoremen's Association Welfare Fund (hereinafter, Welfare Funds) have filed a motion to dismiss employer/carrier's appeal. Employer/carrier has belatedly filed a response in opposition to the motion to dismiss, *see* 20 C.F.R. §802.219(e), to which the Welfare Funds have replied. Claimant has not filed a response to the motion to dismiss.

On April 1, 2013, the district director filed and served the administrative law judge's Decision and Order; the decision awarded claimant temporary total disability and medical benefits for work-related left shoulder and left hip injuries. Within 10 days of April 1, 2013, *see* 20 C.F.R. §802.206(b)(1), the Welfare Funds filed with the administrative law judge a "Motion to Amend Order" on the ground that the administrative law judge had omitted any discussion or award of repayment to the Welfare Funds pursuant to Sections 7 and 17 of the Act, 33 U.S.C. §§907, 917. *See also* 20 C.F.R. §702.162. On April 26, 2013, employer/carrier filed with the Board a notice of appeal of the administrative law judge's Decision and Order. The notice of appeal states, "No Motion for Reconsideration of the Decision of the Administrative Law Judge has been filed." On May 2, 2013, the district director filed and served the administrative law judge's Order Granting Motion for Reconsideration. In this Order, the administrative law judge set forth the facts surrounding the Welfare Funds' applications for lien and repayment of disability and medical benefits they paid to claimant for his injuries. The Welfare Funds' entitlement to repayment was contingent upon the administrative law judge's finding claimant's hip injury to be work-related. Having so found, the administrative law judge ordered employer/carrier to reimburse \$14,237.70 to the Mila Fund for medical benefits paid and claimant to reimburse the Georgia Stevedore/ILA Fund \$11,277.52 for disability benefits paid. No party filed a notice of appeal after the administrative law judge issued his Order Granting Motion for Reconsideration.

The Welfare Funds move to dismiss employer/carrier's appeal pursuant to 20 C.F.R. §802.206(a), (f). Section 802.206(a) states that a timely motion for reconsideration suspends the time for filing an appeal with the Board. Section 802.206(f) states:

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. Following decision by the administrative law judge or [district director] pursuant to either paragraph (d) or (e) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. During the pendency of an appeal to the Board, any party having knowledge that a motion for reconsideration of a decision or order

of an administrative law judge or [district director] has been filed shall notify the Board of such filing.

20 C.F.R. §802.206(f). The Welfare Funds assert that since their motion to amend was correctly considered a motion for reconsideration by the administrative law judge, employer/carrier's April 26, 2013 appeal, filed before the administrative law judge issued his Order Granting Motion for Reconsideration, was premature and must be dismissed. We agree.

Section 802.206(f) is a "nonwaivable rule of jurisdiction." *Harmar Coal Co. v. Director, OWCP*, 926 F.2d 302, 308-309, 14 BLR 2-182, 2-192 (3^d Cir. 1991). The United States Court of Appeals for the Fifth Circuit has explained:

[W]hen a motion for reconsideration is filed by any party, a previously filed notice of appeal is nullified *ipso facto*. Any party who still desires review before the BRB, whether he be a party who has previously filed a notice of appeal or a newly aggrieved party, must wait until the motion for reconsideration has been resolved. Once the ALJ or [district director] has filed his order or decision on the reconsideration motion, the would-be appellant--old or new--then has thirty more days to file a notice of appeal (a new one if a previously filed notice of appeal had been nullified by the filing of the motion for reconsideration).

Aetna Casualty & Surety Co. v. Director, OWCP [Jourdan], 97 F.3d 815, 819, 30 BRBS 81, 83(CRT) (5th Cir. 1996), *aff'g Jourdan v. Equitable Equipment Co.*, 29 BRBS 49 (1995); 20 C.F.R. §802.206(d), (e) (providing full 30 days for appeal after administrative law judge's order on reconsideration is filed); *see also Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990); *Jones v. Illinois Central Gulf R.R.*, 846 F.2d 1099, 11 BLR 2-150 (7th Cir. 1988). There is no basis for equitable relief under Section 802.206(f). *Jourdan*, 97 F.3d at 818, 821-822, 30 BRBS at 86(CRT). However, if the timely post-hearing motion to the administrative law judge merely seeks correction of a "clerical or computational oversight," *id.*, 97 F.3d at 820, 30 BRBS at 85(CRT), the time for filing an appeal runs from the date the original decision was filed. *Compare Grimmitt v. Director, OWCP*, 826 F.2d 1015, 10 BLR 2-280 (11th Cir. 1987) *with Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981).¹

¹In *Graham-Stevenson*, the Board dismissed an appeal that was untimely filed as to the original decision, as the subsequent order, issued *sua sponte* by the administrative law judge, merely multiplied the claimant's post-injury wage-earning capacity by two-thirds as required by 33 U.S.C. §908(c)(21). In *Grimmitt*, however, the United States Court of Appeals for the Eleventh Circuit reversed the Board's dismissal of an appeal as untimely, stating that the administrative law judge's correction, on his own motion, of the

In this case, as in *Jourdan*, there is no basis for considering the administrative law judge's Order Granting Motion for Reconsideration as merely correcting a clerical error.² 97 F.3d at 820, 30 BRBS at 85(CRT) (the motion for reconsideration addressed a "significant and substantive provision" of the original order – whether an employer is liable for current and future benefits due claimant). The administrative law judge's initial Decision and Order is silent as to the Welfare Funds' entitlement to repayment pursuant to Sections 7 and 17 of the Act, an issue that was properly raised before the administrative law judge.³ The administrative law judge's Order Granting Motion for Reconsideration altered the legal relationship among the parties by ordering both claimant and employer/carrier to repay the Welfare Funds. "A change to a judgment that 'affects [the] substantive rights of the parties' is 'beyond the scope of [a] clerical correction . . .'" *Rivera v. PNS Stores, Inc.*, 647 F.3d 188, 198-199 (5th Cir. 2011), *cert. denied*, 132 S.Ct. 1741 (2012).

omission of several sentences containing a substantive rationale was not merely the correction of a clerical error. Thus, the time for filing an appeal did not commence until after the second order was issued.

²Moreover, the fact that the Welfare Funds' motion was not directly premised on the same issue as that appealed by employer/carrier is of no consequence. *Jourdan*, 97 F.3d at 820-821, 30 BRBS at 85(CRT). We note, however, that employer/carrier appeals the administrative law judge's finding that claimant's hip injury is work-related and that the Welfare Funds' entitlement to repayment of the liens is premised on the work-relatedness of the hip condition.

³The Welfare Funds filed applications for lien and repayment with the district director. *See* 33 U.S.C. §§907, 917; 20 C.F.R. §702.162. As claimant's compensation claim was contested, the issue of the Welfare Funds' entitlement to repayment was properly presented to the administrative law judge for resolution. *See* 20 C.F.R. §702.162(e); *M.K. [Kellstrom] v. California United Terminals*, 43 BRBS 1, *clarified on recon.*, 43 BRBS 115 (2009). At the hearing, the parties verbally stipulated that if claimant's hip injury was found to be compensable, employer/carrier and claimant would reimburse the Welfare Funds. Tr. at 8-9. The Welfare Funds submitted to the administrative law judge exhibits demonstrating the amounts of their liens. Mila Ex. 1; GS/ILA Ex. 1.

The Welfare Funds filed a timely motion for reconsideration with the administrative law judge seeking substantive relief.⁴ 20 C.F.R. §802.206(b)(1). Employer/carrier's appeal to the Board, filed prior to the administrative law judge's action on the motion for reconsideration, therefore is premature and must be dismissed pursuant to Section 802.206(f).⁵ *Jourdan*, 97 F.3d 815, 30 BRBS 81(CRT); *Harmar Coal Co.*, 926 F.2d 302, 14 BLR 2-182; *Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT); *Jones*, 846 F.2d 1099, 11 BLR 2-150.

Accordingly, employer/carrier's appeal is dismissed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴It is well-established that "a title given to a motion . . . does not control its meaning." *U.S. v. Hart*, 933 F.2d 80, 84 (1st Cir. 1991); *Hasbrouck v. Texaco*, 879 F.2d 632, 635 (9th Cir. 1989). Thus, that the Welfare Funds entitled their document "Motion to Amend" did not prevent the administrative law judge from appropriately deeming it a motion for reconsideration.

⁵As a previously filed appeal "is nullified *ipso facto*" when a timely motion for reconsideration has been filed, *Jourdan*, 97 F.3d 819, 30 BRBS 83(CRT), we need not address employer's contention that the Welfare Funds lack standing to move to dismiss its appeal. The Board is obligated to dismiss a premature appeal when it is apprised of a motion for reconsideration. *See, e.g., Murray v. U.S. Army/NAF*, BRB No. 05-0198 (Nov. 30, 2004) (order) available at www.dol.gov/brb/decisions/Ingshore/unpublished/Nov04/main.htm.