

J.M. )  
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 Claimant-Respondent )  
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 v. )  
 )  
 PROCUREMENT SERVICES )  
 ASSOCIATES )  
 )  
 Employer-Petitioner )  
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 and )  
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 PERINI MANAGEMENT SERVICES, ) DATE ISSUED: 01/29/2008  
 INCORPORATED )  
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 Employer-Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) ORDER

By Order dated September 27, 2007, the Board granted the motion of Procurement Services Associates (PSA) to reinstate its appeal following the issuance of the Decision and Order Granting Modification of Administrative Law Judge Russell D. Pulver, which was filed on August 2, 2007. Claimant has filed a motion to dismiss the appeal, to which Perini Management Services (Perini) has responded. Claimant has filed a reply brief.

To briefly recapitulate the facts, claimant was injured in Kuwait, and he brought a claim under the Defense Base Act (DBA) against PSA, his employer. PSA, a subcontractor, did not have workers' compensation insurance under the DBA. The administrative law judge awarded claimant ongoing temporary total disability benefits at the maximum compensation rate of \$1,031.00. PSA appealed the award to the Board and also filed a motion for a stay of payments. 33 U.S.C. §921(b)(3). The Board granted a temporary, and then permanent, stay as PSA demonstrated irreparable injury with

evidence of its precarious financial situation. [*J.M.*] v. *Procurement Services Associates*, BRB No. 07-0187 (Nov. 17, 2006) (Order), (Jan. 16, 2007) (Order).

Subsequently, the Director, Office of Workers' Compensation Programs, moved to dismiss PSA's appeal on the ground that the Director had filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, in order to hold the general contractor liable for benefits pursuant to Section 4(a) of the Act, 33 U.S.C. §904(a).<sup>1</sup> The Board granted the Director's motion. The Board stated that PSA's appeal would be reinstated upon its motion within 30 days of the date the administrative law judge's decision on modification was filed, and that any party adversely affected by the decision on modification could file a new appeal. *J.M. v. Procurement Services Associates*, BRB No. 07-0187 (Feb. 28, 2007) (Order).

In the modification proceedings before the administrative law judge, the parties submitted a Joint Motion for Modification, stipulating that PSA was an uninsured subcontractor of Perini on a contract subject to the DBA and that Perini had DBA insurance coverage. Perini accepted liability pursuant to Section 4(a) for the benefits awarded by the administrative law judge in his initial decision, with a credit for any benefits paid by employer. The administrative law judge therefore awarded benefits to claimant, payable by Perini, pursuant to these stipulations.

Within 30 days of the date this decision was filed, PSA filed a motion to reinstate its appeal, which the Board granted by Order dated September 27, 2007. No party filed a new appeal of the administrative law judge's decision on modification. Claimant has filed a motion to dismiss PSA's appeal on the grounds that it was not subject to reinstatement pursuant to 20 C.F.R. §802.301(c), noting, in addition, that PSA's motion for reinstatement cannot be construed as a new appeal as PSA is not "adversely affected or aggrieved" by the decision on modification, having been relieved of liability. Perini responds that the reinstatement should be permitted and that it should be joined as a party to the appeal as it was deprived of an opportunity to defend the claim on the merits.

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<sup>1</sup> Section 4(a) states, in relevant part,

In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. . . .

33 U.S.C. §904(a).

Claimant replies that Perini could have sought to defend the claim before the administrative law judge on modification, but chose instead to enter into stipulations accepting liability. Claimant also contends that Perini's failure to file a timely appeal, of its own accord, after the decision on modification was issued, cannot be remedied by joining Perini as a party to PSA's appeal.

We grant claimant's motion to dismiss PSA's appeal, as its motion for reinstatement was improvidently granted. Pursuant to 20 C.F.R. §802.301(c), the Board remanded the case to the administrative law judge for consideration of the Director's petition for modification. This regulation also provides,

*Should the petition for modification be declined, the petitioner may file a request for reinstatement of his or her appeal with the Board within 30 days of the date the petition is declined. Should the petition for modification be accepted, any party adversely affected by the decision or order granting or denying modification may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed.*

20 C.F.R. §802.301(c) (emphasis added). In this case, the petition for modification was granted, and therefore, reinstatement of PSA's prior appeal would be appropriate only if PSA, the petitioner, remained aggrieved after the decision on modification was issued. PSA, however, was wholly absolved of liability by virtue of the modification proceedings, as Perini was held solely liable for all disability and medical benefits awarded. Therefore, PSA is no longer "adversely affected or aggrieved" by the administrative law judge's initial decision and thus lacks standing to raise issues concerning the compensability of the claim. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.201(a). The Supreme Court has stated that one who is allegedly "adversely affected or aggrieved" must, upon appeal, show "that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 127, 29 BRBS 87, 89(CRT) (1995), quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). In this case, PSA is not "injured in fact" by agency action due to its being relieved of liability on modification and therefore lacks standing to assert error in the administrative law judge's initial decision. See generally *Hymel v. McDermott, Inc.*, 37 BRBS 160 (2003), *aff'd mem. sub nom. Bailey v. Hymel*, 104 Fed. Appx. 415 (5<sup>th</sup> Cir. 2004); *Sharpe v. George Washington University*, 18 BRBS 102 (1986). Therefore, PSA's reinstated appeal is dismissed.

As PSA's appeal is not properly before the Board, Perini cannot be joined to it. Perini also did not file its own appeal within 30 days of the date the decision on

modification was filed. 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.201(a), 802.301(c). Therefore, the Board is without authority to address any issues concerning either the modification order or the underlying compensation award. *See generally Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 956 (2000). Moreover, the basis for Perini’s motion for joinder is baseless, as claimant correctly asserts. “The essential element of due process is the right to notice and an opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315, 31 BRBS 129, 130(CRT) (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998), *quoting Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Perini had the opportunity to challenge the underlying claim in the course of the modification proceedings, but instead stipulated before the administrative law judge that it is liable for the benefits previously awarded to claimant. Perini thus waived its right to challenge at this time the compensability of claimant’s claim. *See, e.g., Parker v. Motorboat Sales*, 314 U.S. 244 (1941).

Accordingly, claimant’s motion to dismiss PSA’s appeal is granted. Perini’s motion to join PSA’s appeal is denied.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge