



BRB No. 21-0259
OWCP No. 15-045509

WILLIAM B. KEALOHA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
LEEWARD MARINE, INCORPORATED)	
)	
and)	DATE ISSUED: 03/25/2021
)	
HAWAII EMPLOYERS' MUTUAL)	
INSURANCE COMPANY,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Petitioners)	ORDER

Employer and its Carrier (Employer) filed a timely motion for reconsideration of the Benefits Review Board’s Order, dated March 25, 2021, dismissing their appeal in this case, *Kealoha v. Leeward Marine, Inc.*, BRB No. 21-0259 (Mar. 25, 2021). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds, urging the Board to deny Employer’s motion.

The Board dismissed Employer’s appeal because Employer stated in its Notice of Appeal it had filed a second motion for reconsideration of District Director Todd Bruininks’s Supplemental Compensation Order – Declaration of Default, which had not yet been addressed. *Kealoha*, slip op. at 2. The regulation at 20 C.F.R. §802.206(f) requires the Board to dismiss as premature an appeal filed in a case in which a timely motion for reconsideration has been filed.

After the district director issued a default order in this case, 33 U.S.C. §918(a), Employer filed a motion for reconsideration, challenging the amount declared in default.

Specifically, Employer contended the district director's Section 14(f), 33 U.S.C. §914(f), calculation was incorrect, alleging the period of default was shorter than what was originally found. The district director corrected a scrivener's error (changing the amount owed from \$1,114.29 to \$1,714.29), but otherwise denied Employer's motion for reconsideration. Employer filed a second motion for reconsideration making the same contention, but before the district director acted on it, Employer filed a notice of appeal with the Board. Pursuant to the regulation regarding a premature appeal, the Board dismissed Employer's appeal. 20 C.F.R. §802.206(f). This is the correct result regardless of the fact that the district director acted on Employer's second motion for reconsideration, agreeing with Employer and reducing the Section 14(f) assessment, prior to the issuance of the Board's Order. *See Aetna Casualty & Surety Co. v. Director, OWCP [Jourdan]*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996).

In its motion for reconsideration of the Board's Order, Employer contends the motions it filed with the district director were to correct clerical errors, and the district director merely issued errata orders. Therefore, it asserts the time for filing an appeal was not suspended under 20 C.F.R. §802.206(a) and its notice of appeal, dated February 12, 2021, was timely filed. Contrary to Employer's assertion, its second motion for reconsideration did not merely raise a clerical error.

In *Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981), the Board dismissed an appeal as untimely on the ground that the administrative law judge's *sua sponte* issuance of an order correcting a clerical error did not toll the time for filing an appeal of his original decision. The administrative law judge issued an order multiplying the compensation rate by 66^{2/3} percent, which he had neglected to do in his initial decision. The Board relied on Federal Rule of Civil Procedure 60(a), which provides the correction of a clerical error does not affect the finality of an original order or toll the time for filing an appeal.

Unlike the situation in *Graham-Stevenson*, and the unpublished cases Employer cites,¹ the issue it raised here regarding the calculation of the Section 14(f) assessment was a substantive matter because it affects the amount Employer owes Claimant. *Jourdan*, 97 F.3d at 820, 30 BRBS at 85(CRT) ("the question whether an employer is liable for current and future benefits due to a claimant can hardly be said to constitute a clerical or computational oversight"). Therefore, both of Employer's motions for reconsideration tolled the time for filing an appeal pursuant to Section 802.206(a), with the time for an

¹ *Schultz v. U.S. Marine Corps/MWR*, BRB No. 03-0473 (Mar. 17, 2004) (error in typing monetary figures); *Toomer v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 20-0486/A (Mar. 25, 2003) (error in typing date).

appeal restarting upon the filing of the district director's substantive order on Employer's second motion for reconsideration, 20 C.F.R. §802.206(d), (e), and requiring the dismissal of Employer's appeal as premature. *Jourdan*, 97 F.3d 815, 30 BRBS 81(CRT); 20 C.F.R. §802.206(f). As the district director's Order on Employer's second motion for reconsideration was filed on February 16, 2021, any aggrieved party had to file a notice of appeal by March 18, 2021. 20 C.F.R. §§802.205(a), 802.206(d), (e). No such notice was filed, and any appeal filed now would be untimely.

Accordingly, as Employer has not established error in the Board's Order dismissing its appeal as premature, we deny its motion for reconsideration.² 20 C.F.R. §802.409.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

² Additionally, supplemental orders declaring a default, including the additional Section 14(f) assessment, are final when issued and generally are not subject to Board review. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). Where the district director finds no amount is in default or the employer pays the amount due, the district court has nothing to enforce, and the Board has jurisdiction if a party seeks review of the default order. *See Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *aff'd in part*, 830 F.2d 1188 (D.C. Cir. 1987). In this case, neither party has presented evidence establishing Employer's payment of the amount in default. If Employer has not paid, the Board lacks jurisdiction to address the appeal in any event. *Rucker*, 18 BRBS 74.