

BRB No. 13-0400

STAN OLESKA )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CSX TRANSPORTATION, )  
 INCORPORATED ) DATE ISSUED: June 26, 2014  
 )  
 and )  
 )  
 BROADSPIRE )  
 )  
 Self-Insured Employer/ ) ORDER on  
 Administrator-Petitioners ) RECONSIDERATION

Claimant has filed a timely motion for reconsideration of the Board’s Decision and Order in *Oleska v. CSX Transp., Inc.*, BRB No. 13-0400 (Feb. 18, 2014) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds, urging the Board to reject claimant’s motion.

In its decision, the Board reversed the administrative law judge’s award of an attorney’s fee under Section 28(b), 33 U.S.C. §928(b), because claimant did not receive a greater award than employer had paid him pursuant to the district director’s written recommendation. *Oleska*, slip op. at 4. The administrative law judge had concluded from employer’s submission of several medical reports that employer had attempted to limit claimant’s impairment ratings to less than the five percent bilateral impairment recommended by the district director and paid by employer. The Board stated, however, that employer had argued at the formal hearing and in its post-hearing brief only that claimant was entitled to an award based on the five percent impairment ratings of Dr. Halikman; employer’s post-hearing brief does not mention the reports containing lower impairment ratings. The Board stated that the administrative law judge’s inference from the mere submission of these medical reports that employer attempted to reduce claimant’s award below the amount it had paid after the district director issued her recommendation is not supported by the totality of the record. *Id.* The Board distinguished the facts of this case from *Carey v. Ormet Primary Aluminum Corp.*, 627 F.3d 979, 44 BRBS 83(CRT) (5<sup>th</sup> Cir. 2010), in that employer did not seek a lower award than it had paid after the informal conference and claimant did not obtain an award greater than employer paid or believed claimant was entitled to. *Oleska*, slip op. at 5.

In his motion for reconsideration, claimant argues that he was compelled to prepare for the hearing based on the issues listed in employer's LS-18 Pre-Hearing Statement, which included, inter alia, "fact of injury," "Claimant's entitlement to compensation," and "nature and extent of Claimant's disability." We reject claimant's contention that the mere listing of issues in employer's LS-18 is sufficient to establish that claimant obtained greater compensation than that paid by employer while the case was before the district director in the absence of evidence that employer urged the administrative law judge to find that claimant was entitled to a lesser award than employer had paid. Therefore, employer cannot be held liable for claimant's attorney's fee pursuant to Section 28(b). Thus, we deny claimant's motion for reconsideration and affirm the Board's decision. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hassell]*, 477 F.3d 123, 41 BRBS 1(CRT) (4<sup>th</sup> Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4<sup>th</sup> Cir. 2006); *Virginia Int'l Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT) (4<sup>th</sup> Cir.), *cert. denied*, 546 U.S. 960 (2005).

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH<sup>1</sup>  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>1</sup>Due to the retirement of Chief Administrative Appeals Judge Nancy S. Dolder on April 30, 2014, Administrative Appeals Judge Smith is substituted for Judge Dolder on this panel. 20 C.F.R. §§801.301(b), 802.407(a).