

BRB No. 04-0753
and 04-0753A

DAVID HARMON)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
MCGINNIS, INCORPORATED)
) DATE ISSUED: Oct. 15, 2004
and)
)
FRANKS GATE/ACCLAIM)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents) ORDER

Employer appeals and claimant cross-appeals the Decision and Order on Remand-Awarding Medical Expenses and Attorney Fees (1999-LHC-2969) of Administrative Law Judge Thomas F. Phalen rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The parties have filed a Joint Motion for Summary Action, which we hereby grant.

This case is before the Board for the second time. Claimant, a barge laborer/cleaner, injured his wrist, head, and low back when he fell off a barge at work on July 31, 1998. Claimant did not return to his usual work, but, post-injury, had held three jobs, and was working part-time as a dishwasher at the time of the formal hearing. Employer voluntarily paid benefits for periods of temporary total disability. The administrative law judge awarded claimant benefits for periods of total disability pursuant to Section 8(a) and (b) of the Act, 33 U.S.C. §908(a), (b), and ongoing permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of

the Act, 33 U.S.C. §907. Employer appealed this decision, challenging the administrative law judge's award of partial disability and medical benefits and the award of an attorney's fee of \$25,290.16.

The Board affirmed the award of partial disability benefits. The Board held that substantial evidence supported the findings that claimant could not return to his usual work, that employer did not establish the availability of suitable alternate employment by way of the testimony of its vocational counselor, and that claimant's earnings as a dishwasher fairly and reasonably represent his post-injury wage-earning capacity. *Harmon v. McGinnis, Inc.*, BRB No. 01-0845 (July 25, 2002) (unpub.), slip op. at 3. With regard to the award of medical benefits, the Board held that the administrative law judge erred in holding employer liable for the expenses associated with claimant's Bell's palsy, as the administrative law judge found that this condition is not work-related. The Board remanded the case for the administrative law judge to address whether some of the medical bills submitted by claimant were for services related to his work injury. *Id.* at 4-5. Finally, the Board affirmed the administrative law judge's striking employer's objections to claimant's counsel's fee petition as untimely filed. However, the Board remanded the case for the administrative law judge to reconsider the amount of the fee award in view of the Board's holding that employer is not liable for the medical expenses associated with the Bell's palsy. *Id.* at 5-6. The Board denied employer's motion for reconsideration of the fee awards of the administrative law judge and the Board. *Harmon v. McGinnis, Inc.*, BRB No. 01-0845 (Jan. 15, 2003) (McGranery, J., dissenting) (unpub.).

On remand, the parties stipulated as to which medical bills were associated with the Bell's palsy and which were related to the work injury, and the administrative law judge entered an award of medical benefits accordingly. The administrative law judge reduced the fee award to \$19,489.50.

Employer appeals and claimant cross-appeals the administrative law judge's decision on remand. Both parties acknowledge that the administrative law judge's decision on remand is in compliance with the Board's decision, and they appeal only to preserve their right to appeal the Board's original decision to the United States Court of Appeals. For this reason, they have filed a Joint Motion for Summary Action. We affirm the administrative law judge's decision on remand, as no party challenges any of the findings therein. *See generally Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995). Moreover, the Board's initial decision constitutes the "law of the case" and neither party has offered any basis for the Board's departing from this tenet. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

Accordingly, we grant the parties' Joint Motion for Summary Action. The administrative law judge's Decision and Order on Remand-Awarding Medical Expenses and Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with my colleagues and the parties that the instant case is ripe for summary disposition because the administrative law judge followed the Board's instructions set forth in *Harmon v. McGinnis, Inc.*, BRB No. 01-0845 (July 25, 2002), *aff'd on recon.*, (Jan. 15, 2003)(McGranery, J., dissenting in part). I continue to believe, however, that the majority's decision in *Harmon* should be vacated insofar as it denied reconsideration of the Board's decision: both to award claimant's counsel an attorney's fee, without providing employer an opportunity to respond to the attorney's fee petition; and to affirm the administrative law judge's award of an attorney's fee without considering employer's objections. I would vacate both awards of attorney's fees and permit employer to respond to both petitions.

REGINA C. McGRANERY
Administrative Appeals Judge