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Issue Date: 01 September 2015

CASE NO.: 2013-LCA-10

IN THE MATTER OF

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Prosecuting Party

v.

PARSETEK, INC.,
Respondent

DECISION AND ORDER DENYING ADMINISTRATOR'S MOTION FOR RECONSIDERATION

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(15)(H)(i)(B) (the "Act"), and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I. The Act allows employers to hire foreign workers under H-1B visas to work in specialty occupations on a temporary basis.

On 1 Jun 15, I issued a Decision and Order that, among other things, directed Respondent to reimburse Sumikutty Maniyanakunnath ("Complainant 2") for the period of 1 Dec 08 until 12 Apr 09. I found Complainant 2 made herself "available to work" for purposes of the regulations[1] and therefore Respondent was obligated to pay her the required wage. Based on calculations made by Margaret Samotyj, the Investigator in this matter, I found Respondent owed Complainant 2 $2,772 in back wages for the period of 1 Dec 08 until 12 Apr 09.

On 23 Jun 15, Administrator filed a Motion for Partial Reconsideration of the back wage computation for Complainant 2 for the period of 1 Dec 08 to 12 Apr 09. It averred that I erred in applying a $16,000 credit because some of those payments were irregular and (1) were not payments made for pay periods in which the employee worked or was available to work, and (2) were not nondiscretionary payments.[2] Administrator argues that under 20 C.F.R. § 655.731 Respondent was entitled to a credit of only $6,610.46 and thus owes Complainant 2 an additional $9,389.54 in back wages.

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[1] *See* 20 C.F.R. § 655.731.
[2] Administrator's Motion for Partial Reconsideration, p. 2.

On 13 Jul 15, Respondent opposed the motion, first noting that it is procedurally defective. It also argued that since its argument and my ruling was based upon a position taken by the Administrator during the hearing and in the Administrator's post hearing brief, the Administrator could not now change that position. Finally, Respondent argued that even if the Administrator were now allowed to reverse its position, my ruling was still correct under the applicable legal standards. Administrator filed a Reply to Respondent's opposition on 27 Jul 15, essentially arguing that "the position" upon which my ruling was based was contingent upon an assumption that I would not find Complainant 2 made herself unavailable for work.[3]

Basis for Reconsideration

The Federal Rules of Civil Procedure govern motions for reconsideration.[4] Motions for reconsideration are not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.[5] Pursuant to Fed. R. Civ. P. 59(e), motions for reconsideration can be granted only on the following grounds: (1) to correct manifest errors of law; (2) to introduce newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) to reflect an intervening change in controlling law.[6] Although the Administrator did not specify a basis for its motion, it appears that it the most likely grounds would be a manifest error of law.

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[3] On 10 Aug 15, Respondent filed a Sur-Reply to Administrator's Response to Respondent's Opposition. On 17 Aug 15, Administrator objected to Respondent's filing of a Sur-Reply. However, Respondent's Sur-Reply was simply a reiteration of previous arguments raised in its initial Reply, presenting no new arguments. Thus, Administrator's objection is moot.

[4] *See* 29 C.F.R. §18.1. Respondent made a number of arguments as to the procedural accuracy of Administrator's motion including reliance on 29 C.F.R. § 18.6, 18.1(a), and Fed. R. Civ. P. 59(e). Respondent asserted the ALJ Procedural Rules only allow for Administrator to appeal, not file a motion to reconsider.

[5] *See Van Skiver v. U.S.*, 952 F.2d 1241, 1243 (10th Cir. 1991).

[6] *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999), *cert. denied*, 529 U.S. 1082 (2000). Respondent argues that I should deny the motion for reconsideration filed by Administrator because it is procedurally inaccurate and contains technical errors. However, after further review, OALJs have permitted motions for reconsideration in matters arising under the INA utilizing civil law. *Bidwal v. Board of Education of Prince George's County,* 2011-LCA-29, (Jun 15, 2012); *Administrator, Wage & Hour Dic., USDOL v. Advanced Professional Marketing, Inc.*, 2008-LCA-17 (Jan 19, 2010); *Watson v. Electric Data Systems Corp.*, 2004-LCA-9 (Jan 8, 2004); *Gupta v. Compunnel Software Group, Inc.*, 2011-LCA-45 (Mar 7, 2012). I find Administrator's reliance on Fed. R. Civ. Pro. 59(e) is accurate and the applicable standard by which I will decide this motion. Respondent also argues this motion should be denied because Administrator incorrectly cited 29 C.F.R. § 655.731 as the statute requiring employer to pay its H-1B employees when they are available to work. After further review, it appears Administrator mistakenly cited 29 C.F.R. § 655.731, when the accurate citation is 20 C.F.R. § 655.731. All of Administrator's other citations to this regulation in its motion and in its prior briefs cite the accurate statute and therefore this appears to be a typographical error. Thus, I find the error to be de minimis and an inadequate ground to deny this motion for reconsideration.

Analysis

The Administrator's central argument is that I should not have ordered a $16,000 credit for three paychecks issued to Complainant 2,[7] because they were regular payroll checks for the time period listed on the checks[8] and did not qualify as non-discretionary payments under the regulations.[9]

However in a report submitted and relied upon by the Administrator the Administrator's Investigator subtracted the $16,000 in those three payments when determining the amount of back wages due to Complainant 2. Both the Administrator and the Respondent cited and relied on that calculation in their post-hearing briefs. Neither the Administrator's post-hearing opening nor reply brief suggested that all or a portion of the $16,000 in payments made by Respondent to Complainant 2 in 2009 should not be credited to the back wages due for the 1 Dec 08 through 12 Apr 09 period.[10]

In support of his basic argument the Administrator noted that I had correctly addressed payments made to Complainant 1 and argued I should have done the same to the disputed payments made to Complainant 2. However, the 3 Nov 10 payment to Complainant 1 and the three 2009 payments to Complainant 2 present starkly different circumstances that warrant differing conclusions. [11] The issue of whether the 3 Nov 10 payment should be credited to the back wages due to Complainant 1 was always disputed by the parties. In contrast, the $16,000 in payments to Complainant 2 was deemed a credit to the back wages due since the Investigator reported her findings, with neither party disputing this finding until the present Motion.

In fact, the Administrator relied on the Investigator's findings in the initial hearing and in its post-hearing briefs. Administrator agreed with the Investigator's findings that the purpose of the $16,000 paid by Respondent to Complainant 2 in 2009 was to compensate her for the time she was available to work between 1 Dec 08 and 12 Apr 09. In its post-hearing brief, Administrator stated "Investigator Samotyi credited Respondent for these payments and subtracted $16,000 from the back wages", concluding that Complainant #2 was due $58,692.80

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[7] Respondent issued Complainant 2 the following checks: $6,000 on 31 Mar 09, $5,000 on 31 Jul 09, and $5,000 on 30 Sep 09.

[8] Administrator concedes that $6,610.46 of the $16,000 paid fell within the December to April 2009 period of Complainant 2's employment. Administrator's Motion for Reconsideration, p. 2.

[9] 20 C.F.R. § 655.731.

[10] In fact, Administrator argued in its post-hearing opening and reply brief that Complainant 2 was due $58,692.80 in back wages, which is the calculation *after* crediting Respondent with the $16,000 in payments made to her in 2009. The Administrator further stated that the amount due after crediting the $16,000 was reasonable and supported by facts and law, citing to the regulations. 20 C.F.R. § 655.731 (a). It reasoned that the back wages due to Complainant 2 was calculated by subtracting the amount that should have been paid for that period from the amount actually paid. Respondent's post-hearing brief explicitly conceded that for the period of 1 Dec 08 until 12 Apr 09 it was responsible for paying her the required wage rate and then stated that it owed her $2,772, which is the difference between the amount owed ($18,772) and the amount it paid her during this marketing period ($16,000). Administrator's Reply neither questioned nor disagreed with Respondent's method of calculating back wages due for this period of time.

[11] I note that Administrator also agreed with the Investigator's determination that the 3 Nov 10 paycheck to Complainant 1 was a regular paycheck and did not qualify as a non-discretionary payment and thus, should not be credited to back wages due.

and further arguing "the Administrator's back wage calculations are reasonable and supported by facts and law."

In my Decision and Order, I found that the $16,000 to be a credit to the back wages due to Complainant 2, agreeing with both Administrator and Respondent. I based this finding on the Investigator's analysis differentiating between the 3 Nov 10 payment and the $16,000 credit, the Respondent's testimony[12], and the fact that the parties not only did not dispute the finding of a $16,000 credit, but agreed to it in their respective briefs.

Throughout the discovery, hearing, and post-hearing briefs, the Administrator never raised an objection to crediting what Respondent owed Complainant 2 in back wages by the $16,000 paid to her over the course of 2009. In fact, it supported the Investigator's findings in its closing brief.[13] Effectively, the parties stipulated to this issue throughout the pre-hearing procedures, at hearing, and when Administrator did not object to Respondent's calculations in its post-hearing brief explicitly explaining the application of the $16,000 credit for back wages.[14]

I n its Response to Respondent's Memorandum Contra Administrator's Motion for Partial Reconsideration, Administrator cites a Ninth Circuit to argue that courts have accepted a party's change in position when the change was a result of changes that give old facts new importance.[15] Administrator argues that its position (or stipulation) concerning the $16,000 credit due to Complainant 2 was based on an assumption that I would find her available to work from 1 Oct 08 to 11 Mar 10, and thus did not apply, since I found she was available to work only from 1 Oct 08 to 12 Apr 09.[16] However, the court in *Handgards* was referring to a stipulation one party was attempting to use in two different cases. Unlike *Handgard*, this is a single case and while initially there may have been some ambiguity about the applicable time period for the $16,000 credit in wages when the Investigator made her report, the Respondent's subsequent testimony[17] and the explicit language used in both Respondent and Administrator's post-hearing briefs make the position patently unambiguous.[18] Through the course of the hearing and post-hearing briefs, Respondent and I had no reason to understand that the stipulated $16,000 credit in wages was contingent on the Administrator prevailing on the availability to work issue. Thus, I find *Handgards* to be unpersuasive.

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[12] Respondent replied that Jadala testified that these three payments were made to Complainant 2 specifically for the efforts of marketing Complainant 2 through April 2009 and while the payments were not made during the specific pay period due to cash-flow issues, the sole intent of those payments was to remunerate Complainant 2 for her employment with Respondent from 1 Dec 08 to 12 Apr 09. Tr. 230, 31.

[13] Administrator's Post-Hearing Brief, p. 18.

[14] Respondent's Post-Hearing Brief, p. 19. Respondent titled Section 3(b), which discussed the $16,000 credit: "Between December 1, 2008 and April 12, 2009 Sumi was marginally responsive to Parsetek's marketing attempts." *Id*.

[15] *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1291, *cert. denied* 469 U.S. 1190 (1984).

[16] *Administrator v. Parsetek, Inc*., 2013-LCA-00010 (ALJ June 1, 2015).

[17] *Id*. at p. 12.

[18] Respondent's Post-Hearing Brief, p. 19 (Respondent titled Section 3(b) "Between December 1, 2008 and April 12, 2009 Sumi was marginally responsive to Parsetek's marketing attempts."); Administrator's Post-Hearing Brief, p. 18.

Applying the law of the case doctrine[19] and *Van Skiver*, I find the Administrator's Motion for Reconsideration raises an argument that not only could have been raised during the extensive time leading up to, during, and after the hearing, but is directly contrary to the position taken by the Administrator and relied upon by Respondent and the court.

ORDER

Based on the foregoing, the Administrator's motion for reconsideration is **DENIED**.

ORDERED this 1st day of September, 2015, at Covington, Louisiana.

Digitally signed by PATRICK ROSENOW
DN: CN=PATRICK ROSENOW, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

PATRICK M. ROSENOW
Administrative Law Judge

[19] *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("The law of the case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'"); *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'"). In this case, I find that the testimony from the Respondent identifying the purpose of the three 2009 paychecks, the Investigator's thorough and detailed findings that the payments qualified as a credit to what Respondent owed Complainant 2 in back wages, and my finding that as of 12 Apr 09 Complainant 2 was on non-productive status and unavailable to work demonstrates that affirming my previous Decision to apply the entire $16,000 to back wages due would not be a manifest injustice and was not erroneous. Thus, under this doctrine, I refuse to reopen what has already been decided.