

DAVID KNOX WILSON)
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 Claimant-Respondent)
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 v.)
)
 ATLAS WIRELINE SERVICES) DATE ISSUED: 08/16/2005
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 and)
)
 CNA INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr.,
Administrative Law Judge, United States Department of Labor.

David Knox Wilson, Elisville, Mississippi, *pro se*.

Kevin A. Marks (Galloway, Johnson, Tompkins, Burr & Smith), New
Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1998-LHC-0255) of
Administrative Law Judge Lee J. Romero, Jr., 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). This case is before the Board for the third
time.

Claimant, while working for employer on December 27, 1988, sustained injuries to his back and psyche that ultimately led to an inability to perform any work. Employer voluntarily paid benefits until August 1, 1997,¹ and claimant thereafter sought additional compensation for his work injuries. In his initial decision, the administrative law judge determined that claimant sustained work-related back and psychological conditions for which he is entitled to periods of temporary total disability benefits, 33 U.S.C. §908(b), as well as a period of temporary partial disability, 33 U.S.C. §908(e),² and medical benefits, 33 U.S.C. §907(a). The administrative law judge also held employer liable for a Section 14(e) assessment, 33 U.S.C. §914(e), on compensation due from August 1 through October 14, 1997, and furthermore denied its request for Section 8(f) relief, 33 U.S.C. §908(f). On reconsideration, the administrative law judge rejected claimant's contention that his conditions are permanent and modified claimant's average weekly wage based on his 1988 W-2 form.

Claimant, without the assistance of counsel, and employer appealed the administrative law judge's decisions. The Board rejected the parties' contentions and thus affirmed the administrative law judge's decisions. *Wilson v. Atlas Wireline Services*, BRB Nos. 99-0607/A (March 10, 2000) (unpub.). Claimant appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. In an unpublished opinion, that court remanded the case for the administrative law judge to clarify the basis for his award of temporary total disability benefits to claimant, holding that the existing award was ambiguous and contradictory. *Wilson v. Atlas Wireline Service*, 260 F.3d 623 (5th Cir. 2001) (table), *cert. denied*, 534 U.S. 1078 (2002).³ The Fifth Circuit otherwise affirmed the administrative law judge's decision. *Id.*

¹ Employer voluntarily paid temporary total disability benefits from December 27, 1988, to January 22, 1990, and from June 16, 1990, until August 1, 1997, and temporary partial disability benefits for the brief post-injury period claimant worked, from January 22, 1990, to June 16, 1990.

² In particular, the administrative law judge awarded temporary total disability benefits from the date of injury, December 27, 1988, to January 22, 1990, and from June 16, 1990, to the present and continuing, and temporary partial disability benefits for the post-injury period claimant worked, from January 22, 1990, to June 16, 1990.

³ Specifically, the court held that it was unable to tell what the administrative law judge held, factually and legally, on the issue of permanent versus temporary disability. *Wilson*, slip op. at 8. The court stated that if claimant would be permanently and totally disabled due to his back injury alone, he should not be penalized just because his totally disabling psychological condition had not reached permanency. If, on the other hand, claimant's total disability was due to a combination of his back injury and his

On remand from the circuit court, the administrative law judge determined that claimant achieved permanency as to his back condition on December 19, 1989. The administrative law judge also reiterated his findings that claimant could not return to his usual employment and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge modified his prior award of benefits to reflect that claimant's condition became permanent as of December 19, 1989.

Claimant, representing himself, appealed the administrative law judge's decision, arguing, relevant to the current appeal, that pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), he is entitled to an additional assessment on 14 years of unpaid cost-of-living increases payable pursuant to Section 10(f), 33 U.S.C. §910(f). BRB No. 02-0758. Employer, in its cross-appeal, challenged the administrative law judge's findings with regard to the permanency of claimant's back condition and suitable alternate employment. BRB No. 02-0758A. The Board affirmed the administrative law judge's award of benefits, but remanded the case to the administrative law judge for consideration of employer's liability for a Section 14(e) assessment. *Wilson v. Atlas Wireline Services*, BRB Nos. 02-0758/A (July 29, 2003)(unpub.). Employer's subsequent appeal to the Fifth Circuit was dismissed.

In his most recent Decision and Order on Remand, the administrative law judge found employer liable for a ten percent assessment pursuant to Section 14(e) of the Act based only on the amount of Section 10(f) adjustments due from December 19, 1989, to September 23, 1997.

On appeal, employer challenges the administrative law judge's award of a Section 14(e) assessment in this case. Claimant, without assistance from counsel, responds, urging affirmance.

Employer contends that claimant's entitlement to a Section 14(e) assessment based on the award of permanent total disability benefits should not have been considered by the administrative law judge, as it was only raised by claimant for the first time in his second appeal to the Board, BRB No. 02-0758, and thus falls beyond the limited scope of consideration mandated by the Fifth Circuit's decision in this case. Employer also contends that it timely paid all assessments and interest due under the Act in this case, thereby obviating the basis for any Section 14(e) assessment. Employer maintains that no award of permanent total disability benefits was due until the administrative law judge's order of June 28, 2002, at which time employer, in a timely fashion, paid all compensation, including Section 10(f) adjustments and interest. Moreover, employer argues that contrary to the administrative law judge's finding, its notices of controversion

psychological impairment, then the administrative law judge was correct to find claimant entitled to temporary disability benefits.

in 1994 and 1996 sufficiently indicate that employer disputed all grounds for claimant's entitlement to benefits such that, pursuant to Section 14(d), it cannot be liable for a Section 14(e) assessment.

As an initial matter, we note that the Board has long held that since Section 14(e) provides for a mandatory assessment of additional compensation, it may be raised at any time. See *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981). Accordingly, the fact that claimant first raised this issue in his second appeal before the Board does not preclude its consideration, and thus, we hold it was properly before the administrative law judge in this case.

Section 14(e) states that if an employer fails to pay benefits in accordance with Section 14(b), 33 U.S.C. §914(b), or to timely controvert the claim in accordance with Section 14(d), 33 U.S.C. §914(d), then it shall be liable for a ten percent assessment added to unpaid installments of compensation, unless the district director excuses the failure to pay due to conditions beyond employer's control.⁴ *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Scott*, 22 BRBS 164; *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). Employer's liability for a Section 14(e) assessment ends when employer controverts the claim or when the Department of Labor knows of the facts that a proper notice of controversion would have revealed, such as at an informal conference. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Hitt*, 38 BRBS 47. The Board has held that if employer does not file a timely notice of controversion, a Section 14(e) assessment attaches to all payments not timely made between the time the controversy arises, including unpaid amounts accrued prior to that date, and the date the

⁴ Section 14(e) states:

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

notice of controversion is filed or the date of the informal conference, whichever is earlier. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993) (order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993); *see also James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

In his original decision, the administrative law judge found that employer voluntarily paid compensation until August 1, 1997, at which time it unilaterally suspended those payments, prompting claimant to pursue an administrative adjudication of his claim. In his most recent decision, the administrative law judge determined that employer is liable for a Section 14(e) assessment based on the Section 10(f) adjustments due for the period between December 19, 1989, and September 23, 1997. The administrative law judge concluded that employer's liability for a Section 14(e) assessment based on the relevant Section 10(f) adjustments ceased as of the date of the informal conference, on September 23, 1997, as that is the point that the Department of Labor would have known of the facts that a proper notice of controversion would have revealed.

As the administrative law judge determined, the controversy relevant to the applicability of Section 14(e) arose at the time that employer suspended payment of benefits in this case. The parties' stipulation to employer's voluntary payment of benefits through August 1, 1997, renders the earlier notices of controversion, dated February 10, 1994, and April 26, 1996, moot as the requirements of Section 14(e) were satisfied at those times by the very payment of benefits during those periods.⁵ Moreover, the voluntary payments belie the existence of any dispute regarding benefits, let alone a controversy over permanency, until employer terminated benefits on August 1, 1997. At that time, claimant sought additional benefits as well as a determination regarding the permanency of his condition. Once this dispute existed, employer had 28 days to pay the entire additional compensation claimant claimed, including any Section 10(f) adjustments back to the date of permanency, or 14 days to file a notice of controversion in order to avoid incurring liability under Section 14(e). *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Employer does not dispute that it failed to timely pay the additional compensation claimed, and as the administrative law judge previously determined, employer did not file a notice of controversion until October 14,

⁵ While a notice of suspension of benefits filed within 14 days of the cessation of payments, which provides the information required by Section 14(d) of the Act, is the functional equivalent of a notice of controversion and precludes application of an assessment pursuant to Section 14(e), *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989), there is no evidence of any such document in the record before the Board. Moreover, employer makes no argument that such a document exists and instead relies exclusively on its earlier notices of controversion.

1997. Since employer did not pay the additional compensation claimed when it became due, and it did not file a timely notice of controversion with regard to the additional compensation claimed, the Section 14(e) ten percent assessment applies to all additional compensation eventually found due from the time of injury until September 23, 1997, the date of the informal conference with regard to these particular issues. *Pullin*, 27 BRBS 45; *Browder*, 24 BRBS at 220; *West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988). Accordingly, we affirm the administrative law judge's conclusion that employer is liable for a ten percent assessment under Section 14(e) based only on the amount of Section 10(f) adjustments due for the period from December 19, 1989, to September 23, 1997, as it is supported by substantial evidence and in accordance with law.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge