BRB No. 03-0438

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| HORACE W. PARKER | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED:MAR 17, 2004 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order-Awarding Benefits and Order Denying Petition for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr., and Dawn L. Serfine (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judges, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Awarding Benefits and Order Denying Petition for Reconsideration (2002-LHC-1199) of Administrative Law Judge Daniel L. Leland 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related left wrist injury on October 25, 1996. Employer voluntarily paid claimant temporary total disability benefits from January 6, 1997 to January 6, 1998, and from April 28, 1998 to December 20, 1999, and temporary

partial disability benefits from December 31, 1999 to May 6, 2000. On May 2, 2000, Dr. McCue stated that claimant had a permanent impairment to his arm of 25 to 30 percent. Employer sought clarification of the impairment rating. Dr. McCue responded that claimant has a 30 percent impairment. Employer received the doctor's letter on May 22, 2000, and employer filed an LS-207 form, notice of controversion, on May 31, 2000. EX 18. Claimant's counsel sought clarification of the reason for the controversion, and employer responded that it was drawing up stipulations regarding the extent of permanent impairment and was suspending wage loss benefits.

At some point in 2001, claimant's counsel became aware that employer had never paid claimant benefits for the 30 percent impairment. He requested that such payment be made. CX 4. Employer did not pay. On January 21, 2002, employer sent to claimant's counsel stipulations for claimant to sign so that the district director could issue a compensation order awarding benefits. EX 20. On January 24, 2002, a Department of Labor claims examiner informed employer of its obligation to pay benefits voluntarily; the claims examiner informed claimant that he should seek a formal hearing if employer did not pay. CX 5. Employer did not pay, and the case proceeded to the administrative law judge.

Before the administrative law judge, employer renewed its request for a compensation order based on the parties' stipulations. Claimant resisted on the ground that if there is no dispute as to the benefits owing, payments must be voluntarily instituted.[1] Claimant responded that employer had no right to withhold voluntary payments when there was no dispute between the parties. Claimant further asserted his entitlement to a Section 14(e) assessment on the unpaid permanent partial schedule award. 33 U.S.C. §914(e). Employer countered that it timely controverted the claim so that no Section 14(e) assessment is due.

The administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 30 percent arm impairment, pursuant to the parties' stipulations. 33 U.S.C. §908(c)(2). He further found that employer is not liable for a Section 14(e) assessment, as employer timely controverted the claim and that employer's

[1] Employer's insistence on the issuance of an order, and claimant's resistance thereto, was based on the applicability of Section 22 of the Act, 33 U.S.C. §922, once a compensation order is issued. *See Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *see also Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333 (4th Cir. 2004); *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *Jones v. Newport News Shipbuilding &Dry Dock Co.*, 36 BRBS 105 (2002).

good faith in doing so, or lack thereof, is not a relevant consideration. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant contends the administrative law judge erred in finding that employer had the right to withhold compensation payments when no controversy existed between the parties. Claimant also contends the administrative law judge erred in finding that employer is not liable for a Section 14(e) penalty. Finally, claimant contends the administrative law judge erred in failing to address his entitlement to an attorney's fee. Employer responds that it had the right to insist on the issuance of a compensation order regarding its liability for the 30 percent impairment. Employer contends that the district director should have issued this order based on the parties' stipulations and that the district director therefore erred in forwarding the case to the administrative law judge. Employer further contends that its timely notice of controversion renders Section 14(e) inapplicable, as the administrative law judge found. Claimant has filed a reply brief.

Initially, we reject employer's contention that the district director should have issued a compensation order based on the parties' stipulations, pursuant to 20 C.F.R. §702.315. While employer is correct in asserting that the district director may issue a compensation order based on the parties' stipulations where the parties are in agreement, 20 C.F.R. §702.315, in this case claimant did not agree to the stipulations, resisted such an order, and raised issues requiring adjudication by an administrative law judge. Therefore, the case was correctly forwarded to the administrative law judge. *See* 20 C.F.R. §702.316; *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5th Cir. 1996).

We also reject claimant's contention that he is entitled to voluntary payments, and that employer is not entitled to the issuance of a compensation order, where the parties do not have a real dispute over the compensation due claimant. Once the case was properly before the administrative law judge, as here, he must award or deny benefits. *See* 33 U.S.C. §919(c); 20 C.F.R. §702.348. He cannot order employer to pay benefits voluntarily. While the Act encourages the voluntary payment of compensation, *see* 33 U.S.C. §914(a) ("Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer"), claimant does not have the right to resist the entry of an order if employer seeks to have one issued. *See generally Boone*, 102 F.3d 1385, 31 BRBS 1(CRT).

If employer does not pay benefits when they are "due," *see* 33 U.S.C. §914(b), it is liable for a Section 14(e) penalty, unless it has timely controverted the claim, 33 U.S.C. §914(d), or the district director excuses the failure to pay due to conditions beyond employer's control. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). Claimant contends the administrative law judge erred in finding that employer is not liable for a Section 14(e) penalty. 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.

33 U.S.C. §914(e). Employer's liability for a Section 14(e) penalty 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. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979).

Claimant contends that employer lacked good faith in controverting the claim and therefore, Section 14(e) is applicable to this case. We reject this contention. The administrative law judge correctly stated that regardless of whether employer controverted the claim in good faith or in order to delay the proceedings, a Section 14(e) penalty is not owed once employer controverts the claim. The case law does not permit a "good faith" inquiry into the reasons employer controverts a claim.

It is clear that when an employer acts in good faith, such will not excuse the failure to file a timely notice of controversion. *See, e.g., Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991), *aff'd on recon.*, 25 BRBS 88 (1991). Moreover, when employer's actions in filing a notice of controversion are questionable, the courts and the Board will not look beyond the four corners of the notice of controversion. In *Pruner v. Ferma Corp.*, 11 BRBS 201 (1979), the employer timely controverted the claim on one ground. It later "abandoned" that ground and controverted the claim on other grounds. The Board held that under the plain language of Section 14, there is no requirement that employer controvert the claim on any particular ground. *Id.* at 209. In *Denton v. Northrop Corp.*, 21 BRBS 37 (1988), the administrative law judge found that employer filed a timely notice of controversion and thereafter delayed the death claim of the widow and minor son for 4½ years without justification. The administrative law judge found, however, and the Board affirmed, that the timely notice of controversion prevented imposition of a Section 14(e) penalty without regard to employer's motives. Indeed, in *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on other grounds on reh'g en banc*, 862 F.2d 491 (5th Cir. 1988) *cert. denied*, 490 U.S. 1035 (1989), the Fifth Circuit, in initially holding that the Act pre-empted a state tort claim for

bad faith withholding of compensation benefits,[2] discussed proposed amendments to Section 14 that would have expressly required employer to controvert a claim in good faith and to impose sanctions for wrongful controversion. The court observed that Congress added criminal penalties for fraudulent denial of benefits, *see* 33 U.S.C. §931(c), but declined to amend Section 14. The court thus concluded that, "[t]his legislative history demonstrates at least that Congress was willing to leave the structure as it was, by which the right to file a formal controversion is unconditioned, subject only to severe criminal penalties for making a false statement in conjunction with such a controversion." 820 F.2d at 1412-1413. While the court's decision on pre-emption was reversed on rehearing, the *dicta* regarding the failed attempts to amend Section 14(e) support the administrative law judge's finding that the reason for employer's notice of controversion is of no import. As the administrative law judge correctly observed, claimant has not identified any cases where employer's motives prevent or cause the imposition of a Section 14(e) penalty. Therefore, we reject claimant's contention that employer's alleged failure to act in good faith in controverting the claim renders employer liable for a Section 14(e) penalty.

We next address claimant's contention that employer's notice of controversion was not timely filed. The administrative law judge found that employer became obligated to pay claimant permanent partial disability benefits or to controvert the claim as of May 22, 2000, when employer received Dr. McCue's report definitively stating that claimant had a 30 percent impairment. Employer controverted the claim on May 31, 2000. The administrative law judge found that the notice of controversion, filed within 14 days of the date the controversy arose between the parties on May 22, was timely filed pursuant to Section 14(d). Claimant contends that the controversy arose on May 9, 2000, when employer received Dr. McCue's report stating that claimant's impairment would be 25 to 30 percent, and that employer's notice of controversion was therefore untimely.

We agree with claimant that the administrative law judge erred in finding that the controversy arose between the parties on May 22, 2000. The plain language of Section 14(b), (d), requires that employer pay benefits or controvert the claim when it has notice or knowledge of the injury, as in Section 12 of the Act, 33 U.S.C. §912, and not knowledge of a specific claim for benefits. *See, e.g., Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). In the context of a scheduled injury case where an employer was voluntarily paying wage loss benefits, as here, employer need not file a notice of controversion when it suspends benefits due to the fact that claimant's loss in wage-earning capacity has ended until a controversy arises

[2] On rehearing, the court held *en banc* that a federal court cannot enjoin state court proceedings on pre-emption grounds unless permitted by statute to order injunctive relief. The court stated that the issue of preemption must be raised in state court, and that the federal court also cannot pre-empt state law on the basis of the Declaratory Judgment Act. *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (*en banc*).

between the parties, *i.e.,* in a scheduled case, when claimant receives a permanent impairment rating. The controversy arises after employer "first gains any knowledge" of the permanency of claimant's condition and/or the extent of claimant's impairment. *See Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981); *see also DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981). In this case, it appears that at some point claimant returned to work, although not with employer. Tr. at 12 (opening statement). The parties stipulated that claimant was totally disabled until May 6, 2000. On May 2, 2000, Dr. McCue stated claimant's impairment was in the 25-30 percent range, and employer received this information on May 9. This date is when employer "first gained any knowledge" of the extent of claimant's permanent impairment, and thus became obligated to controvert the claim within 14 days or to pay benefits. *See Collington,* 13 BRBS at 773.

In finding that the controversy did not arise until May 22, 2000, the administrative law judge relied on *Mowl v. Ingalls Shipbuilding, Inc.,* 32 BRBS 51 (1998), for the proposition that a controversy does not arise until employer is aware of the full extent of the claimant's injury. *Mowl*, however, is distinguishable from this case and is of limited applicability. In *Mowl,* the claimant received a 1988 audiogram which revealed a hearing loss. She continued to work and to be exposed to injurious noise and did not file a notice of injury or claim for compensation until after a 1994 audiogram revealed an increased hearing loss. In reversing the administrative law judge's award of a Section 14(e) penalty on the portion of the hearing impairment shown in 1988, the Board held that, on the facts of the case, employer was not liable for the penalty because the full extent of claimant's injury was not known until 1994. Specifically, the Board stated,

> Employer does not have "knowledge" of an injury for purposes of Section 14(e) until it knows of the full extent of the injury on which the claim is based; in other words, employer must have knowledge of the same injury or aggravation for which compensation is to be paid. Thus, where claimant's claim is based upon aggravation of a prior condition, employer must receive notice or have knowledge of the aggravation before Section 14(e) applies.

*Mowl*, 32 BRBS at 54. The Board relied on *Paul v. General Dynamics Corp.*, 13 BRBS 1073, 1077 (1981), wherein the Board stated, " '[i]t is not rational to require employer to initiate a [defense] to an unknown claim.'"[3] *Id.* *Mowl* thus does not stand for the proposition that employer must be aware of the full extent of claimant's impairment in

[3] In *Paul*, the claimant was diagnosed with asbestosis, but continued working. Thus, employer did not have to file a notice of controversion or pay benefits, pursuant to Section 14, as a controversy did not arise until employer was aware that a claim for benefits was being made.

every case, as such a holding is contrary to the plain language of Section 14(b), (d), that employer must pay or controvert upon knowledge or notice of an injury. *See* 33 U.S.C. §912; *Maddon*, 23 BRBS 55; *see generally Craig v. v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848 (5th Cir. 2003). Rather, *Mowl* is limited to an aggravation case where benefits were never sought for a pre-existing injury and thus employer never gained "knowledge" of the injury within the meaning of Sections 12(d) and 14(d). In this case, unlike *Mowl and Paul,* employer was not required to defend an unknown claim; it had knowledge on May 9, 2000, that claimant had a permanent impairment to his arm as a result of the work injury. We therefore hold that employer was obligated to pay or controvert as of May 9, 2000, and that its notice of controversion, filed on May 31, 2000, is untimely as to this date as it was not filed within 14 days. We modify the administrative law judge's decision to hold that employer is liable for a Section 14(e) penalty on benefits due and unpaid from May 9 until May 31, 2000. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

Finally, claimant contends that the administrative law judge erred in not addressing his entitlement to an attorney's fee. The administrative law judge has not issued an order awarding or denying an attorney's fee. Moreover, the file before the Board does not contain a petition for an attorney's fee and thus there is no indication that the administrative law judge has failed to rule on claimant's entitlement to an attorney's fee. We therefore decline to address claimant's contentions regarding his entitlement to an attorney's fee until such time as the administrative law judge rules on the issue.

Accordingly, the administrative law judge's Decision and Order is modified to reflect employer's liability for a Section 14(e) penalty on permanent partial disability benefits due and unpaid from May 9 until May 31, 2000. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge