BRB No. 91-1366

DAVID L. HARPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order On Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (88-LHC-1844) of Administrative Law Judge C. Richard Avery 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant filed a claim under the Act on May 28, 1987, for a noise-induced hearing loss. By letters dated May 11 and 14, 1987, Assistant District Director[1] Robert Bergeron excused employer from filing notices of controversion or making payments in hearing loss claims pursuant to Section 14 of the Act, 33 U.S.C. §914. The claim was referred to the Office of Administrative Law Judges for a hearing, but inasmuch as employer paid claimant the compensation he sought prior to the

[1]The term "district director" has replaced the term "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

hearing, claimant requested that the administrative law judge remand the case to the district director so that he could appeal the district director's denial of a Section 14(e) penalty.

In his appeal to the Board, claimant contended that the district director abused his discretion in excusing employer from making payments or filing notices of controversion. For the reasons stated in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*) (Brown, J., concurring), the Board held that the excuse granted by the district director is invalid. *Harper v. Ingalls Shipbuilding, Inc*., BRB No. 88-4282 (March 13, 1991) (unpublished). The Board remanded the case to the administrative law judge to consider employer's liability for a Section 14(e) penalty.

On remand, the administrative law judge found employer liable for a Section 14(e) penalty. He rejected employer's contention that its Form LS-202, First Report of Injury, filed on June 3, 1987, is the functional equivalent of a notice of controversion as it does not contain the information required by Section 14(d) of the Act. Employer appeals the administrative law judge's decision on remand, and claimant responds, urging affirmance of the imposition of a Section 14(e) penalty.

We reject employer's contention that the Fifth Circuit's decision in *Fairley*, 898 F.2d at 1088, 23 BRBS at 61 (CRT), holding the district director's "excuse" to be invalid, is not applicable in this case because the "excuse" was granted prior to the time the claim was filed and employer detrimentally relied on it. In *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), the Fifth Circuit held that employer could not assert the doctrine of equitable estoppel on the ground that it detrimentally relied on the "excuse." Furthermore, we reject employer's contention that it is not liable for a Section 14(e) penalty because the concept of "replacement income" does not apply to an injury falling under the provisions of the schedule at 33 U.S.C. §908(c)(1)-(20). *See Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 68 (CRT); *Benn*, 25 BRBS at 39.

Lastly, for the reasons stated in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting), we reject employer's contention that its Form LS-202, First Report of Injury, which states "no injury admitted" in response to various questions, is the functional equivalent of a notice of controversion. *See also* 33 U.S.C. §914(d), (e). We, therefore, affirm the administrative law judge's imposition of a Section 14(e) penalty.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge