

MICHAEL BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 02/27/2012
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick Rosenow, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Richard S. Vale and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-01846) of Administrative Law Judge Patrick Rosenow 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a fiberglass laminator for employer, suffered a work-related injury to his lower back on June 10, 1991, which prevented him from continuing in his usual work for employer. Employer voluntarily paid claimant temporary total disability benefits under the Act, 33 U.S.C. §908(b), from June 21, 1991 until March 2, 1993, and from October 25, 1994 until June 26, 1996. Claimant sought additional benefits. This case has a protracted procedural history which is reflected in the Board's prior decisions and the

multiple decisions issued by Administrative Law Judge Mills and Administrative Law Judge Rosenow (the administrative law judge); it is not relevant to the issues raised on appeal. See *Brown [Brown II] v. Avondale Industries, Inc.*, BRB No. 01-0508 (Feb. 22, 2002); *Brown [Brown I] v. Avondale Industries, Inc.*, BRB Nos. 97-1511, 99-1063/A (July 7, 2000).<sup>1</sup>

In his pursuit of this claim, claimant obtained three compensation awards: one, for permanent partial disability for a weekly loss of wage-earning capacity of \$59.20 from August 2, 1993 to August 24, 1997, 33 U.S.C. §908(c)(21); another, for temporary total disability from August 25, 1997 to February 24, 2005, 33 U.S.C. §908(b); and a third, for permanent total disability continuing from February 25, 2005, 33 U.S.C. §908(a). Specifically, the permanent partial disability award was directed in Judge Mills's Decision and Order on Remand dated November 18, 2002; the temporary total disability award was directed in Judge Mills's Decision and Order on Section 22 Modification dated April 12, 1999, 33 U.S.C. §922,<sup>2</sup> as clarified by an Order issued by Judge Mills on January 22, 2003; and the permanent total disability award was directed in the administrative law judge's Decision and Order on modification dated April 15, 2008, which is the last resolution on the merits of claimant's claim.

In July 2008, and again, on December 10, 2008, claimant requested an informal conference to discuss employer's payments of compensation pursuant to the administrative law judge's April 2008 decision. In February 2010, the district director issued a memorandum of informal conference addressing whether claimant had been paid correctly under the terms of the administrative law judge's April 2008 decision; the district director stated that employer should provide a print-out of all compensation paid to date. See Claimant's Petition for Review at EX C. In a follow-up memorandum dated February 12, 2010, the district director stated his recommendation that employer has paid all sums due under the administrative law judges' decisions. See Employer's Motion for Summary Decision at EX E. The case was transferred to the Office of Administrative Law Judges on July 15, 2010, for a hearing on the issue of whether employer was in default of any payments awarded and due.

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<sup>1</sup>A thorough recitation of the facts in this case is contained in the Board's decision in *Brown v. Avondale Industries, Inc.*, BRB No. 01-0508 (Feb. 22, 2002).

<sup>2</sup>In Judge Mills's first decision, the parties stipulated that claimant's average weekly wage is \$260 and that employer voluntarily paid claimant compensation for temporary total disability from June 12, 1991 to March 2, 1993, and from October 25, 1994 to June 26, 1996. Decision and Order at 2 (April 17, 1997).

On October 19, 2010, claimant signed an affidavit based on employer's print-out of payments alleging that: 1) employer failed to make lump sum payments of \$15,600.60 and \$10,102.66 in 1995; 2) employer did not pay 22 weeks of temporary total disability compensation at \$173.33 per week from March 2 to August 1, 1993; 3) employer underpaid claimant the amount of \$42.14 bi-weekly for the period from October 17, 1996 to May 1, 1997, when he should have received bi-weekly payments of \$92.26; and 4) employer wrongly credited \$8,889.99 against its subsequent bi-weekly payments, after it had paid claimant a lump sum of \$38,305.36 on February 13, 2003. *See* Claimant's Opposition to Employer's Motion for Summary Judgment, EX A. In sum, claimant alleged in the affidavit that he had been underpaid a total of \$39,109.19, plus interest and additional assessments. Claimant thus sought the issuance of a default order and a Section 14(f) assessment. *See* 33 U.S.C. §§914(f), 918(a); 20 C.F.R. §702.372.

In his Order Cancelling Hearing issued on January 5, 2011, the administrative law judge stated that the issues before him were whether, under Section 18(a) of the Act, 33 U.S.C. §918(a), employer failed to make compensation payments as alleged by claimant and whether employer had fully complied with the previously issued compensation orders. Recognizing that claimant may file for enforcement of final compensation orders in federal district court pursuant to Section 21(d), 33 U.S.C. §921(d), the administrative law judge informed the parties that he was inclined to remand the case on jurisdictional grounds. On January 19, 2011, employer filed with the administrative law judge a motion for summary decision on the basis that claimant's claim of default of allegedly past-due compensation was untimely under Section 18(a).

In his Decision and Order, the administrative law judge found that Section 18(a) is inapplicable as the most recent alleged default took place on February 13, 2003. The administrative law judge found that claimant first sought relief for employer's alleged underpayment of compensation on December 10, 2008, when claimant requested an informal conference regarding employer's payment of compensation pursuant to the orders issued by Judge Mills. The administrative law judge found that there is no genuine issue of material fact that claimant failed to seek enforcement within one year of Judge Mills's compensation orders becoming final. The administrative law judge concluded that Section 18(a) is inapplicable, and he dismissed the claim because the only remedy available to claimant was to seek enforcement of Judge Mills's orders in federal district court pursuant to Section 21(d).

Claimant appeals the administrative law judge's dismissal of his claim that employer is in default of awarded compensation. Employer responds, urging affirmance. Claimant filed a reply brief.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2<sup>d</sup> Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §§18.40(c), (d), 18.41(a). In this case, the administrative law judge determined that there are no issues of material fact concerning the applicability of Section 18(a). The administrative law judge also found employer entitled to a decision in its favor as a matter of law because Section 21(d), and not Section 18(a), applies to claimant's claim of default. We have jurisdiction to rule on the administrative law judge's dismissal of claimant's claim. *See generally Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5<sup>th</sup> Cir. 1981).

The Act has two provisions by which a claimant may seek to enforce compensation orders. 33 U.S.C. §921(e); *see also* 33 U.S.C. §§918(a), 921(d). First, under Section 18(a),<sup>3</sup> claimant may, within one year of an alleged default, apply to the district director for a supplemental order declaring default. After obtaining a

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<sup>3</sup>Section 18(a) of the Act, 33 U.S.C. §918(a), states:

In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the [district director] making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the [district director] shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order.

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Such supplementary order of the [district director] shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law.

33 U.S.C. §918(a).

supplemental default order from the district director, claimant may obtain its enforcement in federal district court. 33 U.S.C. §918(a); 20 C.F.R. §702.372. The law is clear that compensation is due and payable when a compensation order is filed in the office of the district director. 33 U.S.C. §921(a); 20 C.F.R. §§702.350, 802.205; *see generally Tideland Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5<sup>th</sup> Cir. 1983). An employer is in default, for purposes of Section 18(a), if payment has not occurred within thirty days of the award's effective date, the date of filing with the district director. *Kinder v. Coleman & Yates Coal Co.*, 974 F.Supp. 868 (W.D. Va. 1997).

The second statutory provision for enforcement of compensation orders is contained in Section 21(d),<sup>4</sup> which authorizes the claimant to apply to the district court for enforcement of a compensation order that has become final. *See, e.g., Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1<sup>st</sup> Cir. 1993). If the district court determines that the order was made and served in accordance with law and that employer has failed to comply with it, the statute requires the district court to enforce the order.<sup>5</sup> 33 U.S.C. §921(d). A compensation order becomes final thirty days after it is filed in the office of the district director, or, in the event a party appeals the order to the Board or Court of Appeals, when the Board or Court of Appeals makes a decision which resolves the merits

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<sup>4</sup>Section 21(d) of the Act, 33 U.S.C. §921(d), provides:

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

33 U.S.C. §921(d).

<sup>5</sup>The scope of the district court's inquiry is limited to answering two questions: (1) was the compensation order made and served in accordance with law; and (2) has the employer failed to comply with it. If the answers to both questions are "yes," the statute requires the district court to enforce the order. *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 28 BRBS 18(CRT) (5<sup>th</sup> Cir. 1994).

of the administrative proceeding. 33 U.S.C. §921(a), (c); *see also* 20 C.F.R. §§702.350, 802.205. Thus, while Section 18(a) permits enforcement of effective, but not-yet-final awards, Section 21(d) permits the enforcement of final awards. *Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 15 BRBS 149(CRT) (5<sup>th</sup> Cir. 1983).

### **Enforceability of Awards**

Claimant contends that because the underlying compensation orders are ambiguous and do not allow for the proper calculation of benefits due, the administrative law judge erred in finding Section 18(a) inapplicable. Where a compensation order is ambiguous or unclear and thus does not explicitly address a question which emerges during the period of payment, further proceedings to address the ambiguity may be instituted under Section 18(a). *Bray*, 664 F.2d 1045, 14 BRBS 341. In such a case, the order is not yet final or subject to the one-year limitations period in Section 18(a). *See Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5<sup>th</sup> Cir. 1994); *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5<sup>th</sup> Cir. 1990).

In this regard, Section 702.372(a) of the regulations provides that where employer is in default, *i.e.*, not making payments when due, claimant applies to the district director for an order declaring the amount of the default. 20 C.F.R. §702.372(a). The district director institutes proceedings, as with any other claim, and if the parties cannot agree on the compensation due under the initial order, the procedures of Section 702.316, 20 C.F.R. §702.316, apply. Thus, where a question arises as to the interpretation or clarification of findings made in a final compensation order, *Bray*, 664 F.2d 1045, 14 BRBS 341; *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988), the case must go to an administrative law judge for findings of fact before a district director can determine if the employer is in default. *See Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2<sup>d</sup> Cir. 2008); *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000). The Board then has the authority to review the administrative law judge's decision. *Bray*, 664 F.2d 1045, 14 BRBS 341.

We reject claimant's assertion that ambiguity in the decisions issued by Judge Mills prevents the proper calculation of benefits due. Claimant's average weekly wage of \$260 was stipulated in Judge Mills's first decision. Decision and Order at 2, 13 (April 7, 1997). Judge Mills's 1999 decision awarding temporary total disability clearly states that this award commences on August 25, 1997, and is payable based on an average weekly wage of \$260. Decision and Order at 12 (April 19, 1999). The permanent partial disability award, entered in 2002, ran from August 2, 1993 to August 24, 1997. Judge Mills unambiguously stated claimant's \$260 average weekly wage and residual weekly wage-earning capacity of \$190.80. Decision and Order at 5 (Nov. 18, 2002). Thereafter, claimant requested that Judge Mills address his entitlement to temporary total disability

benefits based on the April 1999 award, for the period after claimant's partial disability ended. Judge Mills issued his "Order Clarifying Decision on Remand," which stated that employer remained liable for continuing temporary total disability compensation. Order at 5 (Jan. 22, 2003). Accordingly, Judge Mills's decisions are not ambiguous or unclear as to the extent of employer's compensation liability during the periods he awarded claimant temporary total and permanent partial disability benefits. Accordingly, we reject claimant's contention that the limitations period in Section 18(a) is inapplicable on the ground that Judge Mills's compensation orders are ambiguous. *See generally Cohen v. Pragma Corp.*, 445 F.Supp. 2d 15 (D.D.C. 2006).

### **Alleged Default of Lump Sum Payments Employer Made in 1995**

Claimant's assertion that he did not receive from employer voluntary lump sum payments of \$15,600.60 and \$10,102.66 in 1995 is not subject to consideration under either default provision,<sup>6</sup> since Sections 18(a) and 21(d) require the issuance of a compensation order making an award of benefits. 33 U.S.C. §§918(a), 921(d); *Keen*, 35 F.3d 226, 28 BRBS 110(CRT) (employer cannot be held in default for amounts that have not been specifically awarded by the administrative law judge or calculated by the district director pursuant to the administrative law judge's directive). Thus, we affirm the administrative law judge's finding that Section 18(a) is inapplicable with regard to these alleged defaults.

### **Alleged Default of Temporary Total Disability from March 2 to August 1, 1993**

Sections 18(a) and 21(d) are similarly inapplicable with regard to claimant's assertion that employer did not pay 22 weeks of temporary total disability compensation at \$173.33 per week from March 2 to August 1, 1993, as Judge Mills did not award compensation for this period. Employer voluntarily paid compensation for temporary total disability from June 12, 1991 to March 2, 1993, and from October 25, 1994 to June 26, 1996. Decision and Order at 2 (April 7, 1997). In the initial proceeding before Judge Mills, claimant raised the issue of whether he was owed additional compensation for a prior period of disability. *Id.* Judge Mills found that claimant reached maximum medical improvement on December 20, 1992, that employer established the availability of suitable alternate employment on March 5, 1993, and that claimant had no loss of wage-

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<sup>6</sup>Employer's print-out sheet indicates that it made lump sum "indemnity" payments to claimant of \$15,600.60 on August 16, 1995, and \$10,102.66 on December 7, 1995. Claimant contends he did not receive these payments.

earning capacity. *Id.* at 12-13. Therefore, he denied claimant compensation as of March 5, 1993.<sup>7</sup>

The Board affirmed the maximum medical improvement finding, but vacated the finding that suitable alternate employment was established as of March 5, 1993, and the resulting denial of permanent total disability from December 20, 1992, and remanded the case for further consideration of the suitable alternate employment issue. *Brown I*, BRB Nos. 97-1511, 99-1063/A, slip op. at 4-6. On remand, Judge Mills again found that employer established the availability of suitable alternate employment with no loss of wage-earning capacity. Decision and Order at 5-6, 8 (Nov. 29, 2000). He did not specify the date on which employer established the availability of suitable alternate employment. On appeal, the Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment but stated that some of the positions credited by the administrative law judge did not contain sufficient information to support his finding. *Brown II*, BRB No. 01-0508, slip op. at 5-7. The Board remanded the case for Judge Mills to recalculate claimant's wage-earning capacity based on the positions that he properly found constituted suitable alternate employment and "to make a specific determination regarding the date of cessation of claimant's entitlement to permanent total disability benefits." *Id.*

On remand, Judge Mills found that employer established the availability of suitable alternate employment on August 2, 1993, and he awarded claimant permanent partial disability benefits from that date to August 24, 1997. Decision and Order at 2-3, 5 (Nov. 18, 2002). Again, Judge Mills did not address claimant's entitlement to permanent total disability benefits from the date of maximum medical improvement, December 20, 1992, to August 2, 1993. Therefore, he did not address claimant's entitlement to permanent total disability compensation from the date employer had stopped its voluntary payments of total disability compensation on March 2, 1993, until August 1, 1993, which is the period during which, claimant now asserts, employer failed to pay total disability compensation. Claimant, however, did not request reconsideration from Judge Mills or appeal this omission. Judge Mills's November 18, 2002 Decision and Order is now final. Thus, as there was never an award of compensation for the specific period in question, *i.e.*, March 2 to August 1, 1993, Section 18(a) cannot apply. Accordingly, we affirm the administrative law judge's dismissal for lack of jurisdiction under Section 18(a) of claimant's claim that employer was in default during this period.

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<sup>7</sup>The administrative law judge subsequently found that claimant became temporarily totally disabled on August 25, 1997, when surgery was anticipated. Decision and Order (April 19, 1999).

**Alleged Default from October 1996 to May 1997 and from February 2003 to February 2005**

Claimant's allegation of underpayments relating to employer's bi-weekly permanent partial disability payments from October 17, 1996 to May 1, 1997, and temporary total disability payments from February 13, 2003 to February 24, 2005, are not within the scope of Section 18(a). Claimant sought a default order in 2008, more than one year after the alleged defaults. The administrative law judge's dismissal of this aspect of claimant's Section 18(a) default claim is affirmed. *Cassell v. Taylor*, 243 F.2d 259 (D.C. Cir. 1957).

**Default in the Payment of Permanent Total Disability Benefits**

Contrary to the administrative law judge's finding, Section 18(a) is potentially applicable to claimant's allegation that employer "wrongfully deducted \$8,889.99 from [his] subsequent bi-weekly indemnity payments (payments made after February 13, 2003)" to the extent that the disputed payments fall within the period of permanent total disability compensation awarded by the administrative law judge in his April 2008 decision. Claimant alleged a default in this regard on December 10, 2008, which is within the one-year limitations period of Section 18(a). The administrative law judge found that his April 15, 2008, decision was irrelevant to the timeliness of claimant's seeking a default order because claimant's claim alleged a default in 2003, more than one year before December 2008. However, claimant alleged a default after February 13, 2003, an assertion that could encompass an underpayment of the permanent total disability benefits awarded in 2008, commencing on February 25, 2005.

Therefore, employer's permanent total disability payments made pursuant to the administrative law judge's 2008 decision fall within the scope of Section 18(a) as claimant timely requested that the district director review these payments within one year of the administrative law judge's April 2008 decision. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). While employer's post-decision bi-weekly payments appear to correspond with the permanent total disability award entered by the administrative law judge in April 2008, there is an issue of material fact whether employer paid permanent total disability compensation in the proper amounts awarded for the period prior to April 2008 pursuant to the administrative law judge's decision.<sup>8</sup>

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<sup>8</sup>Specifically, it is unclear if employer's payments included Section 10(f) adjustments. 33 U.S.C. §910(f). In addition to its bi-weekly payments, however, employer also made one-time payments of \$449.43 on April 21, 2008, \$1,568.82 on June 18, 2008, \$303.29 on September 23, 2008, and \$28.57 on September 30, 2008. The

Accordingly, we reverse the administrative law judge's finding that Section 18(a) is inapplicable from a timeliness standpoint with regard to amounts claimant alleges he did not receive commencing February 25, 2005. Consequently, we vacate the administrative law judge's granting of employer's motion for summary decision on this issue. *See generally Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). We remand this case for the administrative law judge to specifically resolve any factual dispute arising with regard to the amount of permanent total disability benefits owed to claimant, as well as the amount of benefits paid by employer pursuant to the 2008 decision. *See* 20 C.F.R. §§702.372, 702.316; *Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT); *Hanson*, 34 BRBS at 138. If, as a result of the administrative law judge's findings of fact, claimant believes employer defaulted on compensation due, he may again apply to the district director for a default order pursuant to Section 18(a).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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administrative law judge also awarded employer a credit pursuant to Section 14(j), 33 U.S.C. §914(j), for its prior payment of benefits against any benefits due.