

D.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES	)	DATE ISSUED: 01/23/2009
INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
THE INSURANCE COMPANY OF THE	)	
STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-	)	
Petitioners	)	DECISION and ORDER

Appeal of the Supplemental Compensation Order Declaration of Default of Charles D. Lee, District Director, United States Department of Labor.

Robert N. Dengler (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Compensation Order Declaration of Default (OWCP No. 02-141934) of District Director Charles D. Lee 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). The determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Claimant commenced employment as a vector control specialist in Baghdad in January 2005. In March 2005, he began to experience swelling in his calves and ankles and tingling in his right hand, and he was diagnosed as a diabetic. Claimant continued to work despite fluctuating symptoms. On March 22, 2005, claimant was in a convoy that

was taking him to the hospital for a check-up of his condition. While traveling, an explosion rocked the vehicle, throwing it to the left, but the convoy was able to continue to its destination. At the medical clinic, claimant experienced new tingling in his left hand, and he was ultimately told he suffered neurologic damage. He returned to the United States and was diagnosed with cervical myelopathy and disc herniations at C4-5 and C5-6. Claimant underwent surgery on April 7, 2005, and his doctor reported that, at a minimum, his condition was aggravated by the explosion.

The parties disputed whether there was a causal relationship between claimant's employment and his injury. They resolved the dispute via stipulation and requested approval of their Section 8(i), 33 U.S.C. §908(i), settlement agreement, wherein employer agreed to pay claimant a total of \$145,000.00, \$11,178.22 of which would be deducted for an attorney's fee.<sup>1</sup> The agreement also included the following clause:

Claimant specifically directs and authorizes Carrier to send the check covering the compensation that will become due to Claimant under such a compensation order to Claimant's attorney, Mark L. Schaffer, Esq. of the law firm of Ashcraft & Gerel, whose mailing address is 2000 L Street, N.W., Suite 400, Washington, D.C. 20036. Claimant acknowledges that Employer/Carrier will be deemed to have satisfied its payment obligations under Section 14(f) of the LHWCA by sending Claimant's check to Claimant's attorney.

Emp. Brief at 6. On December 27, 2007, Administrative Law Judge Bergstrom approved the settlement and the Order Approving Settlement was filed on January 4, 2008. Although the parties had not received the order by January 10, 2008, claimant's attorney learned that day that the settlement had been approved and filed, and he called carrier's attorney. According to employer's brief, carrier immediately ordered the settlement check and arranged to have it sent by overnight courier on January 11. The settlement check was sent to claimant's counsel, Mr. Schaffer, in accordance with the parties' agreement, and he received it on January 14, 2008, the tenth day after the order was filed. Order at 1; Dist. Dir. letter (3/20/08); Emp. Brief at 6.

According to the district director's letter of March 20, 2008, accompanying his Order declaring employer in default, after receiving and depositing the check, claimant had difficulty obtaining funds from the bank until at least January 29, 2008. On January

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<sup>1</sup>The parties allocated the remaining proceeds as follows: \$86,400 for temporary total disability from March 22, 2005 through November 12, 2007; \$33,600 for all compensation due after November 12, 2007; \$15,000 for past medical expenses; and \$10,000 for future medical expenses. Emp. Brief at 5.

30, claimant wrote a letter to the Board, copying the district director, describing his difficulties. This letter was interpreted as a claim for default.

Following an informal conference on March 11, 2008, the district director found that claimant received the check from his attorney on January 16, 2008, deposited it on January 18, 2008, but had trouble withdrawing the funds. The district director found that the account was not credited with the full amount until January 30.

Based on various letters and discussions, the district director found that claimant did nothing wrong, that carrier has sufficient funds to cover the settlement amount, and that there must have been a problem with the check, related to carrier's zero-balance account, because there should not have been a 12-day hold on claimant's funds. As he concluded that the fact claimant timely received the check is of no consequence where it was not negotiable for another 12 days, the district director found that employer was in default of the compensation due under the compensation order. Accordingly, the district director issued a default order stating that additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), is due claimant in the amount of \$26,764.36. Comp. Order at 1. Employer challenged the district director's authority to issue the compensation order because there were issues in dispute. It requested that he vacate the order and refer the case to the Office of Administrative Law Judges (OALJ) for a formal hearing. On the district director's refusal to vacate his order, and based on his statement that his ruling must be appealed to the Board, employer filed this appeal.

Employer contends the district director did not have the authority to assess additional compensation under Section 14(f) because there were disputed issues as to whether the settlement payment was late, and the district director does not have the authority to resolve disputed issues. Employer argues that the district director erred in failing to transfer this case to the OALJ when requested, in usurping the administrative law judge's powers, and in violating employer's due process rights. Alternatively, if the Board holds that the district director had the authority to issue the default order under these circumstances, then employer argues that his decision is not in accordance with law.

Section 14(f) of the Act provides:

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in

section 921 of this title and an order staying payment has been issued by the Board or court.

A request for a Section 14(f) assessment must be made to the district director, and once the request is made, the district director must investigate it. 20 C.F.R. §702.372. If the district director finds that payment has not been made within 10 days after the compensation order was filed, and he enters an order declaring default, the Board lacks jurisdiction to review the default order; default orders are subject to review only by a district court in enforcement proceedings under Section 18(a), 33 U.S.C. §918(a).<sup>2</sup> See, e.g., *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5<sup>th</sup> Cir. 1989), cert. denied, 494 U.S. 1082 (1990); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9<sup>th</sup> Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5<sup>th</sup> Cir. 1983). The Board has consistently followed these decisions, holding it lacks jurisdiction except under circumstances where the district director declines to issue a default order or an employer has paid the benefits and the Section 14(f) assessment. See, e.g., *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000).

In this case, employer contends the district director erred by issuing an order after his “investigation,” rather than issuing a “recommendation.” Employer asserts the district director compounded that error when he refused to transfer the case to the OALJ. Specifically, employer asserts that Section 702.372(a), 20 C.F.R. §702.372(a), requires the district director to institute proceedings for a Section 14(f) assessment as if the claim

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<sup>2</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 deputy commissioner 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 deputy commissioner 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 deputy commissioner 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.

were an original claim for compensation. Citing Section 702.315, 20 C.F.R. §702.315, which applies where an agreement is reached between the parties on all issues, and Section 702.316, 20 C.F.R. §702.316, applicable where agreement is not reached,<sup>3</sup> employer argues that as no agreement was reached here, the case should have been transferred to the OALJ. This argument is similar to that rejected by the Board in *Hanson*, 34 BRBS 136.

In *Hanson*, the district director filed the administrative law judge's approval of the parties' Section 8(i) agreement and the employer issued a check three days later. Because the check was mailed to an incorrect address, payment of benefits was late. Thereafter, the district director issued a default order. The employer sought a hearing on the propriety of the award, and the case was transferred to the OALJ. The administrative law judge dismissed the action, and the employer appealed the dismissal to the Board. The Board held that the administrative law judge properly dismissed the action, rejecting employer's argument that under Section 702.316 it was entitled to a hearing before the OALJ. *Hanson*, 34 BRBS at 138. The Board reasoned that the question to be resolved by the district director in default proceedings concerns the amount of the default, and if there is no dispute as to the amount, the district director issues his supplemental order, consistent with Section 702.315. Section 702.316 comes into play where a factual matter is raised requiring interpretation of the compensation order in order to determine the amount due. *Id.* As the case did not require interpretation of the compensation order, and as employer had not paid the additional amount assessed by the district director, the Board held the issue involved enforcement under Section 18(a) and the administrative law judge properly found he lacked jurisdiction. The Board stated that employer's recourse was to raise its defenses in district court if the claimant brought the claim for enforcement, as the district court has the authority to address such issues in determining whether the order is in accordance with the law. *See Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11<sup>th</sup> Cir. 1998). *Cf. Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9<sup>th</sup> Cir. 2002) (reversing district court's denial of enforcement of Section 14(f) assessment based on equitable estoppel where claimant provided an incorrect address and holding district court lacks authority to consider equitable factors).

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<sup>3</sup>Section 702.315 permits the district director to issue a memorandum or order setting forth the terms agreed upon and resolving the claim. Where the parties do not agree on the resolution of the claim, Section 702.316 requires the district director to evaluate the evidence and issue a memorandum setting forth his recommendations. If the parties disagree, the case may be transferred to the OALJ for a hearing.

As in *Hanson*, employer here has not paid the Section 14(f) assessment, and there is no dispute regarding the amount of compensation he assessed. As employer's arguments here concern the timeliness of its payment, and the courts have not recognized any exceptions to the holdings that the Board lacks jurisdiction over supplemental orders which would permit it to address employer's contentions challenging the Section 14(f) assessment in this case, its appeal must be dismissed. See *Pleasant-El*, 148 F.3d 1300, 32 BRBS 141(CRT); *Patterson*, 719 F.2d 126, 16 BRBS 10(CRT). Employer's remedy is to raise its arguments regarding the order before the district court if claimant files a request for enforcement. *Hanson*, 34 BRBS at 139.

Accordingly, employer's appeal is dismissed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge