U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0199

DAVID FOWLER Claimant-Petitioner v. M.T.C. EAST d/b/a PORTS AMERICA, INCORPORATED and PORTS INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 04/05/2024 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Monica Markley, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for Claimant.

Brian P. McElreath and Erica B. McElreath (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for Employer/Carrier.

Jessica E. Matthis (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer L. Jones, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore; Gary K. Stearman, Counsel for Appellate Litigation), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS, and BUZZARD, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Monica Markley's Decision and Order Denying Benefits (2021-LHC-00310) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This appeal presents an issue of first impression: whether service on a claimant is a required part of filing an employer's notice of controversion under Section 14(d) of the Act, 33 U.S.C. §914(d), such that failure to do so makes the employer liable for additional compensation under Section 14(e), 33 U.S.C. §914(e).

Section 14(d) provides that an employer must voluntarily pay benefits or file a notice of controversion within 14 days of becoming aware of an injury; Section 14(e) requires the employer to pay the claimant 10 percent additional compensation for failure to do so. Section 14(d), however, is silent as to whether filing includes a requirement to serve the notice of controversion on the claimant. Finding the regulation, 20 C.F.R. §702.251, implemented by the Secretary of Labor to fill that statutory silence permissible and straightforward, we hold that service on the claimant is a required component of filing a notice under Section 14(d). The failure to timely do so thus subjects an employer to liability for 10 percent additional compensation under Section 14(e). We, therefore, reverse the ALJ's denial of Claimant's request for a Section 14(e) assessment and remand this case for further consideration consistent with this opinion.[1]

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the injury occurred in Wilmington, North Carolina. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

Background

The dispositive facts are straightforward and undisputed. Claimant filed a claim seeking benefits for a hearing impairment sustained in his work for Employer as a longshoreman. CX 1 at 67-71, 104, 113. Employer received notice of the claim on August 26, 2020. CX 1 at 29, 33. On September 8, 2020, Employer paid permanent partial disability benefits for the period from May 8 to May 14, 2020, and provided the Office of Workers' Compensation Programs (OWCP) with a notice of controversion disputing multiple other aspects of the claim. *Id.* at 90, 92; DX 1.

On September 11, 2020, OWCP notified Claimant of Employer's notice of controversion. *Id.* at 84. In that notification, OWCP informed Claimant that "[a] copy of the notice, Form LS-207, Notice of Controversion of Right to Compensation, giving the reasons for the objection, was sent to you by the employer/carrier." *Id.*

In response, Claimant stated "the carrier has not provided claimant or claimant's counsel with the Form LS-207 or LS-208." CX 1 at 48. OWCP then requested Employer provide information confirming its initial payment of benefits to Claimant and provide Claimant and his representative a copy of the notice of controversion, Form LS-207. *Id.* at 45-46.

On December 3, 2020, Claimant informed OWCP that Employer accepted Claimant's claim for hearing loss and paid him all benefits due under 33 U.S.C. §908(c)(13)(B). CX 1 at 35-36. Claimant, however, continued to seek additional compensation under Section 14(e) of the Act, alleging Employer did not comply with Section 14(d) of the Act because it never served Claimant its notice of controversion. *Id.*[2]

After OWCP denied Claimant's Section 14(e) claim on December 7, 2020, and denied reconsideration on December 22, 2020, CX 1 at 5, 33, the case was referred to the Office of Administrative Law Judges (OALJ).

The ALJ's Decision

After setting out the pertinent law and the parties' contentions, the ALJ found that filing and serving the notice of controversion are two distinct acts, and the statute does not

[2] In his December 3, 2020 letter to OWCP, Claimant's counsel stated that as of that time neither he nor Claimant had received Employer's notice of controversion. CX 1 at 35. As such, he asked OWCP "[i]f the employer submitted a Notice of Controversion, I would appreciate your providing my office with a copy." *Id.*

require an employer to serve the notice to avoid additional compensation under Section 14(e). Instead, she found Section 14(d) only requires an employer to file a notice with the district director "in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted." D&O at 8 (citing 33 U.S.C. §914(d)). In reaching this conclusion, she held that while the regulation implementing Section 14(d) requires the notice must be served on the claimant, it "does not prescribe any penalty for failure" and "[i]t certainly does not give the employer notice that it will incur liability" if "it does not send the notice of controversion to the claimant." *Id.* at 10 (interpreting 20 C.F.R. §702.251).

The ALJ further found subjecting an employer to a penalty would allow the Secretary to add substantive requirements to the notice beyond those specifically listed in Section 14(d). *Id.* She speculated:

> If Congress intended the phrase 'in accordance with a form prescribed by the Secretary' [as used in Section 14(d)] to delegate to the Department of Labor the ability to establish the requirements for properly filing a Notice for Controversion, rather than simply meaning on a form created by the Department, Congress would not have specifically listed the required contents of that notice [in Section 14(d).].

Id. (interpreting 33 U.S.C. §914(d)). Having equated service of the notice with the requirements for its content, the ALJ found Congress did not "invite" additional substantive requirements not already specifically listed in Section 14(d). *Id.* Rather, because filing and service are inherently separate acts, and because the term service "*does not appear in the statute,*" the ALJ concluded the Secretary must treat them as distinct. *Id.* (emphasis in original). Thus, concluded the ALJ, while Employer "should have provided Claimant a copy of its notice of controversion as stated on Form LS-207" and "required by Section 702.251," its failure to do so did not violate Section 14(d) – and Employer cannot be liable for any Section 14(e) assessment. *Id.*

The Parties' Contentions on Appeal

Employer asserts the ALJ properly interpreted Section 14 and denied Claimant's request for additional compensation. It maintains the unambiguous language of Section 14(d) establishes the Section 14(e) assessment can only be triggered where an employer either fails to pay compensation or fails to notify the Department of Labor (DOL) within 14 days that benefits are controverted. Because Section 14 is silent as to whether filing includes service, Employer maintains there can be no requirement for service. It states the statutory requirements are satisfied in this case because it received notice of Claimant's claim from OWCP on August 31, 2020, and filed its notice with OWCP within 14 days, on

September 8, 2020. That it never provided Claimant with its notice of controversion is irrelevant.

Claimant asserts the ALJ improperly interpreted Section 14(d) by casting aside the Secretary's valid implementation of the provision through regulation. He states the regulatory language of Section 702.251 implementing Section 14(d) specifies "[a] copy of the notice must also be given to the claimant." 20 C.F.R. §702.251. In addition, the language contained in Section 14(d) specifying that Employer's notice be "in accordance with a form prescribed by the Secretary" further clarifies the Secretary's authority to define the requirements for filing – and the Form LS-207 designed by the Secretary to implement that language explicitly states it "must be mailed to the claimant and claimant's representative." The signature block further clarifies: "[a]s verified by the signature below, this form was mailed to the claimant and claimant's representative." Claimant concludes that because Employer never served him with a copy of the notice of controversion, as Section 14(d) requires – *as that provision is implemented through 20 CFR §702.251 and Form LS-207* – its filing of the notice was incomplete. He concludes he is thereby entitled to additional compensation under Section 14(e).

The Director, on behalf of the DOL, agrees with Claimant. He maintains the Secretary, as the administrator of the Act, is authorized to make all regulations necessary to that administration, 33 U.S.C. §939(a). In addition to the general authority to promulgate regulations, and the language of Section 14(d) itself, the Act also explicitly grants the Secretary the authority to regulate how the statutory notice and filing requirements are met in three other instances. *See* 33 U.S.C §912(c) (employer must notify employees of the official designated to receive notices of injury "in a manner prescribed by the Secretary in the regulations"); 33 U.S.C § 919(a) (claim for compensation may be filed "in accordance with the regulations prescribed by the Secretary"); 33 U.S.C § 919(b) (notice of claim to be made "in accordance with the regulations prescribed by the Secretary"). The statutory language of Section 14(d) is indisputably silent on whether filing includes service. But in furtherance of her regulatory duty, the Secretary has implemented Section 702.251 to fill that gap and clarify that filing includes service – under authority both generally and specifically delegated from Congress to the agency.

Applicable Law

Section 14(e) of the Act, 33 U.S.C. §914(e), provides that when an employer fails to pay compensation within 14 days after it becomes due, it is liable for additional compensation of 10 percent, unless it files a notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d).[3]

[3] Section 14(e) states:

Section 14(d), in turn, lists what is required in the body of the notice and further establishes that the filing of the notice must be in accordance with the process prescribed by the Secretary:

> If the employer controverts the right to compensation he shall file with the [district director] on or before the fourteenth day after he has knowledge of the alleged injury or death, ***a notice, in accordance with a form prescribed by the Secretary*** stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

33 U.S.C. §914(d) (emphasis added).

While Section 14(d) itself is silent on whether service is a component of filing, the accompanying regulation, 20 C.F.R. §702.251, entitled "Employer's controversion of the right to compensation," clarifies the notice must be served on claimants:

> Where the employer controverts the right to compensation after notice or knowledge of the injury or death, or after receipt of a written claim, [it] must give notice thereof, stating the reasons for controverting the right to compensation, ***using the form prescribed by the Director***. Such notice, or answer to the claim, must be filed with the district director within 14 days from the date the employer receives notice or has knowledge of the injury or death. ***A copy of the notice must also be given to the claimant.***

> 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 [district director] 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) (emphasis added).

20 C.F.R. §702.251 (emphasis added). The "form prescribed" for this purpose is Form LS-207. 33 U.S.C. §914(d), (e); 20 C.F.R. §702.251. That form clearly states "a copy of the completed form must be mailed to the claimant and claimant's representative" and requires the employer's signature to verify that the form was, in fact, "mailed to the claimant and claimant's representative." *See* Form LS-207, available at https://www.dol.gov/sites/dolgov/files/owcp/dlhwc/ls-207.pdf (last visited Mar. 6, 2024).

Analysis

As the Director notes, in addition to the general authority to enact regulations, the Act specifies in three other sections where the Secretary retains the specific authority to regulate how the statutory notice and filing requirements are met. *See* 33 U.S.C. §§912(c), 919(a), 919(b). And since the Act is silent on whether the filing in Section 14(d) includes service – other than to suggest service is a process prescribed by the Secretary as it is in other sections of the Act – the regulation at Section 702.251 permissibly fills any remaining gap by specifying the notice must be served on the claimant to complete filing. *Id.*

Inclusion of service as a part of filing is well within the Secretary's authority and is consistent with how courts have interpreted other filing requirements in the Act. *See e.g.*, *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 970-71 (9th Cir. 1993) (service on the claimant must take place before "filing" under Section 19(e) can be deemed to have occurred); *cf.*, *Dominion Coal Corp. v. Honaker*, 33 F.3d 401, 404-05 (4th Cir. 1994) (service of a decision on a claimant's attorney operates as service on the claimant thereby fulfilling the requirement under Section 19(e) that the decision be filed in order to trigger the time to appeal). Because 20 C.F.R. §702.251 (and Form LS-207) unambiguously require service of the notice on claimants, we need not consider anything further to conclude service on the claimant is a necessary component of filing under Sections 14(d) and (e). *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400, 2415 (2019) ("If uncertainty does not exist" in interpreting a regulation implementing a silent statutory provision, then the "regulation just means what it means -- and the court must give it effect, as the court would any law.").[4]

That is because while Employer, the ALJ, and our dissenting colleague all suggest there are better ways to interpret the statute, finding "better" interpretations is not our role.

[4] Indeed, service on opposing parties is an integral part of filing in most instances under the law. *See, e.g.*, 29 C.F.R. §18.30(a)(1) ("*In general.* Unless these rules provide otherwise, all papers filed with [the Office of Administrative Law Judges] or with the judge must be served on every party."); Fed. R. Civ. P. Rule 5(a)(1)(B) (all pleadings filed by a party must be provided to every other party to the action).

Instead, this case presents us with the limited task of examining an "agency's construction of the statute which it administers." *Chevron U.S.A., Inc. v. Natural Res.'s Def. Council, Inc.*, 467 U.S. 837, 842 (1984). As a result, we implement the familiar *Chevron* framework. *See City of Arlington v. F.C.C.*, 569 U.S. 290. 296 (2013); *Am. Online, Inc. v. AT & T Corp.*, 243 F.3d 812, 817 (4th Cir. 2001). At its core, that framework operates as a tool of statutory construction whereby we give plain and unambiguous statutes their full effect.

But where, like here, a statute is silent – and therefore inherently ambiguous – on an issue, we afford deference "to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996). *Chevron* deference provides that "any ensuing regulation" related to silence "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Since the Secretary's regulatory implementation of Section 14(d) to include service of the notice categorically cannot be said to be any of those, our task is complete. *Id.*

But even if it were necessary to consider anything further, neither the purpose of Section 14(d) nor the case law cited by the ALJ, or by our dissenting colleague, compel a "better" result.

First, both argue Section 14(d) was "designed to encourage employers to 'bear the burden of bringing any compensation disputes to the attention of the Department of Labor.'" *See* dissent at 12 (citations omitted). That is true – as far as that purpose goes. But as the Board has previously articulated, the purpose of Section 14(d) is "to notify [both] ***the claimant*** and the [district director] that the employer disputes its liability and will not pay all claimed benefits without adversary proceedings." *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 196 (1980) (emphasis added). An employer's compliance with this dual purpose – notifying the claimant and the district director – is essential to the "prompt resolution" of compensation claims under the Act. *See Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 98 (2012) (district director proceedings are designed to "promptly resolve" claims) (quoting 20 C.F.R. §702.301); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 105 (1996) (recon. en banc) (the Act contains specific provisions "intended to encourage the *prompt resolution* of claims, *see* 33 U.S.C. § 914(e), (f)") (emphasis added). A proper notice of controversion contains information critical to claimants, most importantly "the grounds upon which the right to compensation is controverted," 33 U.S.C. §914(d), which advises them that they must affirmatively engage the DOL's dispute resolution process by requesting an informal conference or a formal hearing before the OALJ. *See* 20 C.F.R. §§702.311, 702.316, 702.317.

Failing to provide such direct and timely notice of the "grounds upon which the right to compensation is controverted" discourages "the prompt resolution of claims" and payment of benefits. *See Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79, n. 9 (2019) (en banc), *vacated on other grounds*, 839 F. App'x 201 (9th Cir. 2021); *Renfroe*, 30 BRBS at 105 (explaining that Sections 14(e) and (f) are "intended to encourage the prompt resolution of claims" and payment).[5]

Second, in interpreting Section 14(d), Employer, the ALJ, and our dissenting colleague misconstrue case law concerning the required contents of a notice with the separate issue of whether the notice must be served. The ALJ, for example, stated, "the Board has held that use of Form LS-207 is not strictly required; if a document contains all the information required by Section 14(d), it may be considered equivalent to a notice of controversion." D&O at 9 (citing *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 78 (1985) and *Spencer v. Baker Agricultural Co.*, 16 BRBS 205, 209 (1984)). This statement accurately characterizes Board precedent concerning the content of the notice. In other words, the Board has held that failing to use Form LS-207 is not fatal to filing so long as the employer provides all the required information in its notice. But that analysis does not address the issue here. As the Director summarizes the relevant issue in this case: "the *sufficiency* of the information Employer provided is not at issue; rather, it is Employer's failure to timely provide the information to Claimant that is at stake." *See* Director's Br. at 9.

[5] Our dissenting colleague concedes Employer never served Claimant with its notice of controversion, but nevertheless alleges "the district director provided that information to Claimant after receiving Employer's notice." *See* dissent at 15, n.13. However, Claimant first became aware of Employer's notice of controversion through communication from the district director on September 11, 2020, more than fourteen days after Employer received notice of the claim. Although that communication informed Claimant of the fact that Employer was controverting the claim, it did not provide Claimant with a copy of the controversion or the information Employer was required to include in it, including the grounds on which it was disputing Claimant's entitlement. CX 1 at 84-85. Thus, the district director's communication to Claimant did not somehow render Employer's filing timely and complete under Section 14(d). Nor did it "accomplish the goal" of "hasten[ing] the final adjudication" of this claim. *See* dissent at 13, n.10. Following the district director's communication, further delay ensued, as the district director denied Claimant's request for an informal conference to resolve the claim, determining it would not be "productive" until Employer provided Claimant with an actual copy of its notice of controversion which, the district director noted, Employer had attested to doing but did not actually do. CX 1 at 45-46.

None of the Board's previous cases deal with the issue of service of the notice. Thus, they simply have no applicability to the issue at hand. And confronting the relevant issue head-on for the first time, we hold the regulation implemented by the Secretary of Labor permissibly fills a silent statutory gap and, pursuant to its straightforward terms, service on the claimant is a required component of filing a notice under Section 14(d).[6] *Chevron*, 467 U.S. at 843 (if a statute is "silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"); *Kisor*, 139 S.Ct. at 2415 (a straightforward regulation implementing a silent statutory provision "just means what it means -- and the court must give it effect, as the court would any law").[7]

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[6] Our dissenting colleague does not dispute that the Secretary has regulatory authority to require an employer to serve its notice of controversion on a claimant. She nevertheless concludes the Longshore Procedure Manual reflects a "longstanding" interpretation of the statute and regulations that puts the onus on the district director, not the employer, to provide the claimant with a copy. *See* dissent at 15-17. But that conclusion misreads the procedure manual. In discussing the ways in which an employer may avoid liability for a Section 14(e) assessment, the manual simply refers generally to the act of "filing" or "submitting" Form LS-207 – with no indication whatsoever that such filing includes service *only* on the district director. *See* Longshore Procedure Manual at §§3-0301.3.4, 3-0301.10.4, 8-0202.2, 08-0202.8.2. The one provision in the procedure manual our colleague identifies that discusses filing in relationship to the district director simply advises that the Section 14(e) assessment does not apply to benefit payments due "after the date notice of controversion is filed in the office of the [district director]." *Id*. at §08-0202.9. But that provision neither attempts to define "filing" nor in any way suggests it does not include service upon the claimant. As happened in this case, once the district director "receives" the employer's notice of controversion, he is instructed to ask the claimant to reply to the employer's objections and not, as our dissenting colleague seems to believe, take on the employer's role to serve the claimant with the notice itself. *Id*. at §03-0301.3.4. Thus, contrary to our colleague's views, our opinion is not "counter to the purpose and use" of the procedure manual. More importantly, the dissenting opinion fails to offer any reason why we should interpret the parties' legal obligations in a manner that ignores the clear language of the regulation and the explicit service instructions on Form LS-207 in favor of guidelines developed to assist DOL employees to process claims.

[7] Notably, given that the agency's interpretation of the statute is the more persuasive one, we need not even determine whether it is entitled to deference because where an agency's interpretation is "clearly right" there "is no need to choose between *Chevron* or *Skidmore* or even to defer[.]" *General Dynamics Land System, Inc. v. Cline,* 540 U.S. 581, 600 (2004) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency

Accordingly, we reverse the ALJ's denial of Claimant's request for additional compensation under Section 14(e) and remand this case for further consideration consistent with this opinion.[8]

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's holding that Section 14(d) compliance requires the notice of controversion be "timely" served by the employer/carrier directly to the claimant to avoid liability for a Section 14(e) assessment. I would affirm the ALJ's

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interpretations which lack the force of law are entitled to respect, but only to the extent that those interpretations have power to persuade)); *see also Doe v. Leavitt*, 552 F.3d 75, 80 (1st Cir. 2009) ("[W]e agree with the district court that the level of deference is not determinative here; whether viewed through the prism of *Chevron* or the less forgiving prism of *Skidmore*, the Secretary's interpretation ... withstands scrutiny."); *Springfield, Inc. v. Buckles*, 292 F.3d 813, 818 (D.C. Cir. 2002) ("Whether we follow *Chevron* ... is of no moment. The persuasiveness of the agency's reasoning ... lead[s] us to the same result[.]").

[8] Given our holding, we need not address whether the ALJ's decision allowing Employer to not comply with the service requirement contravenes the "general and indisputable rule, that where there is a legal right, there is also a legal remedy[.]" *Marbury v. Madison*, 5 U.S. 137, 163 (1803). We note, however, the ALJ's decision completely overlooks that Employer's representative, in executing the Form LS-207, explicitly attested to having "mailed to the claimant and claimant's representative" a copy of that document – a legally confirmed obligation for which Employer should be held accountable. Although Form LS-207 itself does not specify the remedy or penalty for an employer's failure to serve the claimant, we note that 20 C.F.R. §702.233, the regulation implementing 33 U.S.C. §914(e), plainly delineates the 10 percent assessment will be imposed "unless the employer files notice of controversion in accordance with [20 C.F.R. §702.251]" which includes the service requirement.

well-reasoned denial of a Section 14(e) assessment because it is undisputed Employer filed a timely notice of controversion with OWCP containing the requisite information in accordance with Section 14(d) of the Act, and nothing more is statutorily required to avoid the additional assessment.

Analysis of the Statute

The statute requires a notice of controversion be filed with the deputy commissioner [now the district director][9] and imposes an assessment of 10 percent of the unpaid installment of compensation unless that notice is filed. Specifically, Section 14(d) begins by stating that, "[i]f the employer controverts the right to compensation ***he shall file with the* [*district director*]** on or before the fourteenth day after he has knowledge of the alleged injury or death a notice [controverting the right to compensation]." 33 U.S.C. §914(d) (emphasis added). Section 14(e) states that the Employer must pay an assessment "unless notice is ***filed*** under subdivision (d) of this section." 33 U.S.C. §914(e) (emphasis added). Thus, the plain language of the statute imposes the assessment for not filing with the district director. This is consistent with the underlying purposes of both provisions and the general operation of the longshore statute. Sections 14(d) and (e), operating in unison, were designed to encourage employers to "bear the burden of bringing any compensation disputes ***to the attention of the Department of Labor***." *Cox v. Army Times Publ'g Co.*, 19 BRBS 195, 198 (1987) (citing *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 78 (1985) (emphasis added)); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 196 (1980); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 1095-1096 (5th Cir. 1990). Once the district director receives the notice of controversion, the statute requires the district director to act. 33 U.S.C. §914(h).[10]

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[9] The statutory responsibilities of the deputy commissioner have been re-allocated by DOL to the district director and the administrative law judge. Consequently, "district director" will be substituted hereafter for "deputy commissioner" as those functions are now assumed by the district director.

[10] The district director is required to act ("make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties") upon notification, from any person, that the right to compensation is controverted. 33 U.S.C. §914(h). The statute, therefore, lays out the sequence of events: when the employer controverts the employee's right to compensation, it must file notice with the district director, who, upon receipt of said notice, is to take action to protect the rights of the claimant. *Id.* If the employer fails to file the required notice with the district director, it is liable for payment of additional significant sums of money to the claimant. 33 U.S.C. §914(e).

Moreover, other language in the Act confirms that "filing," for purposes of imposition of the assessment, is not left open to be redefined by DOL. The term "filing" is used *only* with respect to filing with the district director and as to what are or may become formal proceedings. 33 U.S.C. §913 ("claim shall be filed with the district director"; "33 U.S.C. §914(d) (employer "shall file" its notice of controversion with the district director); 33 U.S.C. §919(a) (claim "may be filed with" the district director); 33 U.S.C. §919(e) ("The order rejecting the claim or making the award…shall be filed in the office of the district director…"). Consequently, filing in Sections 914(d) and (e) is the formal act between the party and the government official.

Contrary to the majority's position, a clear distinction exists between the statutory authority of the Secretary under Sections 14(d) and (e) and other statutory provisions bearing on notice and filings, i.e. Sections 12(c), 19(a) and 19(b), 33 U.S.C. §§912(c), 919(a), 919(b). The majority contends the language of those other sections lends support for the Secretary to impose a Section 14(e) assessment on an employer who complies with the statutory requirement to file its notice of controversion with the district director but does not also directly notify the claimant. However, examination of the statutory language of those sections reveals the opposite. Under the latter provisions, filing is to be made "in accordance with regulations prescribed by the Secretary," whereas under Section 14(d), only the form is to be prescribed by the Secretary. The initial "shall file with the [district director]" language of Section 14(d) is immediately followed by the statement that the

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In *Oho v. Castle & Cooke Terminals, Ltd.*, 9 BRBS 989 (1979), when analyzing the role played by the notice of controversion under the Act, the Board stated:

> The notice of controversion serves a useful purpose in the administration of the Act. In many cases it is the first document which apprises the [district director] of the existence of a disputed claim. It enables the [district director] to contact the claimant at an early stage and inform claimant that he may be eligible for benefits under the Act. Also, the notice of controversion requires the employer to state the grounds for its denial of liability. This encourages the early settlement of claims, expedites the investigatory process, and allows for prompt scheduling of contested matters for informal conference.

Id. at 992. The Board concluded, "[t]he Section 14(e) additional payment is primarily an incentive to encourage employers to file notices of controversion and hasten the final adjudication of disputed claims." *Id.* at 993. Those goals have been accomplished in this case through Employer's timely filing of its notice of controversion with the district director.

employer's controversion should consist of "a notice, in accordance with a form prescribed by the Secretary" that contains the information delineated in the section. This specifies a narrow scope for the Secretary's action under Section 14(d), in contrast to the broad authority for regulations in the other sections. 33 U.S.C. §914(d).[11]

As the Board recognized in *Hawthorne*, 28 BRBS at 80, "Section 14(d) requires that specific information be provided in the notice;" it must state: "the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted." *See* 33 U.S.C. §914(d). Further, absent from these clearly expressed statutory pre-requisites is any directive that the employer also must simultaneously serve its notice directly on the claimant. *See, e.g., Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor, OWCP [Holston]*, 606 F.2d 875 (9th Cir. 1979) ("Once a controversy has arisen, of course, the employer may avoid imposition of the assessment on future payments ***by filing notice of controversion and providing the Department with the required information***."); *White*, 17 BRBS at 78 (emphasis added) ("The express terms of subsections 14(d) and (e) only require the assessment when employer has failed to file within two weeks ***a notice of controversion which states the names of claimant and employer, date of injury, and the grounds for controversion***."); *Primc*, 12 BRBS at 196.

The majority claims the absence from Section 14(d) of a requirement for giving claimants or potential claimants a copy of an employer's controversion notice creates a "gap" which in turn creates an ambiguity as to whether "filing" for purposes of imposing a substantial additional assessment on employer encompasses service on claimant, thereby mandating a *Chevron* deference analysis. However, looking at these statutory provisions together, the elaborate confusion suggested by my colleagues as to the meaning of "filing" simply does not exist. There is no ambiguity here as to what Congress meant by filing, and whether - for purposes of imposing Section 14(e) liability - filing encompasses service on

[11] *Compare* 33 U.S.C. §§912(c) ("Such designations shall be made ***in accordance with regulations*** prescribed by the Secretary" (emphasis added)), 919(a) ("a claim for compensation may be filed with the [district director] ***in accordance with regulations*** prescribed by the Secretary" (emphasis added)), 919(b) ("the [district director], ***in accordance with regulations*** prescribed by the Secretary, shall notify the employer" (emphasis added)), *with* 914(d) (the employer "shall file" with the district director "a notice, in accordance with a form prescribed by the Secretary" containing the statutorily required information). The former provisions explicitly reference that such filings shall be made consistent with "regulations" issued by the Secretary, whereas Section 14(d) already provides a filing and notice requirement by explicitly stating notice shall be filed with the district director and by directing the specific information required therein.

a claimant, given that Section 14(d) specifically states notice shall be filed with the district director and spells out the information required for such notice, while Sections 12(c), 19(a) and 19(b) each explicitly defer to (in the "manner" or "in accordance with") regulations prescribed by the Secretary. *Id.*; *see also generally Illinois Pub. Telecommunications Ass'n v. F.C.C.*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) ("We will not read into the statute a mandatory provision that Congress declined to supply."). Affording full consideration to this distinction, Section 14(d) is clear and unambiguous in terms of the complete filing requirements for a notice of controversion or equivalent thereof. Accordingly, *Chevron* deference does not apply to this case.[12]

The Department's Longstanding Manual Contravenes Its Litigating Position

The clarity of the statute, and the inappropriateness of granting deference to the Department's litigating position, is underlined by the fact that its position is contrary to the Department's longstanding interpretation of the statute and regulations which is set forth in its Manual. The Department provides guidance to its staff for processing claims under the Act and regulations in its Longshore and Harbor Workers' Compensation Act Procedure Manual (Manual). This Manual is also available to the public; it is now available online. The Manual states the Section 14(e) assessment does not apply once a notice of controversion is filed in the district office.[13] *See* Procedure Manual | U.S. Department of

[12] To paraphrase Dr. Seuss's Horton the Elephant, Congress meant what it said and said what it meant. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) ("where Congress includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 93, 348 (West 2012) ("Nothing is to be added to what the text states or reasonably implies. That is, a matter not covered is to be treated as not covered.").

[13] The majority suggests that service of the notice on a claimant by the employer is a purpose of the statute, citing the Board's decision in *Primc*; however, it ignores that, under the system in place, the district director provides that information to Claimant after receiving Employer's notice (in accordance with the statute's directive that the district director take action he determines is required to secure the claimant's rights). *See* 33 U.S.C. §914(h); *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 611 (3d Cir. 1978). As discussed in greater detail *infra*, consistent with this, the Department's Manual instructs *the claims examiner* to send a copy of the employer's notice of controversion to the claimant within ten days of receipt of the notice in the district office. *See*, among other sections, Manual Chapter 2-0201, Para. 3.4 ("Consider Controversion of

Labor (dol.gov) (Jan. 10, 2024).[14] In numerous sections, the Manual states that the employer must file its notice of controversion (LS-207) in the district office; otherwise it is subject to liability under Section 14(e). *See*, *e.g.*, Manual Chapter 8-0202, Para. 4, Para. 9. Nowhere does the Manual indicate that the employer must send a copy of the LS-207 to the claimant or is subject to Section 14(e) liability if it does not send a copy of the LS-207 to the claimant.[15]

The ALJ's Analysis

Any interpretation of Section 14(d) must give effect to the words of the statute including the phrase "in accordance with a form prescribed by the Secretary," which

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Entitlement"). Departmental notification to the claimant that the employer has filed a notice of controversion also is consistent with the counterpart requirement that the district director (not the claimant) send notice to the employer when the claimant files a claim. *See* 33 U.S.C. §919(b) and 20 C.F.R. §702.224.

Moreover, the regulation that provides the claimant with a similar right to contest actions taken by an employer or carrier with respect to the claim only requires the claimant to "immediately notify the office of the district director who is administering the claim and set forth the facts pertinent to his complaint." It does not require the claimant to also inform the employer of those "facts pertinent to his complaint." By regulation, the district director's subsequent action, upon receipt of either an employer's notice of controversion or a claimant's notice of contest, is the same - "the district director shall forthwith commence proceedings for adjudication of the claim." *Compare* 20 C.F.R. §702.252 *with* 20 C.F.R. §702.262.

Given the specific statutory language and the overall structure of the statute, the Secretary cannot create a penalty on employers under Section 914(e) for not sending a copy of the notice of controversion to claimants. Rather, the Secretary would have to utilize such other sanctions as are available if there is a failure to comply with a regulatory dictate or attestation requirement.

[14] All Manual references herein are to the Procedure Manual, Division of Federal Employees, Longshore and Harbor Workers' Compensation (DFELHWC), as posted online at dol.gov/agencies/owcp/dlhwc/lsproman/proman, as of January10, 2024.

[15] The Manual references 20 C.F.R. §702.251, and repeatedly states that, for purposes of avoiding a Section 14(e) assessment, an employer must submit its LS-207 (notice of controversion) or equivalent to the district office within 14 days and that thereafter a *claims examiner* shall send a copy of that form to the claimant and his

representative within 10 days. Manual Chapter 2-0201, Para. 3.4 ("Consider Controversion of Entitlement") (The form [LS-207] is submitted in duplicate to the district office and the claims examiner sends a copy of the form to the claimant within 10 days of receipt of the form in the district office; the Form LS-209, Request for Employee's Reply is used to transmit the LS-207)); Chapter 3-0301, Para. 3.4 ("Failure to Pay Installment of Compensation") (Once the Form LS-207 is received, the claims examiner shall send a Form LS-209 to the claimant within 10 days), Para. 10.4 ("Controversion by [Employer] of Informal Recommendation") (Employer "is required to submit Form LS-207 or equivalent within fourteen days of the day of injury. If not the [Employer] may be subject to payment of additional compensation under section 14(e)" and "If Form LS-207 is received, copies, with Form LS-209, or by a cover letter prepared by the district office, are sent to the claimant and his/her representative within ten days of receipt of Form LS-207 or equivalent)." The Manual section relating to imposition of the Section 14(e) assessment speaks only of notification of the district director: *See* Chapter 8-0202 ("Late Payment: Section 14(e) Penalty"), Para. 4 ("Effect of Controversion of Claim") (If the claim is controverted within the time allowed by section 14(d), the additional 10 percent is not assessed against the employer/insurer; the controversion notice should be submitted to the district office on or before the fourteenth day after the employer had knowledge of the injury or death; the period of assessment stops on the date the notice of controversion is filed in the district office or on the date an informal conference is held, whichever came first), Para. 9 ("Period of Assessment") (The Benefits Review Board and the courts have held that the employer's liability under section 14(e) does not apply to payments falling due on or after the date notice of controversion is filed in the office of the district director or the date of the informal conference, whichever occurs first).

The majority suggests there is no significance to the absence from the Manual of any mention that to avoid a Section 14(e) assessment/penalty, the employer must send a copy of the LS-207 or its equivalent to the claimant. According to the majority, this is the case because the Manual does not say filing does not include notification to the claimant. However, the Manual has a purpose -- to instruct DOL employees in implementing the relevant regulations and statute. Omitting information that would be essential to implementing the statute and regulations (if the majority's contention about the statute and regulations' interpretation were correct) would run entirely counter to the purpose and use of the Manual. Moreover, the omission of the putative requirement cannot be considered accidental because it occurs throughout the Manual. Accordingly, the majority's argument is the equivalent of the fraudster tailor's contention that the Emperor was garbed in the finest of clothing when he was not wearing any clothing at all. As the little boy who observed the reality noted: There is nothing there.

necessarily references Form LS-207. The ALJ's interpretation of that language as meaning "in a way that agrees with or follows," D&O at 9, is consistent with longstanding Board interpretations of the requirement: Section 14(d) explicitly lists the required contents of the notice; it is well established that use of Form LS-207 is not mandatory so long as the document submitted by the employer contains all the information explicitly required by

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Thus, the Manual makes the interpretation that an employer must file controversion with the district director to avoid having to pay the assessment/penalty. It does not make the interpretation that an employer must file controversion with the district director and send a copy to the claimant in order to avoid having to pay the assessment/penalty.

It also is significant that the agency interpretation of the statute and regulations provided by the claims examiner, who serves as the Secretary's designee to administer and, where possible, informally resolve disputes as to claims arising under the Act, 20 C.F.R. §§702.301, 702.311, repeatedly recognized that Section 14(d) compliance, for purposes of avoiding a Section 14(e) assessment, does not require an employer's service of its LS-207 directly on the claimant. First, the claims examiner, on December 7, 2020, explicitly "determined that Employer/Carrier acted in compliance with Section 14(d)" as OWCP received its LS-207 on September 8, 2020, "13 days after knowledge of the injury." CX 1 at 33. He reached this conclusion despite recognizing Employer had confirmed "that a copy of the LS-207 has been sent to [C]laimant by way of signing the form," but it had not sent a copy of the form to Claimant. *Id.* Second, on December 22, 2020, the claims examiner affirmed his prior interpretation of Section 14(e) by reiterating it "cannot be applied when the claimant or claimant's representative is not served with a notice of controversion from" the employer/carrier. *Id.*, at 5. He stated, in "support of my position," that "it is impossible to prove or disprove that form LS-207 was sent to claimant or his representative" and that although "the adjuster confirms a copy was sent to claimant by signing the form, this is not enforceable under [Section] 14 of the Act." *Id.* He again found Employer/Carrier complied with the explicit language of Section 14(d) by filing its "notice with the district office within 14 days." *Id.* Further, the claims examiner pointed out that upon OWCP's receipt of an LS-207, a form LS-209, "is automatically generated and mailed to claimant." He added the LS-209 informs the claimant as to the employer's filing of its LS-207 and explains the next steps which can be taken. In this case, the LS-209 was mailed to Claimant, necessarily implying that OWCP's actions in sending that form adequately informed Claimant of Employer's notice. *Primc v. Todd Shipyards Corp.*, 12 BRBS 190, 196 (1980); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088 (5th Cir. 1990); *Nat'l Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984).

Section 14(d);[16] and because the notice, once filed with OWCP, whether simultaneously served on the claimant or not, satisfies the purpose of that provision to alert DOL as to the existence of a dispute in order to "commence proceedings for the adjudication of the claim." *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (timely filed notice of suspension of payments which includes all information required by Section 14(d) is functional equivalent of a notice of controversion); *White*, 17 BRBS at 79 (1984) (same); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205, 209 (1984) (employer's pre-hearing statement, which included all relevant information, constituted a notice of controversion). 20 C.F.R. §702.252. In this regard, it stands to reason, as the ALJ found, that "Congress would not have specifically listed the required contents of the notice" if it had intended the phrase "in accordance with a form prescribed by the Secretary" to delegate to DOL "the ability to establish the requirements for properly filing a Notice of Controversion, rather than simply meaning 'on a form created by the Department.'" *Id.* Similarly, the ALJ's explanation for her conclusion "that non-compliance with the regulation does not establish a violation of the statute, Section 14(d)," D&O at 10, is valid. Unlike the statute, which clearly articulates the consequences for failing to comply with the stated notice requirements of Section 14(d), Section 702.251 neither describes "any penalty for failure to send the notice of controversion to the claimant," nor provides an

[16] The Board has held the validity of an employer's notice of controversion must be determined ***with reference only to the contents of the notice itself***. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004). From this, it would appear whether/when that document was served on the claimant is not relevant.

employer "notice" that failure to do so will result in its incurring a Section 14(e) assessment. *Id.*[17]

Consequently, based on the plain language of Section 14(d), as well as the relevant case law interpreting the purpose of that provision and the requirements therein,[18] I would hold that compliance with Section 14(d), for purposes of avoiding the application of a Section 14(e) assessment, requires only that an employer timely file its notice of

[17] Indeed, the regulation, which is titled "Employer's controversion of the right to compensation," uses the term *filing* only with respect to providing notice to the *district director* and requires that the filing with the district director occur within 14 days from the date the employer receives notice or has knowledge of the injury or death. The filing requirement is followed by the sentence, "[a] copy of the notice must also be given to the claimant." 20 C.F.R. §702.251. That sentence does not explicitly place the burden of providing the notice on the employer. It neither specifies who is to give the notice to the claimant, nor the time within which the notice is to be given. As previously noted, the Manual repeatedly states that the claims examiner is to send a copy of the notice to the claimant. *See* n. 15 *supra*. In addition, Section 702.233 of the regulations (entitled "Penalty for failure to pay without an award"), which implements Section 14(e) of the Act, states that if an installment of compensation is not paid within 14 days after it becomes due, a 10 percent amount shall be added to the compensation "unless the employer *files* notice of controversion in accordance with §[702.251]." 20 C.F.R. §702.233. As previously pointed out, the only filing described in Section 702.251 is the filing of notice with the district director. The regulations thus do not provide "notice" that if the employer fails to give a copy of the notice of controversion to the claimant it will have to pay a Section 14(e) assessment. Particularly, the regulations do not alert the employer that even if it files the notice of controversion with the district director as required, it nonetheless will be subject to the 10 percent assessment if it does not also give notice to the claimant within the same time period.

[18] Contrary to the majority's position, the case law, insofar as it articulates the purposes behind the Section 14(e) assessment and an employer's filing of a notice of controversion and compliance with Section 14(d), is not "inapposite" to the facts in this case. Although the Director (and Claimant) concede the sufficiency of the information Employer provided is not at issue and, instead contend it is Employer's failure to timely provide the information directly to Claimant that is at stake, the resolution of this issue requires consideration of this case law to determine the requirements for compliance with Section 14(d) and whether Employer has satisfied them.

controversion containing the requisite information with the district director. I, therefore, would affirm the ALJ's decision.

JUDITH S. BOGGS
Administrative Appeals Judge