BRB No. 99-0598

LEE ULMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHUPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Lee Ulmer, Moss Point, Mississippi, *pro se*.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (98-LHC-1114, 1115) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). As claimant appeals without representation by counsel, we will review the administrative law judge's findings of fact and conclusions of law to determine whether they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220. If so, they must be affirmed.

Claimant, who works as a welder for employer, suffered a work-related injury to his knee on December 16, 1993. An MRI performed on March 14, 1994 revealed subluxations of the medial meniscus. Claimant underwent arthroscopic surgery in

May 1994, and was thereafter treated with physical therapy and continued medication. Employer controverted this claim on May 10, 1994, and began making voluntary payments of temporary total disability compensation on June 2, 1994. Due to subsequent complaints of back pain, claimant did not work from August 31, 1994 through October 19, 1994. Results of an EMG performed on September 13, 1994 revealed possible acute bilateral radiculopathy at the L5-S1 level. Claimant suffered a second work-related injury on February 17, 1997, when he slipped and fell on his back. Claimant missed approximately eight days of work due to this injury, and returned to his usual welding position with employer thereafter. Employer voluntarily paid temporary total disability compensation for the period April 25, 1994 until June 26, 1994, 33 U.S.C. §908(b), permanent partial disability compensation for a 15 percent disability to claimant's leg, 33 U.S.C. §908(c)(2), and medical expenses, 33 U.S.C. §907, for the December 16, 1993 injury to claimant's knee. In addition, employer voluntarily paid temporary total disability compensation for the work days claimant missed as a result of the February 17, 1997 injury to claimant's back.

At the hearing, employer conceded that the February 17, 1997 injury was work-related, and the parties stipulated that employer was liable for medical expenses related to this incident, and that claimant seeks no further benefits as a result of this incident or the knee injury relating to the December 16, 1993 accident. *See* Tr. at 7-9. Thus, the only issues before the administrative law judge concerned claimant's residual back problems following the December 16, 1993 accident.[1] In his decision, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption with regard to causation, and found that employer failed to establish rebuttal of the presumption. Having determined that there was no evidence to establish maximum medical improvement with regard to claimant's residual back complaints, the administrative law judge found that claimant established a *prima facie* case of total disability for the period August 31, 1994, through October 19, 1994, and that employer presented no evidence of suitable alternate employment for this period. Thus, the administrative law judge awarded claimant temporary total disability compensation from August 31, 1994 through October 19, 1994, as well as reasonable and necessary medical expenses relating to the December 16, 1993 and February 17, 1997 injuries.

Claimant, representing himself, has filed an appeal of the administrative law

[1]At the hearing, employer withdrew its application for relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

judge's decision. Specifically, claimant contends that employer failed to file a timely notice of controversion subsequent to the December 16, 1993 injury. Employer responds, urging affirmance.

Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. §912(d), or after the employer has knowledge of the injury. 33 U.S.C. §914(b). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. §914(d); *see also Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Frisco v. Perini Corp.*, 14 BRBS 798 (1981). The Board has held that an employer need not file a notice of controversion until it is aware of an actual controversy, *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); however, it has rejected the argument that there is no controversy until a claim has been filed. *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989).

We note that although claimant did not raise the issue of a penalty under Section 14(e) before the administrative law judge, this issue may be raised at any time, as Section 14(e) provides for a mandatory penalty. *See Scott*, 22 BRBS at 164. In the instant case, the parties stipulated, and the evidence establishes, that employer received notice of claimant's December 16, 1993 injury on the day of the accident*, see* Emp. Exs. 2, 9, and did not file a notice of controversion until May 10, 1994. Emp. Ex. 9. Since employer failed to file a timely notice of controversion, as a matter of law, employer is liable for a Section 14(e) penalty. As a Section 14(e) assessment is properly imposed on only those compensation installments which were due and unpaid prior to employer's filing of a notice of controversion, *see Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993); *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), we hold that employer is liable for a Section 14(e) penalty commencing on April 25, 1994, and terminating on May 10, 1994.

With regard to the merits of claimant's claim, claimant has succeeded before the administrative law judge, and thus has not been aggrieved by the award of benefits. *See* 20 C.F.R. §802.201(a); *Sharpe v. George Washington Univ.*, 18 BRBS 102 (1986). Thus, the administrative law judge's findings with regard to the merits of claimant's claim are affirmed.

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is entitled to a Section 14(e) assessment for the period April 25, 1994 until May 10, 1994. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge