



BRB No. 17-0466

NATHAN LEWIS, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: <u>Feb. 5, 2018</u>
ADM GRAIN RIVER SYSTEM,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer’s Motion for Summary Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Nathan Lewis, Sr., Hahnville, Louisiana.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without counsel, appeals the Order Granting Employer’s Motion for Summary Decision (2016-LHC-02027) of Administrative Law Judge Clement J. Kennington 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). In an appeal by a claimant without legal representation, we will review the administrative law judge’s findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case arises out of an injury that occurred on April 1, 2011. Claimant was employed as a barge crew foreman at employer’s facility in Ama, Louisiana. He heard

warnings that made him fear that a ship's mooring link was about to snap and began to run, and afterwards suffered pain in his neck, back, and knees. *See* Settlement and Compensation Order ¶ 2.

On September 22, 2014, the parties agreed to a settlement under Section 8(i) of the Act, 33 U.S.C. §908(i), in which employer agreed to pay claimant a lump sum of \$195,000, consisting of \$108,806.23 for disability benefits, \$11,998.09 for past medical expenses, and \$74,195.68 for claimant's attorney's fees and costs.<sup>1</sup> Settlement and Compensation Order ¶ 19. The administrative law judge approved the settlement and the district director served the administrative law judge's order on the parties on September 23, 2014.

Employer issued a check in the amount of \$113,528.70 to claimant on October 10, 2014, which inadvertently included \$4,723.47 in costs intended for claimant's counsel.<sup>2</sup> Claimant's counsel sought a Section 14(f) assessment in the amount of \$39,000, representing 20 percent of the settlement proceeds, as a result of employer's late delivery of the settlement funds. *See* Int. Ex. 5. Subsequently, claimant obtained a new attorney who alleged claimant was entitled to a Section 14(f) assessment of \$21,761.25, 20 percent of the \$108,806.23 in disability benefits due claimant. *See* Int. Ex. 7. The district director issued a recommendation that claimant was entitled to the Section 14(f) assessment in that amount and employer paid this assessment to claimant by check dated January 8, 2015. *See* Int. Ex. 9.

On September 8, 2016, claimant, now without counsel, filed a Pre-hearing Statement, Form LS-18, alleging: (1) fraud and theft; (2) that claimant did not sign the settlement agreement; and (3) that no LS-208 Form was filed by employer. Claimant also asserted that the late payment assessment should have been \$39,000, or 20 percent of the total value of the \$195,000 settlement, rather than the amount employer paid.

On March 23, 2017, employer filed a motion for summary decision with the administrative law judge, contending that claimant's assertions were without merit. Claimant opposed employer's motion. As an initial matter, the administrative law judge

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<sup>1</sup> The attorney's fee portion of the settlement consisted of \$40,000 in fees and \$6,147.21 in costs for claimant's former counsel, and \$23,325.00 in fees and \$4,723.47 in costs for claimant's counsel at the time of settlement. Settlement and Compensation Order ¶¶ 26, 27.

<sup>2</sup> Claimant did not remit the overpayment to his attorney and was permitted to keep the \$4,723.47 in costs. Order Granting Employer's Motion for Summary Decision at 2 n.1.

noted that claimant filed the LS-18 form on September 8, 2016, well after the settlement agreement became final 30 days from September 23, 2014 and after employer paid the 20 percent assessment on January 8, 2015. *See* Order Granting Employer’s Motion for Summary Decision at 4 (citing 33 U.S.C. §921(a); 20 C.F.R. §§702.350, 802.205). However, because claimant was unrepresented, the administrative law judge addressed claimant’s allegations and concluded that no question of material fact existed with respect to any of the claims. Order Granting Employer’s Motion for Summary Decision at 8; *see* discussion, *infra*. The administrative law judge therefore granted employer’s motion for summary decision.

Claimant appeals the administrative law judge’s Order Granting Employer’s Motion for Summary Decision. Employer filed a response brief, urging affirmance. In determining whether to grant a party’s motion for summary decision, the administrative law judge must view the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact and the moving party is entitled to summary decision as a matter of law. *See Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71 (2015), *modified in part on recon*, 50 BRBS 7 (2016).

We affirm the administrative law judge’s finding that claimant did not timely seek relief in this case, either as to the approval of the settlement or as to employer’s payment of the Section 14(f) assessment. Claimant’s pre-hearing statement was filed two years after the settlement became final and 20 months after employer paid the 20 percent assessment. 33 U.S.C. §918(a) (requiring claimant to apply for a default order within one year of the alleged default); 20 C.F.R. §702.372; *see also Porter v. Kwajalein Services, Inc.*, 31 BRBS 112 (1997), *aff’d on recon.*, 32 BRBS 56 (1998), *aff’d sub nom. Porter v. Director, OWCP*, 176 F.3d 484 (9th Cir.) (table), *cert. denied*, 528 U.S. 1052 (1999). Nevertheless, we will address the administrative law judge’s alternative findings, and we affirm.

Section 14(f) states that compensation must be paid within 10 days after it is “due.” 33 U.S.C. §914(f). Compensation becomes “due” upon the district director’s filing of the order. *See Carillo v. Louisiana Ins. Guaranty Ass’n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009). If the compensation is not paid in a timely fashion, Section 14(f) provides that “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....” 33 U.S.C. §914(f). Section 14(f) also applies to payments made under a settlement award. *See Seward v. Marine Maintenance of Texas, Inc.*, 13 BRBS 500 (1981). For purposes of Section 14(f), “compensation” typically does not include medical benefits or attorney’s fees, as they are generally not paid to the employee. *See Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff’d mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Wells v. Int’l Great Lakes Shipping Co.*, 14 BRBS 868 (1982); *cf. Lazarus v. Chevron USA, Inc.*, 958

F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992) (enforcing a compensation order under Section 18(a) where the compensation amount included medical benefits paid to claimant as reimbursement for sums he paid to providers).

Claimant asserts that he was entitled to receive a Section 14(f) assessment in the amount of \$39,000. The administrative law judge concluded that no question of material fact existed with regard to the amount of the Section 14(f) assessment payable to claimant and that employer was entitled to summary decision in its favor. The administrative law judge found that the settlement agreement provided that claimant would receive \$108,806.23 in disability compensation, and that the remaining \$86,193.77 was for attorney's fees, costs, and the payment of medical expenses.<sup>3</sup> Twenty percent of \$108,806.23 equals \$21,761.25, which is the amount employer paid claimant pursuant to the district director's recommendation. Thus, the administrative law judge did not err in finding that employer paid the proper amount to claimant pursuant to Section 14(f). *See Nelson v. Stevedoring Services of America*, 29 BRBS 99 (1995). Accordingly, we affirm the administrative law judge's grant of summary decision on this issue.

Claimant also asserted that employer should have been assessed a penalty for the failure to timely file the LS-208 form pursuant to 20 C.F.R. §702.235, which requires that an employer notify the district director that the final payment of compensation has been made within 16 days of that payment. This applies to payments under an approved settlement under Section 8(i) of the Act. 20 C.F.R. §702.235(b)(2). An employer who fails to notify the district director of a final payment shall be assessed a civil penalty of \$279. 20 C.F.R. §702.236. The penalty is assessed by the district director.

The administrative law judge found that claimant was correct in asserting that employer failed to timely file a LS-208 Form with the district director.<sup>4</sup> Order Granting Employer's Motion for Summary Decision at 7. The administrative law judge properly concluded, however, that he lacks the authority to assess a penalty against employer for the failure to timely file the LS-208 or to order the district director to assess the penalty. *Id.* We also note that the penalty would not be payable to claimant in any event. Thus,

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<sup>3</sup> The settlement stated that "medical expenses incurred by or on behalf of [claimant]" amounted to \$11,998.09, and that all medical providers who provided treatment to claimant would be paid by claimant's attorney out of the settlement proceeds. Claimant did not submit any documents indicating that any portion of the \$11,998.09 was intended to reimburse him for medical benefits he paid to providers out of pocket. Settlement and Compensation Order ¶¶ 20, 22.

<sup>4</sup> Employer did not submit its LS-208 Form until September 29, 2016. Intervenor's Ex. 17.

the administrative law judge properly found that claimant is not entitled to any relief on this claim.

In addition, claimant contested the attorney's fee payment noted in employer's Form LS-208, which had not been included in the settlement agreement. The administrative law judge found that the \$1,300 attorney's fee payable by employer was awarded by the district director on March 27, 2015 to claimant's counsel who obtained the late payment assessment on claimant's behalf. Order Granting Employer's Motion for Summary Decision at 7. The administrative law judge correctly noted that because the work being compensated was performed after the September 2014 Order Approving Settlement and before the district director, he did not have the authority to either modify or disapprove the fee. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Watkins]*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979).

Finally, claimant made a general allegation of fraud and theft. The administrative law judge dismissed these allegations for failure to state a claim because, when asked to do so, claimant did not provide any additional information other than the initial allegations, which the administrative law judge determined to be "vague." Order Granting Employer's Motion for Summary Decision at 7-8.

Claimant attached several documents in his appeal to the Board, including a copy of a civil complaint he filed in a district court in Louisiana alleging negligence and legal malpractice against one of his former attorneys,<sup>5</sup> as well as a copy of his Pre-Trial Memorandum to the administrative law judge. Even viewing these documents in the light most favorable to claimant, we cannot conclude that he has presented any evidence to support an allegation of fraud or theft so as to cast doubt on the validity of the settlement.<sup>6</sup> *See generally Downs v. Texas Star Shipping Co.*, 18 BRBS 37 (1986), *aff'd sub nom. Downs v. Director, OWCP*, 803 F.2d 193, 19 BRBS 36(CRT) (5th Cir. 1986). Moreover, the administrative law judge did not err in concluding that claimant's "vague statement of fraud and theft do not amount to a valid claim against Employer." Order Granting Employer's Motion for Summary Decision at 8. Consequently, as claimant has

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<sup>5</sup> The complaint alleges that the attorney failed to timely file a claim under the Act for claimant's injuries arising from the April 1, 2011 incident.

<sup>6</sup> The attorneys who received a fee under the terms of the settlement agreement are not named in the legal malpractice suit. Moreover, public court records indicate that this particular malpractice suit was dismissed following the trial court's granting of a motion for summary judgment in favor of the defendants. *Lewis v. Young*, 2015 WL 11438172 (La.Civil.D.Ct. April 13, 2015), *aff'd*, 187 So.3d 531 (La. App. 4. Cir. Feb. 24, 2016), *cert. denied*, 191 So.3d 1058 (Mem. La. May 13, 2016).

failed to demonstrate error in the administrative law judge's grant of employer's motion for summary decision, we affirm the administrative law judge's order dismissing claimant's challenges to the settlement and his claim for additional compensation from employer.

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge