BRB No. 00-1143

ALFONZO DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DELAWARE RIVER STEVEDORES	)	DATE ISSUED: July 26, 2001
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Aloysius J. Staud (Fine and Staud), Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Field Womack & Kawczynski), Jersey City, New Jersey, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2000-LHC-1033) of Administrative Law Judge Ainsworth H. Brown 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury to his right knee on March 4, 1999, when he suffered a fall on a ship. The administrative law judge found that claimant presented sufficient evidence to invoke the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not establish rebuttal thereof. The administrative law judge found that employer had

constructive notice of the accident when it occurred since it was witnessed by claimant's foreman, who notified his supervisor, although a written record was not made as required by internal company policy. Alternatively, the administrative law judge found that employer did not establish that it was prejudiced by the lack of formal notice of the accident. *See* 33 U.S.C. §912(d). The administrative law judge awarded claimant temporary total disability benefits from March 4, 1999 to January 5, 2000, and medical expenses. The administrative law judge denied claimant a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e), because claimant's counsel raised the issue for the first time in his post-hearing brief.

On appeal, claimant alleges that the administrative law judge erred in denying a Section 14(e) penalty. Employer responds, urging affirmance and contending that the parties stipulated that employer filed a timely notice of controversion.

Claimant correctly contends that the administrative law judge erred in the instant case by refusing to consider his entitlement to a Section 14(e) penalty. Generally, it is within the administrative law judge's discretion to consider whether he will allow a new issue to be raised for the first time before he issues his decision, 20 C.F.R. §702.336(b); *Delay v. Stevedoring Services of America,* 31 BRBS 197 (1998), especially when the issue is raised in violation of the administrative law judge's pre-hearing order. *See generally Durham v. Embassy Dairy*, 19 BRBS 105 (1986). Nonetheless, an assessment pursuant to Section 14(e) is mandatory, when applicable, *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978); *Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981), *aff'g Cuellar v. Garvey Grain Co.*, 11 BRBS 441 (1979), as the statute states that such an assessment "shall" be made. 33 U.S.C. §914(e). Thus, the Board has held that the issue of the applicability of Section 14(e) may be raised at any time. *See, e.g., Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989) (raised by claimant for first time on appeal); *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981) (raised by Director in response brief to Board). Claimant, therefore, could raise a Section 14(e) issue for the first time in his post-hearing brief. Accordingly, we vacate the denial of a Section 14(e) assessment, and we remand this case to the administrative law judge for further proceedings.

Section 14(e) states:

> 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 . . . .

33 U.S.C. §914(e). Compensation is due on the fourteenth day after employer has been notified of the injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or has knowledge of the injury, 33 U.S.C. §914(b), unless employer timely controverts claimant's right to compensation. 33 U.S.C. §914(d). In this case, the parties stipulated that employer filed a notice of controversion on August 31, 1999, and the administrative law judge accepted this stipulation. Decision and Order at 2. The parties also stipulated that the notice of controversion was timely filed. This stipulation was not referenced by the administrative law judge in his decision, and in fact, is belied by the administrative law judge's finding that employer had knowledge of claimant's injury on March 4, 1999. *See id*. at 6; *Scott*, 22 BRBS at 168 (employer's knowledge under Section 14(b) is determined by using the same standard employed under Section 12(d)).

On remand, the administrative law judge must address claimant's entitlement to a Section 14(e) penalty in light of the parties' stipulations and his findings regarding employer's knowledge of claimant's injury. The administrative law judge must give the parties notice if he is not going to accept their stipulations and the opportunity to submit evidence in support of their positions, *see Dodd v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 245 (1989), but he may not accept a stipulation that evinces an incorrect application of the law, *see Pucetti v. Ceres Gulf,* 24 BRBS 25 (1990). Employer's liability for a Section 14(e) penalty ceases on the date employer files its notice of controversion or an equivalent document, or when the Department of Labor knows of facts that a proper notice of controversion would have revealed. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Hearndon v. Ingalls Shipbuilding, Inc.,* 26 BRBS 17 (1992); *Scott*, 22 BRBS at 169; *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated insofar as it declines to address the applicability of Section 14(e), and the case is remanded to the administrative law judge for further findings consistent with this decision. The Decision and Order is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge