

PATRICIA L. SEAGLE	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: <u>July 8, 2004</u>
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr., and Dawn L. Serafine (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-2067) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 right knee injury on March 18, 1999, for which employer apparently paid claimant temporary total disability benefits. Claimant sought permanent partial disability benefits pursuant to the schedule at 33 U.S.C. §908(c)(2). Employer controverted the claim on February 3, 2002; the notice of controversion states that "Extent of permanent disability is controverted," and "Dr. Nevins (sic) report of

012202 gives claimant a 37% permanent impairment to the right lower extremity (sic). We need to find out if this should be paid under the 199601025-OWCP No. 5-106041 or 199901822-OWCP No. 5-108629.” CX 3. Subsequently, on March 11, 2002, employer offered to pay claimant benefits for the 37 percent impairment based on claimant’s 1999 average weekly wage, conditioned on claimant’s signing the accompanying stipulations. Claimant sought to have employer pay benefits voluntarily and she resisted employer’s attempts to have an order issued awarding permanent partial disability benefits. EX 1. Employer would not pay benefits voluntarily, and the case was forwarded to the administrative law judge for a formal hearing. In addition to seeking disability compensation, claimant sought the imposition of a Section 14(e) assessment on benefits due and unpaid, 33 U.S.C. §914(e), asserting that employer’s notice of controversion was invalid.

Before the administrative law judge, the parties agreed that claimant has a 37 percent right leg impairment and to the amount of compensation due claimant. They also stipulated that employer filed a timely notice of controversion. CX 3. The administrative law judge found that claimant cannot force employer to pay benefits voluntarily and that employer has a right to the issuance of a compensation order based on the parties’ stipulations. Thus, he awarded the permanent partial disability benefits to which the parties agreed claimant is entitled. With regard to Section 14(e), claimant contended that employer’s notice of controversion was not filed in good faith because employer did not contest claimant’s entitlement to benefits, but merely filed the form in order to obtain a compensation order. The administrative law judge found that since claimant had sustained two injuries, employer’s controversion on the ground that it was unsure to which injury claimant’s disability was attributable made employer’s controversion “valid.” Decision and Order at 5. The administrative law judge found, moreover, that employer has an unqualified right to file a notice of controversion in any case. *Id.* at 5-6. Thus, as the parties stipulated as to the timeliness of employer’s notice of controversion, the administrative law judge found that employer is not liable for a Section 14(e) assessment. The administrative law judge also denied claimant an attorney’s fee, finding that there had been no successful prosecution of the claim.<sup>1</sup>

On appeal, claimant contends that the administrative law judge erred by not requiring employer to pay benefits voluntarily and by finding that employer is not liable for a Section 14(e) assessment and an attorney’s fee. Employer responds that it had the right to insist on the issuance of a compensation order regarding its liability for the permanent partial disability benefits. Employer contends that the district director should

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<sup>1</sup> Claimant filed a motion for reconsideration seeking interest on the overdue, unpaid compensation. Employer did not object to claimant’s motion, which the administrative law judge granted.

have issued this order based on the parties' stipulations and that the district director therefore erred in forwarding the case to the administrative law judge. Employer also urges affirmance of the administrative law judge's denial of a Section 14(e) assessment and an employer-paid attorney's fee.

We reject claimant's contention that she has an unqualified right to receive voluntary benefits when employer does not "really" contest the claim, and that the administrative law judge should have ordered employer to pay benefits voluntarily. Moreover, we reject employer's contention that the district director erred in forwarding the case to the administrative law judge. While the district director may issue a compensation order based on the parties' stipulations where the parties are in agreement, 20 C.F.R. §702.315, in this case claimant did not agree to the stipulations proposed by employer, resisted the issuance of a compensation order, and raised issues requiring adjudication by an administrative law judge. Therefore, the case was correctly forwarded to the administrative law judge. *See* 20 C.F.R. §702.316; *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1(CRT) (5<sup>th</sup> Cir. 1996); *see also Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 956 (2000). Once the case is properly before the administrative law judge, he must award or deny benefits. *See* 33 U.S.C. §919(c); 20 C.F.R. §702.348. He cannot order employer to pay benefits voluntarily. While the Act encourages the voluntary payment of compensation, *see* 33 U.S.C. §914(a), claimant does not have the right to resist the entry of an order if employer seeks to have one issued.<sup>2</sup>

Claimant next contends that the administrative law judge erred in finding that employer is not liable for a Section 14(e) assessment. Claimant contends that employer did not really controvert the claim on the grounds asserted in the notice of controversion; rather, claimant contends that employer controverted the claim because it did not want to pay benefits voluntarily and desired the issuance of a compensation order. Claimant contends that this lack of good faith renders employer liable for a Section 14(e) assessment on the schedule award.

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<sup>2</sup> Employer's desire for a compensation order, and claimant's resistance thereto, is based on the applicability of Section 22 of the Act, 33 U.S.C. §922, once a compensation order is issued. *See Intercountry Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *see also Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4<sup>th</sup> Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4<sup>th</sup> Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed.Appx. 333 (4<sup>th</sup> Cir. 2004); *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

For the reasons stated in *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, \_\_\_ BRBS \_\_\_, BRB No. 03-0711 (July 7, 2004), we reject claimant’s contention that the administrative law judge erred in finding that employer is not liable for a Section 14(e) assessment.<sup>3</sup> Employer filed a notice of controversion with the Department of Labor on February 3, 2002, and, in accordance with Section 14(d) of the Act, 33 U.S.C. §914(d), stated the reasons it was controverting the claim. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5<sup>th</sup> Cir. 1990). At this point, the Department of Labor was on notice that employer was not going to pay benefits voluntarily, and the purpose of a notice of controversion, that of bringing a dispute to the Department’s attention, was served. *See National Steel & Shipbuilding Co. v. United States Department of Labor*, 606 F.2d 875, 11 BRBS 68 (9<sup>th</sup> Cir. 1979). Moreover, the administrative law judge rationally found that employer was uncertain as to which injury claimant’s impairment was attributable and therefore provided a valid explanation for controverting the claim. Therefore, as employer’s notice of controversion was legally sufficient to controvert the claim and as the parties stipulated that the notice was timely filed, we affirm the administrative law judge’s finding that employer is not liable for a Section 14(e) assessment. *Hitt*, slip op. at 8.

We next address claimant’s contention that the administrative law judge erred in denying her an employer-paid attorney’s fee. At the end of his decision, the administrative law judge wrote:

NOTE: The outcome of this case does not constitute a “successful prosecution” within the meaning of the act. Claimant and Employer are not liable to Claimant’s counsel for any attorney’s fee for services rendered, either before this office or that of the district director, in connection with this claim. . . . However, if Claimant’s counsel believes that a good faith claim exists for attorney’s fees in this matter, a petition should be filed with the office before which the work was performed.

Decision and Order at 6-7 (emphasis in original). We cannot affirm the administrative law judge’s finding. Claimant obtained benefits for a 37 percent leg impairment and interest by virtue of the proceedings before the administrative law judge. Employer thus is liable for claimant’s attorney’s fee under Section 28 of the Act, 33 U.S.C. §928. Employer paid claimant temporary total disability benefits, and claimant subsequently

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<sup>3</sup> Section 14(e) provides that employer is liable for an additional 10 percent assessment on compensation that is not paid within 14 days of when it becomes due, unless employer timely controverts the claim pursuant to the provisions of Section 14(d). 33 U.S.C. §914(d), (e).

sought permanent partial disability benefits under the schedule. Employer controverted this claim and did not pay claimant any additional benefits. *See* 33 U.S.C. §928(a); *Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5<sup>th</sup> Cir. 2001). Moreover, there is no purported tender of compensation, pursuant to Section 28(b), but merely a letter enclosing proposed stipulations concerning claimant’s entitlement to benefits. Such is insufficient to constitute a “tender” of compensation under Section 28(b) as it was not an unconditional offer to pay benefits. *Jackson, et al. v. Newport News Shipbuilding & Dry Dock Co.*, \_\_\_ BRBS \_\_\_, BRB No. 03-0629 (June 15, 2004). As employer controverted the claim and claimant obtained greater benefits than those paid by employer by virtue of the proceedings before the administrative law judge, she successfully prosecuted her claim and employer is liable for a reasonable attorney’s fee to claimant’s counsel. *Id.*; 33 U.S.C. §928; 20 C.F.R. §702.134. The administrative law judge’s finding to the contrary therefore is reversed. *Jackson*, slip op. at 6.

Accordingly, the administrative law judge’s finding that employer is not liable for claimant’s attorney’s fee is reversed. In all other respects, the administrative law judge’s Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge