BRB No. 03-0539

ESTELLE V. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 14, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Second Supplemental Order Declaring Revised Default of B. E. Voultsides, District Director, United States Department of Labor.

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:

Employer appeals the Second Supplemental Order Declaring Revised Default (Case No. 5-39629) of District Director B. E. Voultsides 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). The determination of the district director must be affirmed unless it is shown to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

Claimant sustained a work-related left knee injury on December 4, 1981, and a work-related right knee injury on May 1, 1982. The parties subsequently entered into a settlement agreement pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), with respect to claimant's 1982 right knee injury, and District Director B.E. Voultsides (the district director), in an Order issued on September 11, 1985, approved the agreement. With regard to claimant's 1981 left knee injury, the district director issued a separate Order, on September 26, 1985, wherein, pursuant to the parties' stipulations, he awarded claimant periods of temporary total disability compensation, permanent partial disability compensation for a 15 percent loss of use of the left leg pursuant to the schedule, and medical benefits, which he stated employer

had already paid.

On April 28, 1986, claimant fell while descending steps in her home and sustained a left knee prepatellar contusion with a patella dislocation, which ultimately prompted a third surgery, *i.e.*, a left prepatellar bursectomy performed on June 11, 1986. Claimant, via a letter written on June 11, 1986, by her then attorney, sought additional benefits, and employer, though filing a notice of controversion, voluntarily paid claimant temporary total disability compensation for the periods of April 29, 1986, to September 14, 1986, September 8, 1994, and December 8, 1994 to January 2, 1995; employer's last payment of compensation was made to claimant on August 22, 1995. After an informal conference, claimant filed a pre-hearing statement dated August 16, 2000, stating that she sought compensation for disability to both knees resulting from her 1986 fall. The case was then referred to the Office of Administrative Law Judges for a formal hearing.

In his Decision and Order, the administrative law judge initially determined that the letter from claimant's former counsel dated June 11, 1986, constituted a valid claim for compensation with respect to claimant's left knee, which based on the facts in this case, was timely filed. 33 U.S.C. §913. The administrative law judge then determined that the September 26, 1985, Order awarding benefits for claimant's 1981 left knee injury did not constitute a Section 8(i) settlement, 33 U.S.C. §908(i), and, thus, did not preclude claimant's subsequent claim for additional compensation for this injury. Lastly, the administrative law judge credited the opinion of Dr. Lannick, that claimant sustained a 25 percent permanent partial disability of the left lower extremity, and, accordingly, awarded claimant ongoing permanent partial disability compensation from April 29, 1986, based on that rating.

Employer appealed the administrative law judge's decision, challenging his finding that claimant filed a timely claim with regard to her fall at home in 1986, and alternatively, the administrative law judge's award of ongoing compensation since claimant's permanent partial disability should have been limited to the time period specified in the schedule. 33 U.S.C. §908(c)(2).

In its decision, the Board affirmed the administrative law judge's finding that claimant timely filed a valid claim for additional compensation, but vacated his award of continuing permanent partial disability benefits as, in accordance with *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), claimant cannot receive an ongoing permanent partial disability award pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), in view of the fact that her injury is to a scheduled member. *Thomas v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0121 (Oct. 9, 2002)(unpub.). Accordingly, the Board vacated the ongoing award of permanent partial disability benefits and then modified it to reflect the schedule, *i.e.*, claimant is entitled to receive two-thirds of her average weekly wage for 72 weeks (25 percent of 288). *Id.*

Meanwhile, following the filing of the administrative law judge's decision, claimant sought a default order pursuant to Section 18(a), 33 U.S.C. §918(a). On April 29, 2002, the district director issued a Supplemental Compensation Order Declaring Default, wherein he determined that employer was in default of its payment obligation to claimant under the administrative law judge's award of continuing permanent partial disability benefits in the amount of $29,428.76, plus an additional $7.09 per day from the date of his April 29, 2002, Order. Upon receipt of the Board's decision dated October 9, 2002, employer filed a motion to vacate the district director's default order. In response, the district director issued a Second Supplemental Order – Declaring Revised Default on April 24, 2003, wherein he found that employer remained in default in the amount of $14,346.78, for both its failure to comply with the administrative law judge's award during the pendency of its appeal before the Board, and for its failure to pay the lesser amounts due under the Board's modified award. Employer appeals the district director's April 24, 2003, Order. Claimant has not responded to this appeal.

On appeal, employer requests that the Board vacate the district director's Second Supplemental Compensation Order dated April 24, 2003, and remand the case to the district director with instructions that he grant employer's motion to vacate his original Supplemental Compensation Order Declaring Default dated April 29, 2002.

Section 14(f) of the Act states:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, 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, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. §914(f). Compensation payable under an order becomes due on the day the order is filed with the district director. 33 U.S.C. §921(a). Section 14(f) thus mandates that if an employer does not pay compensation within 10 days after it becomes due,[1] then the employer is liable for an additional 20 percent of compensation as a penalty, which shall be paid at the same time as the compensation. 33 U.S.C. §914(f); *Reid v. Universal Maritime Serv.*

[1] While employer sought and received "review of the compensation order making such award," the Board did not issue any order staying payment in this case. *See* 33 U.S.C. §921(b)(3). Thus, the Section 14(f) penalty became payable upon the issuance of the district director's default order.

Corp., 41 F.3d 200, 28 BRBS 118(CRT) (4th Cir. 1994); *Lauzon v. Strachan Shipping Co.*, 82 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985). Section 18(a) of the Act provides that where an employer defaults in payment of compensation for 30 days after it is due and payable, a claimant may apply to the district director for a supplemental order declaring default, and he may then take a certified copy of that order to federal district court for enforcement thereof. In general, the district court determines whether the default order is in accordance with law and enters judgment on the matter. 33 U.S.C. §918(a); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); 20 C.F.R. §702.372(a).

The Board does not have jurisdiction, pursuant to Section 21(b), 33 U.S.C. §921(b), to review the district director's order declaring employer to be in default of an amount due pursuant to Section 14(f) when employer has not paid the penalty. Rather, pursuant to Section 18(a), 33 U.S.C. §918(a), jurisdiction over the enforcement and lawfulness of the district director's default order lies only with the district court. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002); *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001); *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Providence Washington*, 765 F.2d 1381, 17 BRBS 135(CRT); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). The Board and courts, however, have recognized that jurisdiction will lie under Section 21 in cases involving Section 14(f) under certain circumstances such as when the district director declines to issue a default order or where the employer has paid the Section 14(f) penalty. *Barry*, 41 F.3d 903, 29 BRBS 1(CRT); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting); *Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995); *McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989); *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986). In those instances, as there is no default order to enforce, employer has no remedy under Section 18(a) and may proceed under Section 21. *Id.* The present case, however, does not fit these latter parameters. Rather, the record and pleadings before the Board do not reveal that employer has paid the Section 14(f) penalty imposed by the district director. As such, the instant case presently involves questions regarding the enforcement and lawfulness of the district director's default order, something solely within the purview of the district court and thus beyond the scope of the Board's review authority under Section 21 of the Act. 33 U.S.C. §921; *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT) (the district court's inquiry is solely whether the supplemental order of default is in accordance with law). Consequently, we lack jurisdiction to consider employer's appeal of the district director's default order. *Providence Washington*, 765 F.2d 1381, 17 BRBS 135(CRT).

Accordingly, employer's appeal of the district director's Second Supplemental Order Declaring Revised Default is dismissed for lack of jurisdiction.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge