BRB No. 10-0527

KEVIN ERICKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-STAR STEVEDORING	)	DATE ISSUED: 05/24/2011
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Denying Request for Supplementary Order Declaring Default of Karen P. Staats, District Director, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Mark K. Conley (Slagle Morgan LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Denying Request for Supplementary Order Declaring Default (Case No. 14-142994) of District Director Karen P. Staats 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 determinations of the district director must be affirmed unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986).

Claimant sustained a series of injuries to his neck, back, and right knee as a result of work-related incidents which occurred in the course of his work with various employers between April 7, 2002, and February 11, 2009.[1] Claimant filed ten claims against seven employers, which led to a March 22, 2010, submission of a settlement application to Administrative Law Judge Anne Beytin Torkington (the administrative law judge) signed by claimant, his attorney, and representatives of each employer. 33 U.S.C. §908(i). On April 20, 2010, the administrative law judge received an amendment to the settlement application, wherein the issue as to the apportionment of the liability of each employer for claimant's attorney's fees was resolved. In her decision, which was filed by the district director on April 29, 2010, the administrative law judge approved the settlement agreement, as amended by the supplement received on April 20, 2010, as it was "neither inadequate nor procured by duress." The approved settlement provided that, among other things, employer, Sea-Star Stevedoring, was to pay $2,000 "to claimant for any and all disability benefits, whether temporary or permanent, partial or total, inclusive of any past and future claim for interest and penalties, as well as any and all Section 7 medical benefits arising out of the January 23, 2004, claim."

In correspondence to the district director dated May 3 and 7, 2010, claimant sought a Section 14(f) assessment, 33 U.S.C. §914(f), from employer on the ground that employer had not paid the compensation owed claimant as of May 2, 2010, the date on which claimant alleged that payment was due. Claimant maintained that the administrative law judge's failure to issue an order approving or disapproving the proposed settlement within 30 days of the March 22, 2010, submission date of the original settlement application resulted in the automatic approval of that agreement on April 22, 2010, pursuant to Section 8(i)(1) of the Act, and thus required employer to pay its liability, pursuant to the agreement, no later than May 2, 2010. The district director concluded that since employer paid claimant compensation on May 5, 2010, *i.e.*, within 10 days of the April 29, 2010, filing date, claimant is not entitled to a Section 14(f) assessment. Accordingly, the district director denied claimant's request for a default order.

[1]Pertinent to this appeal, claimant sustained a neck injury while working for employer on January 23, 2004.

On appeal, claimant challenges the district director's denial of his request for a default declaration and Section 14(f) assessment against employer.[2] Employer responds, urging affirmance.

Claimant contends that the district director improperly relied on the administrative law judge's decision approving the settlement application in this case to deny his request for a default declaration and Section 14(f) assessment against employer. Claimant avers that the administrative law judge's approval of the settlement agreement, more than 30 days after the date of its initial submission, is not in accordance with the statutory 30-day limit for approval imposed by Section 8(i)(1) of the Act. Claimant contends that the administrative law judge's failure to act on the settlement agreement within 30 days of its initial submission resulted in the agreement's being "deemed approved" as of April 22, 2010, by operation of Section 8(i)(1) and its corresponding regulation 20 C.F.R. §702.241(d), thereby making employer's May 5, 2010, payment of compensation pursuant to the settlement agreement overdue. Claimant thus argues that he is entitled to a Section 14(f) assessment based on employer's overdue payment of compensation.

Section 8(i) of the Act permits the parties in a case to dispose of the claim via a settlement agreement. If the parties are represented by counsel, the settlement is deemed approved if it has not been disapproved within 30 days after its submission. 33 U.S.C. §908(i)(1);[3] *see also* 20 C.F.R. §702.241(d). The implementing regulation at Section

[2]The Board has jurisdiction over this appeal as the district director denied Section 14(f) compensation. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986) (Board retains jurisdiction over appeals which involve only questions of law regarding the propriety of Section 14(f) assessments, and which do not require enforcement of default orders); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

[3]Section 8(i)(1), 33 U.S.C. §908(i)(1), states:

> Whenever the parties to any claim for compensation under this chapter, including survivors' benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

702.243 states that "the settlement shall be deemed approved unless specifically disapproved within thirty days after receipt of a complete application." 20 C.F.R. §702.243(b). However, this regulation adds that "[t]his thirty day period does not begin until all the information described in §702.242 has been submitted," and that "[f]ailure to submit a complete application shall toll the thirty day period mentioned in section 8(i) of the Act, 33 U.S.C. 908(i), until a complete application is received." 20 C.F.R. §702.243(a), (b); *see generally Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993) (Brown, J., dissenting); *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991).

Among the requirements of Section 702.242 is that the settlement agreement clearly indicate "amounts to be paid for compensation, medical benefits, survivor benefits and *representative's fees*. . . ." 20 C.F.R. §702.241(b) (emphasis added). In this case, the initial settlement agreement submitted on March 22, 2010, stated that "[t]he parties have agreed that the employers/carriers shall pay a proportionate share and/or specific amount of [claimant's counsel's] reasonable attorney's fees and costs beginning in 2002." Several of the parties, including claimant, submitted on April 20, 2010, a "Supplemental Stipulation and Application for Settlement Under 33 U.S.C. §908(i)." This document, signed by claimant's counsel on April 15, 2010, states that the "supplemental application revises the language pertaining to attorney's fees and costs, and replaces the language referring to a 'proportionate share' with the actual percentage of contribution."[4] The submission of a "supplemental application" suggests that the initial settlement application was incomplete, and claimant's participation in amending the agreement establishes his awareness as to that fact. Consequently, the 30-day automatic approval period of Section 8(i)(1) was tolled until the filing of the "supplemental application" on April 20, 2010. 20 C.F.R. §702.243. The district director therefore properly found that the ten-day period in which payment was due commenced with her filing of the administrative law judge's Decision and Order on April 29, 2010. 33 U.S.C. §§914(f), 919(e), 921(a); *see generally Norton*, 25 BRBS 79.

[4]The supplemental agreement also acknowledges that "[o]nly those parties directly affected by the revision have signed the supplemental application." Claimant alleges that the amendment of the settlement agreement resulted from an *ex parte* communication between the administrative law judge and counsel for one of the employers and that the administrative law judge did not communicate to all of the parties the rationale for amending the original settlement agreement. Claimant thus argues that the amendment is an invalid means for extending the time period for application of the automatic approval provision. Claimant's contentions are without merit as the record establishes that claimant was a signatory to the amendment and, thus, had actual knowledge as to the issue giving rise to the amendment.

We next turn to the district director's finding that claimant is not entitled to a Section 14(f) assessment. Section 14(f) provides:

> 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). The assessment applies not only to decisions awarding benefits, *see McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1978), but also to settlement agreements which have been approved. *Carillo v. Louisiana Ins. Guaranty Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009); *Seward v. Marine Maint. of Texas, Inc.*, 13 BRBS 500 (1981). Thus, as with any other award, employer has ten days from the date the order approving settlement is filed by the district director to pay benefits in order to avoid a Section 14(f) assessment. *See Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994). The courts have stated that the only relevant factors for imposition of Section 14(f) assessment are: (1) the date payment was due; (2) whether 10 days elapsed prior to claimant's receipt of the payment; and (3) the calculation of the 20 percent assessment. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983).

In this case, the district director found that the settlement application was received by the administrative law judge on March 22, 2010, amended on April 20, 2010, and approved by the administrative law judge's Decision and Order dated April 27, 2010. The district director stated that she filed the administrative law judge's Decision and Order on April 29, 2010, thereby giving employer ten calendar days from that date, or until May 9, 2010, to make payment to claimant of any amounts owed pursuant to the settlement agreement. *See* 33 U.S.C. §§919(e), 921(a); *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied*, 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998). As employer issued a payment to claimant on May 3, 2010, which was received by claimant on May 5, 2010, the district director properly concluded that employer paid compensation within the ten-day time period and thus, was not in default. She therefore denied claimant's request for the issuance of a supplementary order declaring default. As the district director's finding that claimant's receipt of employer's payment of compensation on May 5, 2010, occurred within the ten days after it became due is in accordance with

law, we affirm the denial of a Section 14(f) assessment. *Sea-Land Service*, 41 F.3d 903, 29 BRBS 1(CRT).

Accordingly, the district director's Order Denying Request for Supplementary Order Declaring Default 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