BRB No. 99-1192

FARRELL HANSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: Aug 22, 2000
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order of Dismissal of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Richard A. Nielsen, Jr. (Le Gros, Buchanan & Paul), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order of Dismissal (1999-LHC-1049) of Administrative Law Judge Alexander Karst 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 during the course of his employment.

Claimant and employer settled the claim for benefits, and the administrative law judge approved the settlement. The district director filed the approval on September 18, 1998. Three days later, on September 21, 1998, employer drafted a check for full payment and sent it by Federal Express delivery to claimant. Because the address for claimant was incorrect, delivery failed, and claimant did not receive payment until September 30, 1998. As payment was made more than 10 days after the filing of the administrative law judge's decision, claimant petitioned for additional compensation in accordance with Section 14(f) of the Act. 33 U.S.C. §914(f). On December 30, 1998, the district director issued a Supplementary Order Declaring Default due to employer's failure to pay the additional compensation pursuant to Section 14(f). Claiming defenses against the assessment, employer sought a hearing on the propriety of the award of additional compensation and requested the case be transferred to the Office of Administrative Law Judges (OALJ). The administrative law judge, however, summarily dismissed the action in light of the holding in *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985). Employer appeals the dismissal, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in dismissing its case as it avers it is not at fault for the delayed payment and as Section 702.372(a) of the regulations, 20 C.F.R. §702.372(a), provides for a hearing before an administrative law judge in cases involving disputes over supplemental default orders. Claimant asserts that the matter is one of enforcement and the administrative law judge has no jurisdiction to address the default order. Section 14(f) 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); *Lauzon v. Strachan Shipping Co.*, 82 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985). Section 18(a) 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. The district court determines whether the default order is in accordance with law and enters judgment on the matter. 33 U.S.C.

[1]Contrary to employer's assertion, payment is made when it is received by the payee, not when it is mailed. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *Seward v. Marine Maintenance of Texas, Inc.*, 13 BRBS 500 (1981); *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1977).

§918(a); *Providence Washington*, 765 F.2d at 1281, 17 BRBS at 135(CRT); 20 C.F.R. §702.372(a).

In *Providence Washington*, the United States Courts of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, distinguished the procedures involving default and enforcement under Section 18(a) from those involving compensation orders under Section 21, 33 U.S.C. §921, which provides for hearings before an administrative law judge with review by the Board and courts of appeals. The court held that Section 14(f) is a self-executing penalty provision, and the penalty is encompassed in a standard Section 18(a) default order. As such, it is subject to enforcement proceedings under Section 18(a) and not to review under Section 21. Employer, however, asserts that the court did not consider Section 702.372(a) of the regulation in its analysis of these procedures. This regulation generally tracks the provisions of Section 18(a). In addition, Section 702.372(a) goes on to provide that, upon receipt of an application for an order declaring default, the district director

> shall institute proceedings . . . as if such application were an original claim for compensation, and the matter shall be disposed of as provided for in §702.315, or if agreement on the issue is not reached, then as in §702.316 et seq.

20 C.F.R. §702.372(a). Section 702.316 provides for referral to an administrative law judge where the parties do not agree following an informal conference. 20 C.F.R. §702.316. Employer relies on this portion of Section 702.372(a) in contending the administrative law judge erred in dismissing its claim, as it avers the United States Court of Appeals for the Ninth Circuit erred in failing to consider Section 702.372(a) in deciding *Providence Washington*. For the reasons set forth below, we reject employer's contention of error.

While employer is correct in stating that the Ninth Circuit, in whose jurisdiction this case arises, did not address the applicability of Section 702.372(a) in *Providence Washington*, we cannot accept its argument that the administrative law judge improperly relied on that case in dismissing the case at bar. The holding of *Providence Washington* that jurisdiction lies solely with the district court under Section 18(a) of the Act in matters of enforcement of default orders, including penalty assessments, is clear and unequivocal. *Providence Washington*, 765 F.2d at 1281, 17 BRBS at 135(CRT). The Ninth Circuit is not alone in taking this position. The courts of appeals have uniformly held that enforcement issues are presented when an order of default has been issued by the district director and the employer has not paid the amount in default; in such cases, the administrative law judge and Board have no jurisdiction under Section 21 of the Act, as the proceedings are governed by Section 18(a). *Id.*; *see also Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Schmit v. ITT Federal Electric Int'l*, 986 F.2d 1103, 26 BRBS

166(CRT) (7th Cir. 1993); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983).

The Board and courts have recognized that jurisdiction will lie under Section 21 in cases involving Section 14(f) under certain circumstances as when the district director declines to issue a default order or where the employer has paid the Section 14(f) penalty. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994); *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting); *Irwin v. Navy Resale Exchange*, 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 Const. 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 within these parameters.

The portion of Section 702.372(a) which provides for the procedures used in the initial claim pursuant to Sections 702.315 and 702.316 is not at odds with this case law. Section 702.372(a) provides that where employer is in default, *i.e.,* not making payments when due, claimant applies to the district director for an order declaring the *amount* of the default. The district director institutes proceedings, the same as with any claim, and if the parties agree as to the amount due under the compensation order, the district director issues a supplemental order declaring the default, consistent with Section 702.315. The procedures of Section 702.316 come into play only if there is no agreement on the compensation due under the initial order. Since calculation of the Section 14(f) penalty is a mathematical task flowing from the amount of the default, *see Providence Washington,* the assessment of the penalty is not an event which in itself triggers a disagreement and thus the opportunity for a hearing before an administrative law judge under Section 702.316. Thus, the administrative law judge has jurisdiction to hear the case where a factual matter is raised with regard to the compensation due which must be resolved before the district director is able to issue the default order. Specifically, where a question arises as to the interpretation or clarification of findings made in a final compensation order, *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); *Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988), the case must go to an administrative law judge for proceedings before a district director can assess additional compensation or determine if the employer is in default.[2] The Board then

[2]In *Bray*, upon receiving notification that his payments would be discontinued as the employer had paid the $24,000 maximum, the claimant sought a declaration of default, contending he was entitled to a total of $48,000 because the

has review authority over the administrative law judge's decision. *Id.* Thus, despite employer's correct assertion that Section 702.372(a) states that claims for additional compensation will be treated as original claims, a hearing before an administrative law judge is only appropriate in limited circumstances.

Employer's challenge to the penalty assessment must be raised in district court in the enforcement proceedings. The decision in *Pleasant-El* is instructive in this regard. In that case, the district court refused to consider employer's challenge to the legitimacy of the supplemental order, construing Section 18(a) as a narrow grant to review the order to ensure it complied with that section. The Eleventh Circuit disagreed, holding that in enforcement proceedings, the district court lacks authority to consider the validity of the underlying compensation order, but when the defendant-employer challenges the imposition and enforcement of the supplemental order, the district court has authority to determine whether the order is lawful. The court then went on to discuss the legal construction of Section 14(f) and the ten-day period, as this issue was properly raised in the enforcement proceedings.

The instant case does not involve interpretation of the compensation order, but rather the imposition and enforcement of the supplemental order. Unlike *Bray* and *Kelley*, there are no factual issues requiring interpretation of the underlying order to resolve and, hence, no issue for consideration by an administrative law judge. Section 21 of the Act does not apply. Employer's dispute is with the Section 14(f) assessment and the determination that its payment was not timely made. As employer has not paid the assessed penalty, it is in default and the matter is one of enforcement under Section 18(a). Employer's recourse is to raise its defenses when claimant brings the order to district court for enforcement,[3] as the district court has the authority to determine whether the

---

compensation order dealt with two separate injuries rather than a single injury. The deputy commissioner declined to declare default, stating that the administrative law judge found the claimant had sustained only one injury. The Fifth Circuit held that the Board had jurisdiction over the case as it did not involve an enforcement issue. In *Kelley*, after the order approving settlement became final, a dispute arose between the parties as to whether a particular doctor's services were related to the work injury and, thus, were the employer's responsibility. The Board held that the district director properly transferred the case to the OALJ for resolution of this question as such action was necessary before a finding of default could be made.

[3]Employer's arguments for equitable relief have been addressed and rejected previously. *Schmit*, 986 F.2d at 1103, 26 BRBS at 166(CRT) (constitutionality of Section 18(a) has been upheld); *Lauzon*, 782 F.2d at 1217, 18 BRBS at 60(CRT) (equitable excuses are irrelevant); *Matthews*, 22 BRBS at 442; *Durham*, 19 BRBS at

default order was issued in accordance with law. *See Pleasant-El*, 148 F.3d at 1300, 32 BRBS at 141(CRT); *Schmit*, 986 F.2d at 1103, 26 BRBS at 166(CRT). Because jurisdiction over enforcement proceedings lies with the federal district court, we hold that the administrative law judge properly relied on *Providence Washington* to dismiss this case.

105 (Section 14(f) applies despite timely payment to incorrect address).

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge