BRB No. 03-0711

JESSE F. HITT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 7, 2004
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order–Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

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

Joshua T. Gillelan II (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and the Supplemental Decision and Order Awarding Attorney's Fees (2002-LHC-1935) of Administrative Law Judge Stephen L. Purcell 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained a work-related right knee injury on March 12, 1999. Claimant underwent surgery on April 14, 1999, for a medial meniscus tear. Employer paid claimant temporary total disability benefits from April 1, 1999, to April 18, 2000. JX 1. On April 19, 2000, Dr. Nevins assessed that claimant has a 24 percent leg impairment. CX 1. On April 26, 2000, employer filed a notice of controversion. CX 3. On this date, employer also "unconditionally tendered" to claimant benefits for the 24 percent impairment and enclosed stipulations for claimant's signature. CX 2. Claimant's counsel responded that he would not agree to the stipulations and wanted employer to pay benefits voluntarily. CX 4. Employer renewed its offer to pay compensation on February 20, 2001, subject to claimant's signing the stipulations. CX 6. Claimant would not agree to the stipulations, and the case was forwarded to the administrative law judge. CX 7. In addition to seeking disability compensation, claimant sought the imposition of a Section 14(e) assessment, 33 U.S.C. §914(e), on benefits due and unpaid.

The administrative law judge rejected employer's contention that the district director erred in not issuing a compensation order and in forwarding the case to the administrative law judge. The administrative law judge found that the district director was without authority to issue a compensation order absent agreement of the parties. The administrative law judge awarded claimant temporary total disability benefits from April 1, 1999 through April 18, 2000, with a credit to employer for benefits paid, and scheduled permanent partial disability benefits for a 24 percent leg impairment with a credit to employer for payments it made on an earlier injury to the same body part. *See* 33 U.S.C. §914(j); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*).

The administrative law judge found that employer is liable for a 10 percent assessment pursuant to Section 14(e) on the benefits due under the schedule. The administrative law judge adopted the position of the Director, Office of Workers' Compensation Programs (the Director), that the mere filing of a notice of controversion "regardless of the circumstances or of the contents of the form" does not prevent imposition of the Section 14(e) assessment. Decision and Order at 7. The administrative law judge found that employer purported to controvert the claim on two grounds: (1) "Extent of permanent disability is controverted," and (2) "Currently in contact with employee regarding agreement of permanent partial disability rating per Dr. Nevins'

medical report dated 4/19/00." CX 3. The administrative law judge found that although the notice of controversion appears to be contesting the degree of disability, this was not actually the case because on the same day it controverted the claim, employer offered to pay claimant partial disability benefits pursuant to Dr. Nevins's opinion, so long as claimant agreed to the stipulations. *See* CX 2, 3. The administrative law judge thus found that employer obviously did not dispute the extent of claimant's impairment and controverted the claim only as a pretext to avoid claimant's right to seek modification absent the issuance of an order.[1] The administrative law judge concluded that employer is liable for a Section 14(e) assessment unless it controverts the claim based on a "reasonable belief" that compensation is not due. Decision and Order at 8. In a subsequent decision, the administrative law judge awarded claimant's counsel an attorney's fee of $3,885.50, payable by employer. The administrative law judge found that employer's offer to pay claimant compensation was not a "tender" within the meaning of Section 28(b) of the Act, 33 U.S.C. §928(b), because it was not unconditional. The administrative law judge also addressed employer's specific objections to the fee requested.

Employer appeals the administrative law judge's imposition of a Section 14(e) assessment and the finding that it is liable for claimant's attorney's fee. The Director responds that the administrative law judge properly analyzed the Section 14(e) issue and held employer liable for an additional 10 percent assessment. The Director also urges affirmance of the fee award payable by employer. Claimant has not responded to employer's appeal.

Employer first contends that the district director erred in not entering a compensation order based on the parties' stipulations and in forwarding the case to the administrative law judge. While employer is correct in asserting that 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

[1] 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 Intercounty 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) (4th Cir. 1998); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th 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 (4th 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).

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) (5th Cir. 1996); *see also Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 33 BRBS 209(CRT) (9th Cir.), *cert. denied*, 531 U.S. 956 (2000).

We next address employer's contention that the administrative law judge erred in finding that its notice of controversion was insufficient to prevent the imposition of a Section 14(e) assessment. Employer contends that the administrative law judge erred in finding that employer may file a notice of controversion only when it reasonably believes that compensation is not due claimant. The Director responds that the administrative law judge properly looked to the circumstances surrounding the filing of the notice of controversion in order to ascertain whether the notice was validly filed and served to prevent the imposition of a Section 14(e) assessment.

If employer does not pay benefits when they are "due," *see* 33 U.S.C. §914(b), it is liable for a Section 14(e) penalty, unless it has timely controverted the claim, 33 U.S.C. §914(d), or the district director excuses the failure to pay due to conditions beyond employer's control.[2] *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). Section 14(d) requires that a notice of controversion state "the grounds upon which the right to compensation is controverted." 33 U.S.C. §914(d). Employer's liability for a Section 14(e) penalty ends when employer controverts the claim or when the Department of Labor knows of the facts that a proper notice of controversion would have revealed. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Scott v. Tug Mate, Inc.*, 22 BRBS 154 (1989). Employer contends that it filed a

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[2] 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, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §914(e).

notice of controversion form stating the grounds upon which it controverted the claim, and that the administrative law judge erred in finding that the reasons employer gave were invalid and therefore insufficient to prevent the imposition of a Section 14(e) assessment. The Director urges the Board to affirm the administrative law judge's inquiry into the external circumstances surrounding the filing of the notice of controversion in order to ascertain its validity. For the reasons that follow, we reject the Director's argument, and we hold the administrative law judge erred in finding employer's notice of controversion was not sufficient.

The Director first cites *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), in support of his position that employer's notice of controversion is invalid on its face. In *Fairley*, employer purported to controvert the claim by stating:

> "based upon information presently available" it does not controvert the claim and that "unless evidence is obtained contrary to that provided the compensability of [the] claim is accepted." Employer further "requests the Secretary to submit a list of physicians he designates in this field of medical specialty so that one of them may be used to evaluate the degree of hearing loss, if any." In addition to promising to pay medical benefits, employer states that it will "voluntarily initiate benefits for any hearing loss determined to be applicable in accordance with the aforementioned medical evidence." After raising entitlement to Section 8(f) relief and disavowing any responsibility for attorney's fees, employer "demands" that the claim be dismissed, on the grounds that it "has voluntarily accepted this claim as compensable and no controversy exists."

Fairley, 22 BRBS at 191. The Board held that since Section 14(d) requires that employer state the grounds upon which the right to compensation is controverted, and as it was not clear from employer's answer whether it was even controverting the claim because it purported to accept liability, employer's answer did not constitute a controversion under Section 14(d) as a matter of law.[3] *Id.* The Fifth Circuit affirmed on the Board's reasoning. *Fairley*, 898 F.2d at 1095, 23 BRBS at 67(CRT); *see also Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991) (Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting). While *Fairley* supports the Director's

[3] Employer's purported controversion in *Fairley* was not on the proper form, but any writing that satisfies the requirements of an actual notice of controversion is sufficient under Section 14(d). *See White v. Rock Creek Ginger Ale*, 17 BRBS 75 (1984).

contention that, in order to be valid, a notice of controversion must state that payment is controverted and the grounds for the controversion as required by Section 14(d), it does not affect the disposition of this case. The notice in this case states that the right to compensation is controverted for a specified reason, in contrast to *Fairley* wherein the employer specifically stated it was not controverting the claim. CX 3. Thus, on its face, employer's notice of controversion in this case satisfies the requirements of Section 14(d). *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

The Director next contends that the decisions of the United States Court of Appeals for the Fourth Circuit in *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996), and *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998), support his position that one should look beyond the face of the notice of controversion to ascertain its validity. In this case, the Director contends, the administrative law judge properly scrutinized employer's other filings, especially employer's purported tender of compensation dated the same date as the notice of controversion, to conclude that employer was not actually controverting the extent of claimant's disability as the notice of controversion states. The cases cited by the Director address the requirements for a valid motion for modification pursuant to Section 22 of the Act. In that context, the Fourth Circuit, within whose jurisdiction the present case arises, has stated that the validity of a motion for modification must come from the "content and context of the [request for modification] itself. . . ," *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181, 21 BLR 2-545, 2-557 (4th Cir. 1999), in order to ascertain whether the motion expresses an actual intent to seek compensation for a particular loss. *Pettus*, 73 F.3d at 537, 30 BRBS at 9(CRT). In light of the Fourth Circuit's holdings, the Board has held that, in cases arising in the Fourth Circuit, consideration must be given to the circumstances surrounding the filing of the motion for modification, as well as to the content of the actual filing itself, in order to establish whether a valid motion for modification has been filed. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

We do not agree that this line of cases regarding the requirements for seeking modification under Section 22 should be extended to require that the administrative law judge look beyond the four corners of a notice of controversion under Section 14(d) in order to determine its validity. The Fourth Circuit has not suggested that its holdings regarding Section 22 should be extended to other filings in the manner proposed by the Director. Moreover, in *Craig v. Avondale Industries, Inc.*, 35 BRBS 164 (2001), *aff'd on recon. en banc.*, 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), the Director advocated, and the Board and the Fifth Circuit adopted, the position that a claim form signed by claimant, standing

alone, is sufficient to constitute a claim under the Act and to start the 30 days running in which employer must "pay or decline to pay" benefits for purposes of fee liability under Section 28(a), 33 U.S.C. §928(a). *See also* 33 U.S.C. §913. The Board held that the Act does not require that claimant submit any evidence of disability or impairment with his claim form in order for the claim to be "valid." Claimant need only submit a written document that evinces an intent to seek compensation. *Craig*, 35 BRBS at 169.

In contrast to his position in *Craig* that only the claim form itself is reviewed, the Director seeks to have the employer's stated reason on the notice of controversion judged by surrounding circumstances in order to determine its validity. However, we believe that the better position is to treat the requirements for a notice of controversion in a manner similar to those for a claim which triggers employer's obligation to pay or controvert under Section 28(a). Thus, the information required and provided in the four corners of the document, standing alone, determines the validity of the filing. In *Craig, et al.*, the claimants were not required to submit any evidence of an actual hearing loss with their claims for hearing loss benefits. *See Alario*, 355 F.3d 848, 37 BRBS 116(CRT). In this case, similarly, the inquiry is solely whether employer's notice provided the information required by Section 14(d). Employer filed a notice of controversion form that stated why the claim was being controverted and thus provided the information required by the Act. The form also sufficed to notify the Department of Labor that employer was not going to pay benefits voluntarily and was seeking claimant's agreement regarding claimant's entitlement to benefits, thus satisfying the underlying policy concerns. *See generally Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992). Resort to other documents in order to divine employer's true intentions unnecessarily clouds the inquiry into employer's liability for a Section 14(e) assessment. Compliance with Section 14(d) in a timely manner is all that the statute requires of employer in order to avoid an additional 10 percent assessment.

In this regard, the decision of the Board in *Pruner v. Ferma Corp.*, 11 BRBS 201 (1979), is instructional. In *Pruner*, the employer timely controverted the claim on one ground. It later "abandoned" that ground and controverted the claim on other grounds. The administrative law judge held employer liable for a Section 14(e) assessment. Employer and the Director contended that no assessment was due because employer had filed a timely notice of controversion. The Board agreed with employer and the Director and reversed the Section 14(e) assessment. The Board held that:

> The language of Section 14 is plain; there is no requirement that the particular grounds upon which the claim is controverted be initially determined with precision. Claimant would have employers penalized ten percent if they are unable to accurately investigate the injury, ascertain the facts, and construct a legal defense within two weeks of the injury. Such a

> requirement would not only present great difficulties in many cases but would be highly impractical.

11 BRBS at 209. Thus, *Pruner* supports the position that a notice of controversion need not accurately reflect the basis for employer's controversion throughout the course of the proceedings. It is sufficient if the notice actually controverts the claim and states a reason for the controversion, thereby alerting the Department of Labor to a controversy between the parties. *See Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

Finally, in *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *rev'd on other grounds on reh'g en banc*, 862 F.2d 491 (5th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989), the Fifth Circuit, in initially holding that the Act pre-empted a state tort claim for bad faith withholding of compensation benefits,[4] discussed proposed amendments to Section 14 of the Act that would have expressly required employer to controvert a claim in good faith and imposed sanctions for wrongful controversion. The court observed that Congress added criminal penalties for fraudulent denial of benefits, *see* 33 U.S.C. §931(c), but declined to amend Section 14. The court thus concluded that, "[t]his legislative history demonstrates at least that Congress was willing to leave the structure as it was, *by which the right to file a formal controversion is unconditioned*, subject only to severe criminal penalties for making a false statement in conjunction with such a controversion." 820 F.2d at 1412-1413 (emphasis added). The Director posits that this case is of limited value because of its subsequent history and because the court was not asked to address what constitutes a valid notice of controversion pursuant to Section 14(d). While the court's decision on pre-emption was reversed on rehearing, *see* n. 4, *supra*, the court's *dicta* regarding the failed attempts to amend Section 14(e) nonetheless support the conclusion that employer has an unqualified right to controvert a claim, so long as the requirements of Section 14(d) are satisfied.

Therefore, we hold that as employer filed a notice of controversion stating the reason for its controverting the claim, employer complied with the requirements of Section 14(d). Moreover, we hold that employer's notice of controversion was timely as it was filed seven days after Dr. Nevins first reported claimant had a permanent impairment. *See National Steel & Shipbuilding Co. v. United States Department of*

[4] On rehearing, the court, *en banc*, held that a federal court cannot enjoin state court proceedings on pre-emption grounds unless permitted by statute to order injunctive relief. The court stated that the issue of preemption must be raised in state court, and that the federal court also cannot pre-empt state law on the basis of the Declaratory Judgment Act. *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1035 (1989).

Labor, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); CX 1, 3. Thus, we reverse the administrative law judge's imposition on employer of a Section 14(e) assessment.

We next address employer's challenge to the administrative law judge's fee award. Employer first contends that the administrative law judge erred in holding it liable for claimant's attorney's fee. The Director responds that the administrative law judge properly held employer liable for the fee pursuant to Section 28(b). The administrative law judge found that employer did not "tender" compensation to claimant under Section 28(b) because its offer to pay was conditioned on claimant's accepting the stipulations accompanying the offer. For the reasons stated in *Jackson, et al. v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS ___, BRB No. 03-0629 (June 15, 2004), we affirm the administrative law judge's finding that employer did not "tender" compensation within the meaning of Section 28(b). As the administrative law judge awarded claimant benefits for a 24 percent leg impairment and interest thereon, claimant obtained additional compensation over that which employer paid or tendered.[5] Thus, we affirm the administrative law judge's finding that employer is liable for claimant's attorney's fee. *Id.;* 33 U.S.C. §928(b) Since, however, we have reversed the award of the Section 14(e) assessment, we remand this case for the administrative law judge to address in the first instance employer's contention that the fee award should be reduced to reflect the amount of benefits awarded and claimant's lesser degree of success. *See generally Hensley v. Eckerhart,* 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT) (1st Cir.), *cert. denied*, 488 U.S. 992 (1988); 20 C.F.R. §702.132.

We reject employer's remaining contentions concerning the attorney's fee award. Employer has not established that the administrative law judge abused his discretion in awarding a fee to more than one attorney in claimant's counsel's firm. The administrative law judge found that no duplicative work was performed and that, therefore, there is no reason why more than one attorney cannot work on a case. The administrative law judge also adequately addressed employer's contention that two attorneys should not be compensated for reading the Director's brief, stating that it was "supported by substantial legal authority" and that it was not inappropriate for two attorneys to "digest" it. The administrative law judge's rationale is sound and is affirmed. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table). Moreover, employer has not

[5] Given our disposition of the Section 14(e) issue, we need not address the parties' contentions concerning whether an award pursuant to Section 14(e) is an assessment of additional compensation or a penalty for purposes of attorney's fees.

demonstrated on appeal why the administrative law judge's award of a reduced fee for faxing copies of claimant's brief to the Director's counsel should be further reduced. Finally, the administrative law judge did not abuse his discretion in awarding claimant's counsel a fee for reasonable wind-up services. *Everitt v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998).

Accordingly, the administrative law judge's imposition on employer of a Section 14(e) assessment is reversed. In all other respects the administrative law judge's Decision and Order-Awarding Benefits is affirmed. The administrative law judge's finding that employer is liable for claimant's attorney's fee is affirmed. The administrative law judge's fee award, however, is vacated and the case is remanded to the administrative law judge for reconsideration of the amount of the fee in view of claimant's lesser degree of success.

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