

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 17 December 2012**

Case No.: **2012-LHC-00977**

OWCP No.: **06-210612**

In the Matter of:

**EDWARD STANLEY, JR.,**  
Claimant,

v.

**M. T. C. EAST / PORTS AMERICA (SAVANNAH GA) /**  
**PORTS INSURANCE COMPANY, INC.,**  
Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'**  
**COMPENSATION PROGRAMS,**  
Party In Interest.

Appearances: Gregory E. Camden, Esq.  
For Claimant

Brian P. McElreath, Esq.  
For Employer

Before: Richard K. Malamphy  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901-950 (2006) ("Act" or "LHWCA") and is governed by the implementing regulations found in the Code of Federal Regulations, Title 29, Part 18, and Title 20, Chapter VI, Subchapter A. The claim was forwarded to the Office of Administrative Law Judges on March 19, 2012 with a notation of injury on October 14, 2010.

In lieu of a hearing, the parties submitted written evidence.

The findings of fact and conclusions which follow are based upon a complete review of the entire record, in light of argument of the parties, as well as applicable statutory provisions, regulations and pertinent precedent.

### **STIPULATIONS**

The parties have stipulated and I concur with the following:

1. The LHWCA, 33 U.S.C. § 901 *et seq.*, as amended, applies to this claim.
2. An employer/employee relationship existed between the parties at all relevant times.
3. Claimant suffered a compensable injury on October 14, 2010 consisting of an 8.5% loss of his binaural hearing.
4. The injury arose out of and in the course of Claimant's employment with Employer.
5. Notice of the claim was timely.
6. Claimant is entitled to compensation and medical benefits.
7. Employer/Carrier is currently providing medical benefits.
8. Claimant has reached maximum medical improvement ("MMI").
9. Claimant is able to return to his pre-injury employment.
10. Claimant's average weekly wage at the time of injury was \$1,284.04.
11. Employer made a lump sum payment of \$10,633.50 under the North Carolina Worker's Compensation Act.
12. Employer made an additional payment of \$3,899.53 under the LHWCA.

### **PARTY CONTENTIONS**

#### **Claimant's Contentions:**

Claimant argues that Employer's failure to timely controvert the LHWCA claim requires that Employer pay Section 14(e) penalties on the entire amount of compensation due under the Act, \$14,533.02, regardless of the amount or timeliness of compensation paid under the state act.

## **Employer's Contentions:**

Although Employer admits that it is responsible for Section 14(e) penalties for failure to timely controvert, Employer argues that it is only responsible for Section 14(e) penalties on the difference between the compensation paid under the state award and the compensation due under the Act. In the alternative, Employer states that Claimant is equitably estopped from receiving penalties on funds that he accepted under the state act.

## **DISCUSSION**

A notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is voluntarily paid. Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980). The employer should pay the compensation it considers due and controvert the remainder. Alston v. United Brands Co., 5 BRBS 600, 607 (1977). It is an employer's knowledge of the injury, and not its receipt of the claim from the District Director, triggers its duty to pay the claim or controvert the claimant's entitlement to benefits. Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904 (5th Cir. 1997) (interest due 14 days following the notice to employer); Renfroe v. Ingalls Shipbuilding, Inc., 30 BRBS 101 (1996) (en banc) ( interest accrues on all benefits due and unpaid from the date that they become due under Section 14(b) until they are paid); Meardry v. Int'l Paper Co., 30 BRBS 160 (1996) (interest should be calculated according to a rate determined under 28 U.S.C. § 1961).

In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice under Section 12. See Spencer v. Baker Agric. Co., 16 BRBS 205, 209 (1984). Here, Claimant filed a claim for benefits under the LHWCA on August 17, 2011. Employer was thus required to file a notice of controversion by August 31, 2011. When Employer failed to either voluntarily make payments or file a notice of controversion at this time, a 10% penalty became due on the entire amount owed, \$14,533.02, under Section 14(e). Accordingly, Employer became liable to Claimant for a total of \$15,986.32<sup>1</sup> on August 31, 2011.

Employer paid Claimant \$10,633.50 under the state workers' compensation act on June 6, 2012 and an additional \$3,899.62 under the LHWCA on June 7, 2012.<sup>2</sup> Employer cites to Dygert v. Manufacturer's Packaging Co., for the proposition that Section 14(e) penalties are only payable on the difference between compensation paid under a state worker's compensation act and the compensation due under the LHWCA. 10 BRBS 1036 (1979). In that case, however,

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<sup>1</sup>  $1.1 \times \$14,533.02 = 15986.32$ .

<sup>2</sup> The parties' briefs contain conflicting dates as to when the compensation payments were made. Employer's brief notes a state award payment on August 7, 2012 while Claimant's brief notes a payment date of June 6, 2012 for the state award and June 7, 2012 for the LHWCA award. As both dates fall well outside the time required for controversion, the exact date is not necessary to a decision on Section 14(e) penalties, but may be required for calculation of interest. Accordingly, I will accept Claimant's earlier dates of June 6, 2012 for the state award and June 7, 2012 for the LHWCA award for the dates of payment.

the claimant was receiving monthly payments under a state award that were lower than the award he was entitled to under the LHWCA. Thus, the employer in that case was only liable for a Section 14(e) penalty on the portion remaining due for each payment.

Here, Claimant's compensation became due on August 31, 2011, but no payment was made until June 6, 2012. *Maes v. Barrett & Hilp* provides the better example of the application of Section 14(e) penalties in the instant case by explaining that the amount due under the LHWCA is first determined, including penalties, and only afterward is the amount of the state compensation payment subtracted to determine the remaining amount due Claimant. 27 BRBS 128 (1993). Accordingly, Claimant was entitled to \$15,986.32 on August 31, 2011, less Employer's payment of \$14,533.02, for a total of \$1,453.30 remaining due.

Employer further argues that Claimant is equitably estopped from receiving Section 14(e) penalties because he accepted Employer's payment of the state award without reservation. I would first note Section 14(e) penalties are mandatory upon fulfillment of the statutory prerequisites. The Fourth Circuit has stated that the Section 14(e) "penalty is mandatory unless non-payment [or the failure to timely controvert] is due to conditions beyond employer's control." *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 171, 8 BRBS 241, 247 (4th Cir.), cert. denied, 439 U.S. 979 (1978). In this case, Employer has presented no evidence that it was unable to either pay or controvert the claim. Although Employer notes that the process of collecting all the evidence necessary to make a determination on liability was cumbersome, this does not rise to the level of exceeding Employer's control or making controversion of the claim impossible.

Employer's equitable estoppel argument also fails because the elements of equitable estoppel have not been fulfilled. Under the LHWCA, there are four necessary elements to equitable estoppel: the party to be estopped must know the facts, intend that his acts be relied on or act so that the moving party has a right to believe the acts are intended to be relied on, the moving party must be ignorant of the facts, and the moving party must rely on those acts to his detriment. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT) (9<sup>th</sup> Cir. 1996), aff'd and remanded on other grounds sub nom. Although Claimant did accept the state award payment, this was far beyond the point at which liability for Section 14(e) penalties attached. Employer could not have relied on that act to its detriment because the detriment had been incurred almost a full year earlier. Accordingly, equitable estoppel does not apply to this case.

## CONCLUSION

I have determined the following based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent. Claimant is entitled to \$1,453.30 in Section 14(e) penalties based on Employer's failure to timely pay or controvert the instant claim. Employer has not proven circumstances beyond its control or established a basis for equitable estoppel.

## **ORDER**

It is hereby **ORDERED** that:

1. Employer shall pay Claimant \$1,453.30 in Section 14(e) penalties.
2. Employer is responsible for medical treatment for Claimant's work injuries in accordance with Section 7 of the Act, to include all necessary and allowable care for his hearing loss.
3. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).
4. All computations are subject to verification by the District Director.
5. Claimant's counsel, within twenty (20) days of the receipt of this Order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have twenty (20) days to respond with objections thereto.

**SO ORDERED.**

RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/jrs  
Newport News, Virginia