

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 10-14413-G

DAVID WHEELER,
Petitioner-Appellant

v.

KELLOGG, BROWN & ROOT and
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
Respondents-Appellees

On Appeal from a Final Order of the United States District Court
For the Middle District of Florida
(Hon. Henry Lee Adams, Jr., United States District Judge)

AMICUS BRIEF FOR THE DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

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CERTIFICATE OF INTERESTED PERSONS

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James, Rae Ellen, Associate Solicitor, United States Department of Labor, Black Lung and Longshore Legal Services Division

Kellogg, Brown & Root, now known as KBR, Inc., a publicly traded corporation (KBR), the employer (through its subsidiary Service Employees International, Inc.) of Mr. Wheeler at the time of his injuries, the respondent-appellee

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AMICUS STATEMENT

The Director, Office of Workers' Compensation Programs, United States Department of Labor files this brief as *amicus curiae*. The Director administers the Longshore and Harbor Workers' Compensation Act and its extensions, including the Defense Base Act, as the Secretary of Labor's delegate. He therefore has a significant programmatic interest in this appeal of a District Court decision interpreting a provision of the Longshore Act. He is authorized to file this brief without the consent of the parties or leave of the Court by Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Section 14(f) of the Longshore Act imposes liability for an additional 20% of all compensation that is not paid within 10 days after it becomes due. Wheeler received a check for the full amount 10 days from the date it was due, but the drawee bank did not fully honor the check for an additional 12 days after the check was deposited. Did the District Court correctly rule that payment was timely made because, as a matter of law, the date a check is eventually honored relates back to the date it was delivered regardless of the reason for the delay?

BACKGROUND

A. Legal Background

The Defense Base Act (“DBA”), 42 U.S.C. § 1651 *et seq.*, extends workers’ compensation coverage under the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 901 *et seq.*, (“Longshore Act”) to, *inter alia*, “employee[s] engaged in any employment . . . under a contract entered into with the United States . . . where such contract is to be performed outside the continental United States.” 42 U.S.C. § 1651(a)(4). Claims for compensation under the Longshore Act are administered by the Office of Workers’ Compensation Programs (“OWCP”) of the United States Department of Labor (“DOL”) and are subject to the comprehensive adjudication scheme provided by §§ 19 and 21 of the Act, 33 U.S.C. §§ 919, 921. The result of these procedures is a compensation order making an award or rejecting the claim. 33 U.S.C. § 919(d); 20 C.F.R. § 702.348.

The Act also provides procedures governing the failure to comply with the terms of a compensation award. A compensation award becomes effective and enforceable when it is filed in the Office of the District Director. 33 U.S.C. § 921(a).¹ If an employer defaults in the payment of

¹ Although the Longshore Act refers to the “deputy commissioner,” that official is now the “District Director.” 20 C.F.R. § 702.105. The change in titles is purely administrative and does not affect the substance of that

compensation owed under an award, the claimant may apply for a supplementary order of default from the District Director. A claimant may enforce a supplementary order by filing a certified copy of the order with a Federal District Court, which “shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law.” 33 U.S.C. § 918(a).

The Act also imposes consequences on employers that do not pay compensation owed under the terms of an effective award. Section 14(f) provides that “[i]f 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[.]” 33 U.S.C § 914(f).² The Act does not define the term “paid” or otherwise

official’s authority. 20 C.F.R. §§ 701.301(a)(7), 702.105; *Kreschollek v. Southern Stevedoring Co.*, 223 F.3d 202, 206 n.1 (3d Cir. 2000). This brief refers to the “District Director” unless quoting a source that uses the earlier title.

² This additional twenty percent is properly denominated “additional compensation” or “section 14(f) compensation” rather than a “penalty.” *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. Brown*, 376 F.3d 245, 249 (4th Cir. 2004) (“payments going directly to an employee are compensation, while payments going to the LHWCA special fund are penalties or fines”); *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 954 (9th Cir. 2007) (same). Nevertheless, the additional payment is frequently described as a penalty in the caselaw and the pleadings below. To avoid confusion, it is referred to as “section 14(f) compensation” herein.

specify the form a payment must take to satisfy section 14(f)'s timeliness requirement. *See* 33 U.S.C. § 902 ("Definitions").

On June 9, 1980, the OWCP issued Notice No. 42, entitled "Penalty Provisions of Section 14(f) of the Longshoreman's and Harbor Worker's Compensation Act." Vol. A, Ben. Rev. Bd. Serv. (MB) 4-74 ("Notice 42").

Notice 42 states in pertinent part:

Payment [of compensation] becomes due when the Order is filed in the Office of the [District Director]. No distinction is made between an award evolved by agreement of the parties such as an agreed settlement [or] an award resulting from a hearing.

No distinction is made between payment by check or by draft. If the check or draft is honored by the bank on which drawn, the time of payment relates back to the date the check or draft is received by the payee. If the check or draft is not promptly honored by the drawee bank, payment is not considered to have been made until the check or draft is honored. (emphasis added).

This interpretation is repeated in OWCP's Longshore Procedure

Manual, which provides:

Definition of Late Payment.

* * * * *

No distinction is made between payment by check or by draft. If the check or draft is promptly honored by the drawee bank, the time of payment relates back to the date the check or draft is

received by the payee. If the check or draft is not promptly honored by the drawee bank, payment is not considered to have been made timely, until the check or draft is honored.

Longshore (DLHWC) Procedure Manual, ch. 8-203, “Late Payment: Section 14(f) Penalty,” ¶ 3.c (emphasis added).³

B. Factual and procedural background

The full factual and procedural history of this case is fairly intricate. These details are largely irrelevant, however, because the District Court granted summary judgment on narrow grounds. The Director therefore summarizes only those facts relevant to the question presented.

1. *Injury and settlement*

Wheeler was employed by Service Employees International (“SEIU”), a subsidiary of respondent Kellogg, Brown & Root (“KBR”) (collectively, “employer”), to perform services in Iraq related to a contract with the United States government. Document (“Doc.”) 10-1 at 3.⁴ He filed a claim for workers’ compensation benefits under the Longshore Act, as extended by the DBA, arguing that he had suffered a disabling injury when a vehicle he was travelling in was thrown by an explosion. Doc. 10-1 at 7.

³ The Longshore Procedure Manual is available electronically at <http://www.dol.gov/owcp/dlhwc/lspm/pmtoc.htm>.

⁴ References to Exhibits are to the record compiled before the District Court. Exhibits are cited by Document number and page number.

Wheeler, his employer, and its insurance carrier, respondent Insurance Company of the State of Pennsylvania (“ICSP”), reached a voluntary settlement resolving the claim for a lump-sum payment of \$145,000. Doc. 10-1 at 8. After reviewing the agreement to ensure that it was neither inadequate nor procured by duress, *see* 33 U.S.C. § 908(i)(1), a DOL Administrative Law Judge (“ALJ”) issued an order approving the settlement. Doc. 10-1 at 16. The District Director filed the ALJ’s Order on January 4, 2008, and served it on the parties. Doc. 10-1 at 15. This filing by the District Director rendered the ALJ’s order “effective,” triggering Respondents’ obligation to pay compensation within 10 days or incur liability for an additional twenty percent of the amount owed. 33 U.S.C. §§ 921(a), 914(f).

ICSP delivered a check, drawn on the Bank of America, for the amount of the settlement to Wheeler’s attorney ten days later, on January 14, 2008.⁵ According to Wheeler, he attempted to negotiate the check with his

⁵ The settlement agreement specifically provided that the check should be delivered to Wheeler’s attorney, rather than Wheeler himself. Doc. 10-1 at 12. Absent such an agreement, the fact that Wheeler did not receive the check within the ten-day period after the order was filed would render the payment untimely. 33 U.S.C. § 914(a) (compensation to “be paid . . . directly to the person entitled thereto . . .”); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1221 (5th Cir. 1985) (“This Court is hard put to understand how issuing and holding a check in the office of the insurer is payment *directly to the claimant*”).

own bank, Wachovia, on January 16th and 17th, but Wachovia refused to honor it. Doc. 10-1 at 23. On January 18th, he opened a new account with Bank of America, the drawee bank, and deposited the check. *Id.* He was allowed to withdraw \$1,900 on January 21, but a hold was then placed on the account. Bank of America did not make the full amount available to Wheeler until January 30, 2008, twenty-six days after payment was due under 33 U.S.C. § 914(f). Doc. 10-1 at 37.

2. *Administrative Proceedings*

On February 15, 2008, the District Director issued an Order to Show Cause, directing ICSP to voluntarily pay section 14(f) compensation or explain why such compensation should not be assessed. Doc. 10-1 at 35. On February 25, AIG, ICSP's parent, responded, stating it had conferred with Wheeler's then-attorney and "resolved this problem" which was "an internal problem with the claimant and his bank and had nothing to do with AIG or the check." Doc. 13 at 21. After conducting a teleconference with the parties on March 11, the District Director issued a Supplemental Order of Default ("Supplemental Order") on March 21, 2008. Doc. 10-1 at 39. The District Director found that Wheeler had deposited the check with Bank of America on January 18, 2008, but did not have access to the funds until

January 30, 2008. *Id.* He therefore imposed liability for section 14(f) compensation in the amount of \$26,764.36.⁶ Doc. 10-1 at 40.

ICSP objected, contending that the District Director lacked authority to issue the Supplemental Order and that it had made timely payment by operation of the relation-back doctrine, and requesting a hearing before an ALJ. Doc. 10-1 at 42. On April 4, 2008, the District Director responded, stating that he had authority to issue the Supplemental Order and that any challenge to it should be directed to the Benefits Review Board (“BRB”). Doc. 10-1 at 22. The BRB dismissed ICSP’s ensuing appeal, holding that it lacks jurisdiction over section 14(f) proceedings “except under circumstances where the district director declines to issue a default order or an employer has paid the benefits and the Section 14(f) assessment,” and rejecting KBR’s argument that it was entitled to a hearing before an ALJ. *D.W. v. Service Employees International, Inc.*, BRB No. 08-570, 2009 WL 4759653 (Jan. 23, 2009). Doc. 10-1 at 48. KBR did not appeal this decision to the Eleventh Circuit.

⁶ Wheeler received a lump-sum payment of \$145,000, of which he was required to pay his attorney \$11,178.22. His net compensation was \$133,821.78. Twenty percent of the net compensation is \$26,764.36.

3. Proceedings before the District Court

Wheeler filed a “Petition for Entry of Judgment in Accordance with Declaration of Default Pursuant to 33 U.S.C. § 918(a)” on April 8, 2009 (“Petition”), seeking enforcement of the Supplemental Order. Doc. 1.

Wheeler argued that KBR had no right to an ALJ hearing because it did not timely request one before the Supplemental Order was issued. Doc. 13 at 8-13. Wheeler further asserted that no material facts were in dispute and that Bank of America’s failure to make the funds available to Wheeler for twelve days demonstrated that he had not been paid promptly. Doc. 13 at 13-17.

Respondents opposed the Petition and moved for summary judgment in their own right, arguing that the Supplemental Order was not in accordance with law. Most importantly for purposes of this appeal, Respondents argued that “payment was timely even if the delay in Wheeler’s access to the funds was attributable to ICSP” by operation of the relation-back doctrine. Doc. 17 at 8. Thus, according to Respondents, the fact the check was eventually paid (January 30, 2008) meant payment had constructively been made on the date Wheeler’s attorney received it (January 14, 2008). Respondents made a number of alternative arguments, including that they were entitled to an ALJ hearing. Doc. 17 at 3-8.

On January 15, 2010, the District Court issued an Order denying the Petition. *Wheeler v. Kellogg, Brown and Root et al.*, 3:09-CV-00897-HLA-J-25TEM; Doc. 19. The Court addressed only Respondents' relation-back argument, effectively adopting it. Doc. 19 at 9-12. Relying principally on the BRB's decision in *Seward v. Marine Maintenance of Texas*, 13 Ben. Rev. Bd. Serv. (MB) 500 (1981), Notice 42, and the Longshore Procedure Manual, the Court concluded:

In the present case, it is undisputed that the check was delivered timely on January 14, 2008. It is also undisputed that Petitioner's account was credited with the full deposit on January 30, 2008; thus, there is no question that the check was honored. Pursuant to the above-cited authorities, the time of payment relates back to January 14, 2008, the date of delivery of the check. Because the payment was timely, the District Director's Supplemental Compensation Order and Declaration of Default, imposing a twenty percent penalty, is not in accordance with the law and will not be enforced.

Doc. 19 at 11-12. Having refused to enforce the District Director's Supplemental Order, the Court considered the remaining arguments to be moot, including Respondents' argument that they were entitled to a hearing before an ALJ.

Wheeler filed a "Motion to Alter or Amend Judgment[,]" contending that the Court had overlooked the specific language in the OWCP Procedure Manual and Notice No. 42 providing that the relation-back doctrine should

only be applied where a check is “promptly” honored. Doc. 20. The District Court denied the motion, explaining that it had “fully and carefully considered [the OWCP Procedure Manual and Notice No. 42] before entering the January 15, 2010 Order.” Doc. 22 at 3. Wheeler then appealed to this Court.

SUMMARY OF THE ARGUMENT

The District Court’s ruling that the date a check for Longshore Act compensation is paid relates back to the date it was received by the claimant in all circumstances is in error. Section 14(f) is designed to encourage employers to pay compensation promptly and to compensate disabled claimants for their delayed receipt of often-crucial benefits. As such, it is construed strictly against employers. The District Court’s wholesale adoption of the commercial common law’s relation-back doctrine is inappropriate in this context. It is supported only by the BRB’s decision in *Seward v. Marine Maintenance of Texas*, 13 Ben. Rev. Bd. Serv. (MB) 500 (BRB 1981), which, in turn, is itself supported only by a misreading of the Director’s position as stated in Notice 42. Respondents are entitled to the benefit of the relation-back doctrine only if they timely delivered a check that is promptly honored by the drawee bank. The District Court incorrectly ruled that the relation-back principle renders Respondents’ payment timely

even if the drawee bank's 12-day delay in honoring the check was entirely attributable to Respondents' own actions. This decision should be reversed.

ARGUMENT

A. Standard of Review

This appeal presents only a question of law decided by the District Court, which this Court reviews *de novo*. *Ellis v. England*, 432 F.3d 1321, 1323 (11th Cir. 2005). The District Court's construction of the Longshore Act is therefore subject to *de novo* review. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 1301 (11th Cir. 1998). This Court defers, however, to "official expressions of policy by the Director" as the administrator of the Longshore Act. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1563 (11th Cir. 1991) (citing *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 1262 (11th Cir.1990)).

B. The District Court erred in ruling that Respondents are entitled to the benefit of the relation-back doctrine as a matter of law; under section 14(f), the date a check is paid relates back to the date it is delivered only if it is promptly honored by the drawee bank

Section 14(f) "serves two distinct purposes. First, it 'encourages employers to provide prompt payment of compensation to injured workers.' Second, when an employer violates the Act's provisions requiring prompt

payment, § 14(f) serves to ‘compensate claimants for their inconvenience and expense during the time when they did not receive timely compensation.’” *Newport News Shipbuilding and Dry Dock Co. v. Brown*, 376 F.3d 245, 250 (4th Cir. 2004) (quoting *Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 372 (7th Cir. 1981), and *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 977 (Fed. Cir. 1997)). Section 14(f) is self-executing; the twenty percent additional compensation is due “immediately upon the expiration of the ten-day period.” *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 128 n.2 (5th Cir. 1983). It is also mandatory; the District Director has no discretion whether to assess it. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141 (9th Cir. 2001); *Sea-Land Service v. Barry*, 41 F.3d 903, 910 (3d Cir. 1994); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1222 (5th Cir. 1985).

To accomplish its twin purposes, section 14(f) does not merely require the timely payment, but the “punctiliously prompt payment” of compensation awards. *Pleasant-El*, 148 F.3d at 1303. To that end, this and other courts have interpreted the 10-day requirement itself strictly, rejecting arguments that payment is timely if made within 10 business days rather than 10 calendar days. *See, e.g., Pleasant-El*, 148 F.3d 1303; *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 143, 145 (2d Cir. 1997); *Reid v. Universal*

Maritime Serv. Corp., 41 F.3d 200, 201 (4th Cir. 1994); *contra Quave v. Progress Marine*, 912 F.2d 798, 800 (5th Cir. 1990). Attempts to extend the 10-day period by moving the trigger for its onset from the date the District Director files the order to the date the order is received by the liable employer, *Carillo v. Louisiana Insurance Guaranty Association*, 559 F.3d 377, 381-82 (5th Cir. 2009), or three days after the order is mailed to the employer, *Lauzon*, 782 F.2d at 1219-20, have been similarly unsuccessful.

Underscoring the strictness of the provision, the courts of appeals have been of one voice in holding that “section 14(f) does not admit to an exception for late payment for equitable reasons.” *Lauzon*, 782 F.2d at 1222. *Accord, Pleasant-El*, 148 F.3d at 1303; *Hanson*, 307 F.3d at 1140; *Burgo*, 122 F.3d at 142; *Severin v. Exxon Corp.*, 910 F.2d 286, 288 (5th Cir. 1990). For example, in *Hanson*, 307 F.3d at 1141-43, the employer attempted to deliver a settlement check to the claimant via Federal Express six days after it was due. Delivery failed because the claimant had provided an incorrect address. Five days later (eleven days from the order), the employer learned of the delivery failure and had the funds delivered to the claimant the following day. A District Director issued a supplemental order awarding section 14(f) compensation, but the District Court refused to

enforce it. The Ninth Circuit reversed and remanded with instructions to enforce the order, explaining:

Precluding equitable considerations not only comports with the plain language of the statute, but also furthers the purpose of the LWCA and, in particular, its penalty provision. The goals of the LHWCA are to provide an efficient mechanism for enforcing unpaid compensation awards and to encourage the prompt payment of injured workers. Adding equitable review at the district court level would undermine the goals of the statute and, in light of the decisions of our sister circuits, would also undermine uniformity in admiralty law.

307 F.3d at 1142-43. *See also Lauzon*, 782 F.2d at 1220-21 (rejecting claim that having the check available for claimant to pick up constituted payment because of a pattern of prior dealings and an explicit arrangement with claimant's spouse).

The clear lesson that emerges from these cases is that successful Longshore Act claimants are entitled to receive their compensation within 10 days after it becomes due without exception. The District Court's ruling is entirely inconsistent with this teaching. It would be anomalous if the employer in *Hanson* or *Pleasant-El* could have entirely avoided liability for section 14(f) compensation by delivering a check drawn upon an empty account, so long as they remembered to eventually deposit sufficient funds

into the account at a later point and thereby invoke the “relation-back” doctrine.

The only authority supporting the District Court’s wholesale importation of the commercial common law’s relation-back doctrine is the BRB’s decision in *Seward v. Marine Maintenance of Texas*, 13 Ben. Rev. Bd. Serv. (MB) 500 (1981). Doc. 19 at 10-11. *Seward*, in turn, justified this importation by claiming that “[t]his common law rule has been adopted by the Office of Workers’ Compensation Programs in Notice No. 42.” 13 Ben. Rev. Bd. Serv. at 502. But this is simply wrong. Notice 42 does not state that the date a check is paid always relates back to the date it was delivered. Notice 42 allows the date of payment to relate back to the date of delivery only where the check is “promptly honored by the drawee bank.” The same rule is repeated in the Longshore Procedure Manual.⁷

Both *Seward* and the District Court erred in ignoring the key qualifier, “promptly.” Notice 42’s limited incorporation of the relation-back principle is designed to protect an employer from liability for additional compensation under section 14(f) if it delivers a check that will be promptly honored by

⁷ In any event, the BRB’s construction of the Longshore Act is not entitled to deference. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (“[T]he Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts.”).

the drawee bank upon presentment within ten days after payment is due. If the claimant does not deposit the check until a later date, or if payment is delayed solely due to the actions of the claimant or his bank, the date of payment will relate back to the date of delivery. If the drawee bank delays payment for any other reason, the employer is not entitled to the benefit of the relation-back principle and payment is made, for purposes of section 14(f), only when the claimant actually receives the compensation owed.

Wheeler alleges, and the District Director found, that the 12-day delay in Bank of America honoring the check at issue in this case was caused by a problem with the zero-balance account the check was drawn upon. Brief for Petitioner-Appellant at 5; Doc. 10-1 at 38. If so, respondents are not entitled to the benefits of the relation-back doctrine, and therefore did not pay compensation to Wheeler, for purposes of section 14(f), until Bank of America gave Wheeler full access to the funds on January 30, 2008. Because this is more than ten days after the compensation order became effective, Wheeler would be entitled to additional compensation under § 14(f). This District Court's decision to the contrary should be reversed.

CONCLUSION

The Director, Office of Workers' Compensation Programs, United States Department of Labor, urges this Court to vacate the United States

District Court's Orders declining to enforce the District Director's Supplemental Order awarding David Wheeler twenty percent additional compensation pursuant to 33 U.S.C. § 914(f). The Court should remand the case to the District Court to determine whether the District Director's Supplemental Order is otherwise "in accordance with law," and if so, to enforce compliance with it.

Respectfully submitted,

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COMBINED CERTIFICATES

I hereby certify with regard to the Director's Brief for the Amicus Curiae that:

- 1) required privacy redactions have been made to the brief;
- 2) the electronic brief is an exact copy of the paper document;
- 3) the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses;
- 4) pursuant to Fed.R.App.Proc. 32(a)(7)(B) and (C), the brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 4,747 words; and

5) on January 3, 2011, a copy was served through the Court's electronic filing system on the following registered users:

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2010, I caused a copy of the foregoing Director's Amicus Brief for the Director, Office of Workers' Compensation Programs, United States Department of Labor, to be mailed, postage prepaid, to the following:

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