UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

Linda Rice, *on behalf of the estate of Marlin D. Rice*,	)	
Plaintiff,	)	No. 6:21-cv-00173-REW-HAI
Linda Rice,	)	
Intervenor,	)	ORDER
v.	)	
BITUMINOUS CASUALTY CORP.,	)	
Defendant.	)	

*** *** *** ***

Before the Court is Plaintiff Linda Rice's motion for summary judgment (*See* DE 19) and Defendant Bituminous Casualty Corporation's cross-motion for summary judgment (*See* DE 22). For the following reasons, the Court **GRANTS** Plaintiff's motion for summary judgment and **DENIES** Defendant's cross-motion for summary judgment.

I. Background

a) Factual Background

This tale began in September of 2002, when Marlin D. Rice[1] filed a claim to receive black lung benefits under the federal Black Lung Benefits Act with the United States Department of Labor. *See* DE 1 at 3 (Complaint). Mr. Rice, a former coal miner, worked in Harlan County, Kentucky for Karst Robbins Coal Company. *Id*. *See also* DE 19 (Plaintiff's Motion for Summary

[1] When the Complaint was filed, Marlin Rice was Plaintiff. *See* DE 1 (Complaint). On July 31, 2022, Marlin Rice died. *See* DE 33 (Motion). Mr. Rice's widow, Linda Rice, moved under Federal Rule of Civil Procedure 25 to substitute as the representative of Mr. Rice's estate and under Rule 24 to intervene to assert her own superior interest under 20 C.F.R. § 725.545(c). *Id*. at 1. The Court granted the motion. *See* DE 36.

Judgment). Defendant Bituminous Casualty Corporation is a corporation that was organized in Illinois. *See* DE 1 at 2. Defendant, as to relevant subject matter, insures Karst Robbins Coal Company. *Id*. Upon review, the district director of the Office of Workers' Compensation Programs (OWCP), who administers the Black Lung Benefits Act, found that Mr. Rice was not entitled to receive benefits "because although he had established the existence of complicated pneumoconiosis and total disability, he was unable to establish that his disease was caused by coal mine work." *Id*. at 3. Mr. Rice would ultimately file four subsequent requests for modification. *Id*. The first request was denied in April 2005. *Id*. The second request was never adjudicated. *Id*.

Mr. Rice filed his third request on September 24, 2007. The district director treated Mr. Rice's third request for modification as a subsequent claim. *Id*. He found Mr. Rice established all of the elements necessary for entitlement and issued a Proposed Decision and Order. *Id*. *See also*, DE 19-1 (District Director's Proposed Decision and Order). Mr. Rice was awarded $17,247.40, representing benefits that accrued up to and including September 2007, and monthly payments of $1,022.60 for future benefits. *See* DE 19-1 at 2. Afterwards, Defendant requested a formal hearing before an Administrative Law Judge (ALJ). *See* DE 1 at 3-4. ALJ Paul Johnson treated Mr. Rice's third request as a subsequent claim and denied Mr. Rice's claim for benefits. *Id*. at 4. Mr. Rice appealed the denial to the Benefits Review Board ("BRB"), who then vacated the denial. *Id*. The BRB held that the claim should be treated as a request for modification rather than a subsequent claim. *Id*. The case was remanded back to ALJ Johnson, who reaffirmed his denial of benefits. *Id*.

Mr. Rice finally found recourse with his fourth, and final, request for modification, filed on October 23, 2013. *Id*. Mr. Rice's initial request was denied by the district director, but after Mr. Rice requested a formal hearing, ALJ Daniel Solomon issued an order awarding Mr. Rice benefits on August 1, 2017. *Id*. *See also*, DE 19-2 (ALJ Solomon's Decision and Order). ALJ Solomon

found that Karst Robbins Coal Company is the responsible operator and Defendant is the correct carrier. *See* DE 19-2 at 11. After evaluating Mr. Rice's chest x-ray and CT scan evidence, ALJ Solomon found that Mr. Rice had established the existence of complicated pneumoconiosis. *Id*. at 31. As such, Mr. Rice was entitled to the presumption that his complicated pneumoconiosis arose out of coal mine employment. *Id*. Further, based on a review of opinions from three different doctors, ALJ Solomon found that Mr. Rice was totally disabled due to coal worker's pneumoconiosis (CWP). *Id*. at 38. Mr. Rice was awarded benefits dating back to August 2006, when he established disability. *Id*.

ALJ Solomon's Decision and Order became effective on September 6, 2017. *See* DE 1 at 4. Following the decision, the District Director issued a computation of benefits owed. *Id*. *See also*, DE 19-3 (Computation of Benefits). Per the prior Order, the computation letter specified that Defendant commence monthly payments of $976.40 to Mr. Rice, beginning in September 2017, payable on or around October 15, 2017. *See* DE 19-3 at 1. The computation tabulated retroactive benefits, under the Order, at $123,139.20 for the period of August 2006 through September 2007 and for the period of October 2008 through September 2017. *Id*. Further, the computation notified Defendant of the specifics of the reimbursement to the Black Lung Disability Trust Fund ("Trust Fund"), the sum of $12,500.70 for interim benefits paid to Mr. Rice from October 2007 through September 2008. Defendant, which had appealed the ALJ decision on August 25, 2017, failed to make any payments to Mr. Rice. *See* DE 1 at 5; DE 17 at 3 (Answer).

Defendant appealed ALJ Solomon's Decision and Order. *See* DE 1 at 5. During the appeal, Defendant continued to refuse to make any payments to Mr. Rice. *Id*. First, Defendant appealed the Decision and Order to the BRB. *Id*. The BRB affirmed ALJ Solomon's Order and denied Defendant' subsequent motion for reconsideration. *Id*. Defendant then appealed to the Sixth

Circuit. *See* DE 22 (Defendant' Cross Motion for Summary Judgment). The Sixth Circuit affirmed ALJ Solomon's Order and issued a mandate. *Id*. at 4. *See also* DE 1 at 5. Afterwards, the district director issued another computation of benefits, recalculating Mr. Rice's retroactive benefits of $123,883.20, in addition to monthly payments of $1,040.40. *See* DE 1 at 5-6. The computation detailed the Trust Fund recoupment of $52,696.70. *Id*. at 6. On February 4, 2021, Defendant paid Mr. Rice the $123,833.20 in retroactive benefits and began making monthly payments of $1,040.40. *Id*. at 6. A few months later, the district director detailed the interest obligation, in Mr. Rice's favor, totaling $65,44378. *Id*. *See also* DE 19-4 (District Director's Interest Calculation). After Defendant challenged the interest calculations, the interest amount was confirmed by the U.S. Department of Labor. *See* DE 22 at 5; DE 19-5 (Letter from District Director). Defendant has not paid Mr. Rice, nor his estate, any of the ordered interest or any additional compensation for unpaid benefits. *See* DE 19 at 4.

b) Procedural History

On October 6, 2021, Mr. Rice sued Defendant to enforce payment and receive additional compensation and interest from and triggered by Defendant's late payment of the benefits awarded to him. *See* DE 1 (Complaint). On May 6, 2022, Mr. Rice filed a motion for summary judgment. *See* DE 19 (Motion for Summary Judgment). Mr. Rice asked the Court to enjoin Defendant to pay: (1) 20% additional compensation based on untimely payment of retroactive benefits and prospective monthly payments; (2) interest on unpaid retroactive benefits and late monthly benefits; and (3) interest on the 20% additional compensation. *Id*. at 19. Defendant responded, *see* DE 23, and filed a cross motion for summary judgment, *see* DE 22. Both motions, now fully briefed, are ripe for review.

II. Plaintiff's and Defendant's Cross Motions for Summary Judgment

a) Jurisdiction

The Longshore and Harbor Workers' Compensation Act (LHWCA) gives federal district courts jurisdiction to enforce properly made and served final orders awarding benefits under the act. 33 U.S.C. § 921(d) ("If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order[.]"). The LHWCA's procedures are largely incorporated into the Black Lung Benefits Act via 30 U.S.C. § 932(a); this includes § 921(d). *Thacker on behalf of Estate of Clevenger v. Old Republic Ins. Co.*, 416 F. Supp. 3d 651, 660 (E.D. Ky. 2019) ("33 U.S.C. § 921(d) is incorporated by reference into the BLBA.").

Notably, the Court has a cabined role under § 921(d), that of enforcement. The statute directs scrutiny of whether the compensation order "was made and served in accordance with law." If so, and if the employer and its agents have not complied, enforcement is a mandate. Thus,

> It is clear from the statutory scheme that our enforcement powers under s 921(d) . . . are not of substantive dimension. That is to say s 921(d) reposes in this court the responsibility of screening compensation orders for procedural defects and thus affording responsible employers a measure of procedural due process before enforcement can be effected.

Marshall v. Barnes & Tucker Co., 432 F. Supp. 935, 939 (W.D. Pa. 1977); *see also Grimm v. Vortex Marine Constr.*, 921 F.3d 845, 847 (9th Cir. 2019) (noting that the statute gives district courts no jurisdiction "over the merits of the litigation," that a district court "cannot affirm, modify, suspend, or set aside the order" but that "jurisdiction extends only to the enforcement of compensation orders") (quoting *Thompson v. Potashnick Const. Co.*, 812 F.2d 574, 576 (1987)). While not in the cross motion for summary judgment, Defendant stated in that it "denies . . . that [the ALJ's findings] were correct, either legally or factually[.]" *See* DE 8 at 2. The Court will not

evaluate the merits of the Order, rather, the Court will evaluate whether the Order is enforceable and has been complied with by Defendant.

b) Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In determining whether a genuine dispute exists, the Court considers all facts and draws all inferences in the light most favorable to the non-moving party. *See Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp*., 106 S. Ct. 1348, 1356 (1986); *Lindsay v. Yates*, 578 F.3d 407, 414 (6th Cir. 2009). Further, the court may not "weigh evidence [or] determine the truth of the matter[.]" *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986). If the moving party satisfies its burden, the burden then shifts to the non-moving party to produce "specific facts" showing a "genuine issue" for trial. *Id.* However, "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Id.* at 2552.

A fact is "material" if the underlying substantive law identifies the fact as critical. *See Anderson*, 106 S. Ct. at 2510. Then, "[o]nly disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id*. An issue is "genuine" if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 2511 (citing *First Nat'l Bank of Az. v. Cities Servs. Co*., 88 S. Ct. 1575, 1592 (1968)). Such

evidence must be suitable for admission into evidence at trial. *See Salt Lick Bancorp v. FDIC, 187 F. App'x* 428, 444-45 (6th Cir. 2006). Obviously, the limited nature of a § 921 action impacts this rubric. The parties, via integrated cross-motions, here argue primarily over the law and the proper mechanics, not over facts.

III. Black Lung Benefits Act

Congress passed the Black Lung Benefits Act (BLBA) to ensure financial support to former coal miners (and their heirs) disabled by pneumoconiosis contracted from working in a mine. *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 F. App'x 470, 471 (6th Cir. 2016). Disabled former miners bring claims for benefits, under the BLBA, to the Department of Labor. The DOL then determines whether the miner is eligible and, if so, what party is responsible for paying those benefits. *Id.* at 471-72; *Thacker on behalf of Estate of Clevenger v. Old Republic Ins. Co*., 416 F. Supp. 3d 651, 656 (E.D. Ky. 2019). Congress intended for the BLBA to shift risk and liability for benefits onto the mining industry. *Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (citing *Director, OWCP v. Oglebay Norton Co.,* 877 F.2d 1300, 1304 (6th Cir.1989)). Accordingly, coal mine operators have the "sole duty to provide benefits under the BLBA[.]" *Travelers Ins. Co. v. Blackstone Min. Co.*, No. 2007-CA-001610-MR, 2012 WL 2603623, at *1 (Ky. Ct. App. July 6, 2012); *see also* 30 U.S.C. § 933; 20 C.F.R. § 726.4. The guiding principle of the DOL regulations is ensuring that "coal mine operators are liable 'to the maximum extent feasible' for awarded claims." *Ark. Coals, Inc.*, 739 F.3d at 313 (citation omitted).

To establish a reliable, alternate source of revenue (in the event of operator insolvency, for example), the BLBA requires financially liable operators "to either qualify as a self-insurer or purchase insurance to cover any BLBA liability." *Karst Robbins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 969 F.3d 316, 320 (6th Cir. 2020) (citing 30 U.S.C. § 933(a); 20 C.F.R.

§ 725.494(e)).[2] Commercially purchased insurance policies must guarantee "'the payment of benefits as required' under the BLBA." *Travelers Ins. Co.*, 2012 WL 2603623, at *1 (citing §§ 726.201–726.202).[3] As a result, all BLBA insurance contracts obligate the carrier to "'cover fully all of the coal operator's liabilities under the BLBA,' and . . . pay benefits equal to those provided under the BLBA." *Id.* (quoting *Lovilia Coal Co. v. Williams,* 143 F.3d 317, 322 (7th Cir.1998)); §§ 726.204–726.207. BLBA insurance carriers therefore "step[] into the shoes" of the operator so that, from a claimant's or the government's perspective, there is no disruption in the event of an operator's inability or refusal to pay. *Tazco, Inc. v. Dir., Office of Workers Comp. Program, U.S. Dep't of Labor*, 895 F.2d 949, 951 (4th Cir. 1990). If there is no responsible operator or insurer able to pay benefits, the Black Lung Disability Trust Fund exists as a final fail-safe to provide benefits to eligible claimants. *Karst*, 969 F.3d at 320; *see also* 26 U.S.C. § 9501(d)(1).[4]

a) The Claims Process

After a miner files a claim with "the applicable district director for the Office of Workers' Compensation Programs[,]" the district director "investigates the claim and makes a preliminary determination of the miner's eligibility and" which operator (*i.e.*, former employer) is responsible for paying benefits. *Arch Coal, Inc.*, 242 F. Supp. 3d at 16 (citing 33 U.S.C. § 919; § 725.401-23). The district director then provides the claimant and the potentially responsible operator with notice

[2] To qualify as a self-insurer, operators must "obtain Departmental approval and meet the Department's requirements—including posting a surety bond or other security—to guarantee that the mine operator can pay future liability." *Arch Coal, Inc. v. Hugler*, 242 F. Supp. 3d 13, 16 (D.D.C. 2017), *aff'd sub nom. Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018).

[3] The Secretary of Labor regulates the contents of all BLBA insurance policies to ensure they meet the BLBA's requirements. *Karst*, 969 F.3d at 326 (citing 30 U.S.C. § 933(b)(3)). Existing mandatory provisions include: required elements for carrier eligibility, § 725.101(a)(18); mandatory reporting requirements pursuant to § 726.208; and acceptance of liability pursuant to § 726.208. BLBA insurance contracts are also required to include an endorsement assigning liability to the carrier whose coverage was in effect "the last day of the last exposure [to coal dust], in the employment of the insured[.]" § 726.203(a); *Westmoreland Coal Co. v. Dir., Office of Workers' Comp. Programs, United States Dep't of Labor*, 696 F. App'x 604, 608 (4th Cir. 2017).

[4] The Trust Fund is administered by the Department and financed by an excise tax on coal. *Arch Coal, Inc.*, 242 F. Supp. 3d at 15.

and an explanation for its "proposed decision and order." *Id.* (citing § 725.418). If neither party responds to the proposed order within thirty days of its issuance, the proposed decision and order becomes final. § 725.419(d) ("Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310.").

A responsible operator's (or insurer's) payment is then due within thirty days of (1) the issuance of an effective compensation order and (2) the issuance to the parties of the district director's computation of benefits.[5] §725.502; *Thacker*, 416 F. Supp. 3d at 657-58. An ALJ decision and order qualifies as a "compensation order." *Thacker,* 416 F. Supp. 3d at 659 (compiling cases).[6] That order becomes effective once filed with the district director. §§ 921(a); 725.479(a); *see also Nowlin v. E. Associated Coal Corp.*, 266 F. Supp. 2d 502, 504 (N.D.W. Va. 2003) (discussing when benefits become due). Provided that first condition is met, when the district director's computation of benefits issues, the thirty-day clock starts running. § 725.502(b)(2) ("Benefits and interest payable ... shall be due on the thirtieth day following issuance of the district director's computation."). *Thacker*, 416 F. Supp 3d at 657-659.

Operators that fail to pay benefits when due are subject to several penalties. First, "[i]n any case in which an operator fails to pay benefits that are due (§ 725.502), the beneficiary shall also be entitled to simple annual interest, computed from the date on which the benefits were due."

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[5] §§ 725.502(a)(1-2) ("[B]enefits under the Act shall be paid when they become due. Benefits shall be considered due after the issuance of an effective order requiring the payment of benefits . . . [a]n order issued by an administrative law judge becomes effective when it is filed in the office of the district director (*see* § 725.479)."); (b)(2) ("Within 30 days after the issuance of an effective order requiring the payment of benefits, the district director shall compute the amount of benefits payable for periods prior to the effective date of the order, in addition to any interest payable for such periods (*see* § 725.608), and shall so notify the parties. Any computation made by the district director under this paragraph shall strictly observe the terms of the order. Benefits and interest payable for such periods shall be due on the thirtieth day following issuance of the district director's computation. A copy of the current table of applicable interest rates shall be attached to the computation.").

[6] A compensation order either rejects the claim or makes the award. § 919(e); *see also Thacker*, 416 F. Supp. 3d at 658.

§ 725.608(a)(1). In the Sixth Circuit, interest starts accruing metered by the initial determination that the claimant is eligible for benefits. *Byrge on behalf of Est. of Byrge v. Premium Coal Co. Inc.*, 301 F. Supp. 3d 785, 801-02 (E.D. Tenn. 2017) (citing *Youghiogheny & Ohio Coal Co. v. Warren*, 841 F.2d 134, 138 (6th Cir. 1987)).[7]

A failure to pay benefits within ten days of the ripe obligation automatically triggers a separate penalty equal to 20% of the underlying compensation award. 33 U.S.C. § 914(f); § 725.607.[8] If an operator is liable for the 20% penalty, "the beneficiary shall also be entitled to simple annual interest computed from the date upon which the beneficiary's right to additional compensation first arose." § 725.608(a)(3); *Thacker*, 416 F. Supp. 3d at 670 (explaining that the clock starts running for interest on an unpaid penalty on same day that claimant is first entitled to the payment, *i.e.*, the eleventh day after the payment was first due).[9]

IV. Analysis

a) Plaintiff's Claim is Properly Before This Court

Neither party is (or could be) contesting the validity of ALJ Solomon's September 2017 Order. The appeal resolved that matter. Rather, Plaintiff seeks, and Defendant opposes, 20% additional compensation under 20 C.F.R. § 725.607 and 33 U.S.C. § 914(f) relating to the Order. *See* DE 19 at 4. Rice also claims entitlement to interest on all relief, per § 725.608. Defendant argues that, as an initial matter, the Court cannot hear Plaintiff's claim because the Court does not

[7] Claimants are however not entitled to any interest from a period in which the BLBA Trust Fund made payments. In those circumstances, the Trust Fund may have a claim against the non-paying party. § 725.608(b); *Byrge*, 301 F. Supp. 3d at 802 ("To be clear, however, the Plaintiff is not entitled to interest on any payments that the Trust Fund has paid because only the Trust Fund is entitled to such interest payments.").

[8] "The 20% penalty assessment arises automatically under [] § 914(f) when an employer is untimely in its payment of benefits awarded by an ALJ." *Thacker*, 416 F. Supp 3d at 663 (quoting *Nowlin*, 331 F. Supp. 2d at 468).

[9] In *Thacker*, the "district director issued a computation of benefits payable on August 17, 2016. The benefits awarded and interest payable became due on September 16, 2016—the thirtieth day following the issuance of the district director's computation." 416 F. Supp. 3d at 663. Accordingly, the 20% penalty was triggered on September 27, 2016, "the eleventh day after the benefits awarded and interest payable became due." *Id*. at 663.

have jurisdiction under 33 U.S.C. § 921(d). Defendant further argues that Plaintiff's claim is time barred based on 33 U.S.C. § 918. *See* DE 22 at 11-14. The Court will address each of Defendant's claims in turn.

i. **The Court has Jurisdiction Under 33 U.S.C. § 921(d)**

Both parties agree that Defendant was ordered to pay benefits to Mr. Rice, going back to August 2006, and that Defendant did not make any payments pending their appeals. *See* DE 1 at 4-5; DE 17 at 2-3. Defendant suggests the payment obligation awaited finality and that, since the district director issued the initial computation of benefits after Defendant had already appealed ALJ Solomon's Order, the computation immediately was stale. *See* DE 22 at 11.

Pursuant to 33 U.S.C. § 921(d):

> If any employer or his officers or agents fails to comply with a compensation order making an award, *that has become final*, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(emphasis added). Under the plain language of the statute, a court has jurisdiction to enforce a final compensation order making an award. *Id*. *See also Thacker*, 416 F. Supp. 3d at 660. A compensation order is the order that either rejects the claim or grants the award. *See* 33 U.S.C. § 919(e). A compensation order becomes effective when filed in the office of the district director and becomes final thirty days later, so long as there is no appeal. *See* 33 U.S.C. § 921(a); 20 C.F.R. § 725.479(a).

Here, ALJ Solomon issued his Order awarding Mr. Rice benefits on August 1, 2017. *See* DE 1 at 4. The Order was filed in the Office of the district director on September 6, 2017. *Id*.; DE

19-2 (file stamp Defendant did appeal ALJ Solomon's Order on August 25, 2017. *See* DE 1 at 5. A compensation order does not become final until all appeals are finalized. *See Thacker*, 416 F. Supp. 3d at 662. While Defendant's appeal delayed the finality of the ALJ's Order, it did not impact effectiveness. The payment obligation ripened irrespective of an appeal to the BRB and to the Circuit. *See* 33 U.S.C. § 921(b)(3) ("The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board."); *id.* at (c)(noting payment required by award not stayed pending final decision except as "ordered by the court"); *Thacker*, 416 F. Supp. 3d at 662; *Byrge*, 301 F. Supp. 3d at 798; *Lazarus v. Chevron USA., Inc.* 958 F.2d 1297, 1299 (5th Cir. 1992). Defendant never requested that the Order be stayed pending any appeal. *See* Answer ¶ 23 (admitting no stay request). Defendant was on notice that, without a stay, payments would be due and Defendant would be subject to penalties for unpaid benefits.[10]

The "concepts of effectiveness and finality are distinct[;]" as such, Defendant was required to start making payments to Mr. Rice when ALJ's Solomon Order became effective and the director computed benefits. *See Byrge*, 301 F. Supp. 3d at 798; 20 C.F.R. § 725.502(a)(1) ("Benefits under the [Black Lung Benefits Act] shall be considered due after the issuance of an effective order requiring the payment of benefits by a[n] . . administrative law judge . . ."); *id.* at (b)(2)(triggering retroactive payment obligation). Once the Order became final, the Court had jurisdiction to enforce. *See* 33 U.S.C. § 921(d). ALJ Solomon's Order became final after the conclusion of Defendant' final appeal to the Sixth Circuit. This occurred when the Sixth Circuit

[10] "Please be advised that by failing to initiate benefits and reimburse the Black Lung Disability Trust Fund within 10 days of the date payment is due, the employer may be subject to payments of additional compensation of up to 20% of the amount due. Further, failure to pay benefits as ordered may result in enforcement of the final award in Federal District Court (20 CFR 725.604). An appeal does not stay this payment of additional compensation unless an Order staying payments has been issued by the Board or Court." DE 19-3 at 2.

issued its mandate on September 28, 2020, affirming the Order. *See Thacker*, 416 F. Supp. 3d at 662. Accordingly, the Court has had jurisdiction to enforce the Order since September 2020. The default in payment triggered follow-on penalties, and the interest obligation has been both evident and unresolved since the time of the computation. Rice has standing to pursue the remedies, and the Court has jurisdiction to enforce the remedies, which are dependent on and within the scope of relief awarded.

Defendant—incorrectly—relies on the district director's final computation of benefits, issued after the Sixth Circuit's mandate, to suggest that benefits remained unripe until that point. *See* DE 22 at 11; DE 1 at 5. Defendant argues that, since it had already appealed ALJ Solomon's Order when the district director issued the first computation of benefits, the computation immediately became stale and the "compensation order" never became final. *Id*. A computation of benefits is not a "compensation order." *See Byrge*, F. Supp. 3d at 797. The computation is "simply [a] letter[] calculating the specific amount owed—[it] does not make the award a[] 'compensation order' as defined in 33 U.S.C. § 919(e)." *Id*. (citing *Navalo v. Conchise Consultancy, Inc.*, 666 F.App'x 661 (9th Cir. 2016) ("Once the ALJ's ruling disposes of all the outstanding legal issues, the district director's role is 'purely ministerial and administrative.'")); *see also* 20 C.F.R. § 725.502(b)(2) ("Any computation made by the district director under this paragraph shall strictly observe the terms of the order.") Accordingly, Defendant's act of appealing did not thwart the payment obligation or mechanics called for by the statute and regulations. Defendant offers no law to support the theory, and the regulation clearly ripens payment upon the computation, *irrespective* of any appeal. *See* § 725.502(a)(1)("Benefits shall be considered due after the issuance of an effective order . . . notwithstanding the pendency of . . . an appeal to the Board or a court[.]").

The Court rejects the contention that there persists no issue for enforcement properly before this Court.

Indeed, the added compensation claim and interest claims are latent features of the original award—the course of conduct and time horizon in the case triggered those elements. However, the 20% kicker is automatic[11] and self-executing. *See Thacker*, 416 F. Supp. 3d at 663 (collecting cases); *Byrge* F. Supp. 3d at 797-98 ("[T]he Court notes that the additional compensation in § 914(f) has been described as 'automatic.'") (citations omitted); *Severin v. Exxon Corp.*, 910 F.2d 286, 288 (5th Cir. 1990) ("The section 14(f) penalty is self-executing and admits of no equitable exceptions for late payment.") Further, interest is mandatory. Plaintiff properly is before the Court, per § 921(d), to enforce those imbedded and unfulfilled aspects of the order.

ii. **Plaintiff's Suit is Not Time Barred by 33 U.S.C. § 918**

Defendant argues that Plaintiff's suit is barred by 33 U.S.C. § 918's statute of limitations. *See* DE 22 at 12. As there is no genuine dispute that from October 2017 until February 2021, Defendant did not make any payments to Mr. Rice, Defendant argues that Plaintiff's claim should arise under 33 U.S.C. § 918, an avenue for collecting on defaulted claims. *Id*. 33 U.S.C. § 918 has a one-year statute of limitations for enforcement of a compensation order when the employer has defaulted. *See* 33 U.S.C. § 918(a). The Complaint seeks relief and asserts jurisdiction under § 921, not mentioning § 918.

Defendant is incorrect. A plaintiff seeking enforcement of a compensation order can rely on either § 918 or § 921, as the statutes provide concurrent remedies. *Thacker*, 416 F. Supp. 3d at 666 ("[I]t appears from the language of the statutes and black lung regulations that §§ 918 and 921

[11] Indeed, per the regulation, the 20% is "additional compensation" and is an addition to "unpaid benefits," payable "at the same time, but in addition to, such benefits." § 725.607(a). There is no ambiguity in the requirement; the addition "will be added." *See id.*

provide concurrent remedies[.]"); *Byrge*, 301 F. Supp. 3d at 795 ("Compensation orders may only be enforced through 33 U.S.C. §§ 918 or 921."); *Nowlin*, 266 F. Supp. 2d at 508 ("In contrast [to § 918], § 921(d) performs a different, but complimentary function, in the BLBA remedial scheme."); *Kinder v. Coleman & Yates Coal Co.*, 974 F. Supp. 868, 879 (W.D. Va. 1997) ("[A]n employee who effectively waives his section 918(a) rights would still have two years after an award becomes final to seek enforcement pursuant to section 921(d).")

"§§ 918 and 921 serve distinct purposes—§918 permits a claimant to enforce an effective, but not-yet-final award and § 921 permits a claimant to enforce an award 'that has become final.'" *Id*. (citing *Nowlin*, 266 F. Supp. 2d at 508). If a plaintiff wanted immediate enforcement of a compensation award being challenged on appeal, they would find recourse under § 918, not § 921. *Id*. Section 921(e) makes clear that the provisions operate as the two options by which an order may be enforced. Since §§ 918 and 921 provide concurrent remedies, a court can gain jurisdiction under either section if the requisite conditions exist**.** *See Thacker*, 416 F. Supp. 3d at 666. Here, Plaintiff could have sought redress under §918 within a year of ALJ Solomon's effective Order. However, that does not prohibit Plaintiff from now filing a claim seeking enforcement under § 921. *See Thacker*, 416 F. Supp. 3d at 666. Further, the requirements of 33 U.S.C. § 921(d) have been met—ALJ Solomon's Order is now final. As such, the Court has jurisdiction to enforce the Order and determine whether Plaintiff is entitled to additional compensation.

b) Plaintiff is Entitled to Additional Compensation Pursuant to 33 U.S.C. § 914(f)

Plaintiff is entitled to additional compensation. 33 U.S.C. § 914(f) states:

> 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.

See also 20 C.F.R. § 725.607(a) ("If any benefits payable under the terms of an award by a district director (§ 725.419(d)), a decision and order filed and served by an administrative law judge (§ 725.478), or a decision filed by the Board or a U.S. court of appeals, are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due, there will be added to such unpaid benefits an amount to 20 percent thereof, which must be paid to the claimant at the same time as, but in addition to, such benefits") A plaintiff is entitled to additional compensation even if he received benefit payments from the Trust Fund. *See* 20 C.F.R. § 725.607(b).

"Black lung benefits are due thirty days after two conditions are fulfilled: (1) an effective compensation order has been issued; and (2) the district director computes the amount of benefits payable and provides notice to the parties." *Thacker*, 416 F. Supp. 3d at 657-58 (citing 20 C.F.R. § 725.502). ALJ Solomon issued the compensation order on August 1, 2017. *See* DE 1 at 4. It became effective on September 6, 2017 when it was filed in the office of the district director. *Id*. Two days later, the district director issued the computation of benefits. *Id*. Accordingly, Plaintiff's benefits became due in October 2017. Per 20 C.F.R. § 725.502(b)(1), (and given inclusion of September in the retroactive calculation) the first payment would be due on November 15, 2017. The retroactive payment likewise became due under (b)(2) in October. Neither party disputes that Defendant did not make any payments to Plaintiff until after finality. *See* DE 1 at 5; DE 22 at 3. A failure to make payment within ten days after it becomes due automatically triggers the 20% additional compensation penalty. *See Thacker*, 416 F. Supp. 3d at 662-63 (compiling cases). By virtue of the plain language of 33 U.S.C. § 914(f) and 20 C.F.R. § 725.607, Plaintiff is entitled to additional compensation.

Defendant's policy-based response[12] is that "practical considerations counsel[] against hybridizing" LHWCA and BLBA. *See* DE 22 at 15. While the Court understands that, from a practical standpoint, there may be tensions between the aims and application contexts of LHWCA and BLBA, those matters, and the precision of fit between acts, are not for the Court to evaluate. Such considerations are properly made by Congress and, to some extent, the agencies. Congress made the decision to incorporate certain LHWCA's procedures, § 914(f) included, into the BLBA. *See* 30 U.S.C. 932(a). Congress gave the DOL power to refine the incorporation by excluding from or adding consistent provisions. The Court must respect this decision by Congress and the reasonable administration by the Secretary. The Court's only job is to apply both statutes to the facts of this case. Not only did Congress incorporate § 914(f), but the Secretary also built on that scaffolding a regulation particularly blessing the propriety of the 20% added compensation for late or nonpayment. The Court rejects Defendant's policy and practical resistance to what the law undoubtedly prescribes. The 20% penalty plainly and automatically applies. *See Byrge*, 301 F. Supp. 3d at 795; *Thacker*, 416 F. Supp. 3d at 659-68; *Templeton v. Appolo Fuels, Inc*., 525 F. Supp. 3d 802, 809-10 (E.D. Ky. 2021). Defendant's argument is unavailing.

Nor is the Court persuaded by Defendant's argument that payment cannot be due without calculation specificity and transparency. *See* DE 22 at 18-22. Defendant relies on *Lazarus v. Chevron*, where the Fifth Circuit held that "[t]o constitute a final decision and order of the ALJ, the order must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to dispute between the parties." 958 F.2d 1297, 1303 (5th Cir. 1992) (quoting *Severin*, 910 F.2d at 289). *Lazarus* is easily distinguished from the present case. Here, the ALJ issued a proper award.

[12] What the defense calls a "loophole," the Court simply sees as a feature of the law, reflecting Congress's drafting choices and the Secretary's resulting implementation.

The district director, per the black lung regulations, then provided the requisite computation of damages. That computation set forth amounts owed and referenced the interest obligation (a math matter wholly knowable and calculable). The 20% penalty and interest sought by Plaintiff rest on clearly communicated and fixed figures, explicit obligations, and established principles of computation. The award triggered inarguable payment duties Defendant ignored or delayed fulfilling.

Finally, Defendant believes that requiring an employer to make payments when it appeals chills appellate rights. *See* DE 22 at 22-24. *Byrge* addressed the argument:

> Further, the Defendants repeatedly claim that such interpretation punishes them for continuing to litigate the claim. The Court disagrees. First, if the Defendants prevail in their continued litigation, they will not owe the Plaintiff—hence no punishment. Second, if they had sought and received a stay order, they would not have had to pay the additional compensation for non-payment. Third, once an award was made for the Plaintiff, the Defendants had to engage in a risk analysis, *i.e.*, whether to hold onto the award money and not pay it to Plaintiff and instead continue to litigate (and continue to earn interest on the unpaid amount) and have the Trust Fund pay the Defendants' obligation, all with hopes of prevailing eventually, or not to run a risk of the additional 20% award by paying the award now (or seeking a stay) and still continue to [litigate] with the risk of over recovery for the miner if the Defendants ultimately prevail. Defendants chose the former and cannot now be heard to complain because they were deemed to have no basis for not paying the award back in 2013.

301 F. Supp. 3d at 798-99. Defendant here faced a like series of strategic choices and risks. Through it all, Defendant could have sought a stay of the payment obligation. The forgone stay opportunity enervates any argument regarding fairness of the payment obligation relative to an appeal. In any event, Congress made this calculus and enacted the scheme.

Here, ALJ Solomon's Order became effective in September 2017. *See* DE 1 at 4. The compensation order, once calculated, required Defendant to pay retroactive benefits and ongoing monthly payments. *See* DE 19-2 at 2. The district director's calculation of benefits specified retroactive benefits totaling $135,639.90: $123,139.20 for unpaid benefits for the period of August

2006 through September 2007 and from October 2008 through September 2017; and $12,500.70 for interim benefits paid by the Trust Fund to Mr. Rice. *See* DE 19-3 at 1. The Director ordered Defendant to make monthly payments totaling, at the outset, $976.40. *Id*. Plaintiff's benefits increased each year, to reflect an increase in the monthly pay rate for federal employees, which is used to calculate the amount of benefits payable. *See* 20 C.F.R. §§ 725.520(a), (c). The monthly payments, from November 2017 until December 2020 totaled $39,219.60. Twenty percent of $135,639.90 and $39,219.60 equals $27,127.98 and $7,843.92, respectively.

In light of the foregoing, the Court finds that Plaintiff is entitled to 20% additional compensation, totaling $34,971.90.[13]

c) Plaintiff is Entitled to Interest on Unpaid Benefits Pursuant to 20 C.F.R. § 725.608(a)(1)

Plaintiff is also entitled to interest on all unpaid benefits.

> In any case in which an operator fails to pay benefits that are due (§ 725.502), the beneficiary shall also be entitled to simple annual interest, computed from the date on which the benefits were due. The interest shall be computed through the date on which the operator paid the benefits, except that the beneficiary shall not be entitled to interest for any period following the date on which the beneficiary received payment of any benefits from the fund pursuant to § 725.522.

See 20 C.F.R. § 725.608(a)(1). Interest payments are due, on an award, on the thirtieth day following the issuance of the district director's computation of benefits. *See* 20 C.F.R. § 725.502(b)(2). Post-finality, the district director specified $65,443.78 as the interest due on retroactive benefits. *See* DE 19-4. Plaintiff, based on its own calculations, only asks for $41,773.99. *See* DE 19 at 17; DE 19-7 at 3-5 (Plaintiff's Damages Calculation). Given that a) the

[13] To the extent Bituminous made new arguments in reply, the Court rejects and will not address those. A reply is not the place to inject novel contentions. Thus, any reply-based effort to invalidate the statutory or regulatory scheme, the Court will not entertain.

interest obligation is inarguable[14]; b) that Plaintiff provided a detailed calculation that Defendant did not address or criticize (or calculate in opposition to) in its summary judgment response; and c) the Court's independent testing of the mathematics, the Court will order payment of interest, as substantiated, on the prior benefits.

d) Plaintiff is Entitled to Interest on Additional Compensation Pursuant to 20 C.F.R. § 725.608(a)(3)

Finally, Plaintiff is entitled to interest on the 20% additional compensation, as outlined in 20 C.F.R. § 725.608(a)(3). "In any case in which an operator is liable for the payment of additional compensation (§ 725.607), the beneficiary shall also be entitled to simple annual interest computed from the date upon which the beneficiary's right to additional compensation first arose." 20 C.F.R. § 725.608(a)(3). A plaintiff's simple annual interest begins accruing on the same day the right to additional compensation accrues, thus the eleventh day after the first payment was due. *See Thacker*, 416 F. Supp. 3d at 670. The Court directs the parties to confer on and seek agreement on this final computation, failing which, the Court will entertain further motion practice or process on the final component.. *Id*. ("The Court encourages the parties to work together to resolve the interest issue, but if that issue cannot be resolved, the parties may file for additional relief in this Court.").

V. Conclusion

For the foregoing reasons, the Court **ORDERS:**

1) Plaintiff Linda Rice's Motion for Summary Judgment is **GRANTED**;
2) Defendant Bituminous' Cross Motion for Summary Judgment is **DENIED**;
3) Defendant Bituminous **SHALL** immediately pay Plaintiff Linda Rice $34,971.90 in additional compensation pursuant to 20 C.F.R. § 725.607(a) and 33 U.S.C. § 914(f);

[14] "BITCO will pay the interest that is required by the regulation." DE 19-6 (letter regarding interest).

4) Defendant Bituminous **SHALL** immediately pay Plaintiff Linda Rice $41,773.99 for interest accrued on retroactive benefits not paid until February 2021;

5) The parties shall confer on the final benefits calculation and remaining interest due; and

6) The Court **ENJOINS** compliance with the DOL's award of benefits and fees, and with the particulars of this enforcement order, by Bituminous Casualty Corp. Failure to comply may be punishable as a contempt of Court;

7) The parties shall jointly report the final and remaining interest payment to the Court within 21 days. If they cannot agree, they shall tender separate calculations;

8) The Court will enter a final judgment following resolution of the lingering interest calculation.

This the 31st day of March, 2023.

Signed By:
Robert E. Wier
United States District Judge