

No. 19-71634

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**MICHAEL R. ROBIRDS,  
Claimant - Petitioner/Cross-Respondent,**

v.

**ICTSI OREGON, INC./SIGNAL MUTUAL INDEMNITY ASS'N,  
Employer/Carrier – Respondent/Cross-Petitioner,**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
Party-in-Interest – Respondent/Cross-Respondent.**

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**On Petition for Review of a Final Order of the Benefits Review Board,  
United States Department of Labor, BRB No. 17-0635**

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**BRIEF FOR THE FEDERAL RESPONDENT**

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**KATE S. O'SCANNLAIN**  
Solicitor of Labor

**BARRY H. JOYNER**  
Associate Solicitor

**SEAN G. BAJKOWSKI**  
Counsel for Appellate Litigation

**MARK A. REINHALTER**  
Counsel for Longshore

**CYNTHIA LIAO**  
Attorney

**U.S. Department of Labor  
Office of the Solicitor, Rm. N-2119  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
(202) 693-5355**

**Attorneys for the Director, Office of  
Workers' Compensation Programs**

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On Petition for Review of a Final Order of the Benefits Review Board,  
United States Department of Labor, BRB No. 17-0635

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BRIEF FOR THE FEDERAL RESPONDENT

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This appeal arises from longshoreman Michael R. Robirds's claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("Longshore Act"). His employer, ICTSI Oregon, Inc. ("ICTSI"), failed to timely pay Mr. Robirds the full disability compensation he was owed between November 20, 2012, and April 3, 2013. Consequently, in 2017, an administrative law judge ("ALJ") issued an order requiring ICTSI to pay 10%

additional compensation on all overdue compensation unpaid during that time period, pursuant to 33 U.S.C. § 914(e). However, even though Mr. Robirds had been entitled to additional compensation under § 914(e) since the 2012-2013 period and the ALJ decision was issued over four years later, the ALJ held that Mr. Robirds was not entitled to interest on the § 914(e) additional compensation.

On appeal, the Board reversed, holding that claimants are entitled to interest on § 914(e) additional compensation. The Board held, however, that interest accrued only on a post-judgment basis, *i.e.*, starting from when the ALJ issued his order in 2017, rather than from 2012-2013 when Mr. Robirds became entitled to that additional compensation under § 914(e).

Mr. Robirds petitioned this Court to review the Board's decision. ICTSI filed a cross-appeal. The Director of the U.S. Department of Labor's Office of Workers' Compensation Programs ("OWCP") responds to address the legal issues presented by Mr. Robirds's appeal.

### **STATEMENT OF JURISDICTION**

The ALJ's decision was issued on July 19, 2017, and was filed and served on the parties by an OWCP district director on July 25, 2017. ER 17. Mr. Robirds timely appealed that decision to the Board on August 24, 2017. *See* ER 78 (Certified Index 145-49); 33 U.S.C. § 921(a). The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3). The Board issued its decision on



January 28, 2019. ER 2. On February 27, 2019, Mr. Robirds filed a timely motion for reconsideration, which the Board denied on May 29, 2019. ER 1; ER 77 (Certified Index 12-20); 20 C.F.R. § 802.407. Mr. Robirds then filed a timely petition for review with this Court on June 27, 2019. The Ninth Circuit has jurisdiction because Mr. Robirds was injured in Oregon. *See* ER 18-19; 33 U.S.C. § 921(c).<sup>1</sup>

### STATEMENT OF THE ISSUES

The Ninth Circuit has long held that interest attaches to overdue payments of Longshore Act compensation and that such interest is computed on a pre-judgment basis, *i.e.*, it begins accruing from the date the worker becomes entitled to the compensation, not the date of the ALJ's award. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 834 (9th Cir. 2012) (en banc); *Matulic v. Dir., OWCP*, 154 F.3d

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<sup>1</sup> As it did before the Board, ICTSI argues in its brief to this Court dated May 18, 2020 that Mr. Robirds's appeal is moot because it has already overpaid Mr. Robirds by an amount greater than the amount of interest that would be due if Mr. Robirds were to prevail in this appeal. ICTSI Br. at 10-16. The mootness question depends on a variety of factors, many of which are best known to Mr. Robirds and ICTSI, not the Director (for example, whether Mr. Robirds's knee injury will naturally worsen over time and, therefore, he will become entitled to more compensation from ICTSI in the future). *See infra* p. 7 n.3 (explaining that overpayments may be recovered by offset against future compensation owed). As the mootness issue was raised in ICTSI's opening brief in support of its cross-petition for review, the Director takes no position on the issue at this time, but reserves the right to do so in her answering brief in ITCSI's cross-appeal.

1052, 1059 (9th Cir. 1998); *Hunt v. Dir., OWCP*, 999 F.2d 419, 422 n.1 (9th Cir. 1993).

The issues presented are (1) whether interest attaches to late payments of additional compensation under 33 U.S.C. § 914(e); and (2) if so, is that interest computed on a pre-judgment or post-judgment basis.

## STATEMENT OF THE CASE

### I. Statutory background

The Longshore Act requires employers to pay compensation to injured workers “periodically, promptly, and directly,” even without a formal award, unless the employer timely controverts the claim. 33 U.S.C. § 914(a). If the employer wishes to controvert an employee’s claim, it must notify OWCP within 14 days of becoming aware of the worker’s injury. *Id.* § 914(d). If the employer does not controvert the claim but rather chooses to pay benefits, the first installment of disability compensation is due 14 days after the employer becomes aware of the worker’s injury. *Id.* § 914(b). Future installments are due on a semimonthly basis after that. *Id.* If an employer does not timely controvert or pay the claim, the employee is entitled to additional compensation under § 914(e):

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, . . . 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 . . . .

*Id.* § 914(e).

If the employer timely controverts the claim, the Act’s adjudication procedures are triggered. *See id.* § 919. If those procedures result in a formal award of benefits, a neighboring provision, 33 U.S.C. § 914(f), similarly encourages prompt payments after such an award is entered:

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 . . . .

*Id.* § 914(f).

The term “compensation” is defined in the Longshore Act as a “money allowance payable to an employee . . . as provided for in this chapter . . . .” *Id.* § 902(12). Although the Ninth Circuit has not yet addressed whether § 914(e) payments are themselves “compensation,” it has held that payments under § 914(f) are. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 952-54 (9th Cir. 2007) (§ 914(f) payments are “compensation” under the Act and thus trigger liability for fee-shifting).

This Court has also long held that, although the Longshore Act does not expressly address interest, interest “is mandatory under the [Act] as a necessary and inherent component of compensation because it ensures that the delay in

payment of compensation does not diminish the amount of compensation to which the employee is entitled.” *Price*, 697 F.3d at 834 (internal quotation marks and citations omitted); *see also Matulic*, 154 F.3d at 1059; *Sproull v. Dir., OWCP*, 6 F.3d 895, 900 (9th Cir. 1996); *Hunt*, 999 F.2d at 421-22; *Found. Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 625 (9th Cir. 1991).

Interest on overdue compensation accrues from the date the worker becomes entitled to the compensation, not the date of the ALJ’s award. *Price*, 697 F.3d at 834; *Matulic*, 154 F.3d at 1059; *Hunt*, 999 F.2d at 422 n.1.

## **II. Relevant facts and procedural history**

Mr. Robirds suffered an injury to his right knee on September 12, 2011, while working for ICTSI. He had knee surgery two months later. While Mr. Robirds was recovering from the injury and unable to work, ICTSI voluntarily paid him temporary total disability compensation. ER 18-19. On November 15, 2012, Mr. Robirds’s knee reached maximum medical improvement, after which he became permanently partially disabled.<sup>2</sup> ER 20. He returned to work on

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<sup>2</sup> An injured worker reaches “maximum medical improvement” when “normal and natural healing is no longer likely.” *SSA Terminals v. Carrion*, 821 F.3d 1168, 1172 (9th Cir. 2016); *Pac. Ship Repair & Fabrication Inc. v. Dir., OWCP*, 687 F.3d

November 18, 2012. ER 20. On November 20, 2012, ICTSI terminated Mr. Robirds's total temporary disability payments. ER 30. ICTSI's termination was effective retroactively to November 15, but the company had already paid Mr. Robirds \$718.79 for the four-day period from November 16 to 19, 2012. *Id.* The company claimed that amount as an overpayment to be charged against Mr. Robirds's ongoing permanent partial disability compensation. *Id.*<sup>3</sup>

On December 7, 2012, ICTSI's medical expert, Dr. Youngblood, examined Mr. Robirds. In his report, Dr. Youngblood agreed that Mr. Robirds's knee was medically stationary (*i.e.*, had reached maximum medical improvement) and

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1182, 1185 (9th Cir. 2012). The maximum medical improvement date "triggers a change in the classification of a claimant's disability from temporary to permanent." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 653 (9th Cir. 2010). Mr. Robirds's disability classification also changed from total to partial because he was able to return to work and thus recovered the capacity to earn wages. ER 18, 20; *Gen. Const. Co. v. Castro*, 401 F.3d 963, 969 (9th Cir. 2005) ("[I]n general, if the claimant is capable of engaging in some gainful work, the disability is partial.").

<sup>3</sup> Under the Longshore Act, employers cannot recover overpayments from claimants directly. *Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 555-57 (9th Cir. 1992). Overpayments may only be recovered by offset. If an employer is required to pay a previously-injured claimant more compensation in the future, it is entitled to a credit for its past overpayments. *Id.* at 556; 33 U.S.C. § 914(j).

concluded that Mr. Robirds's right leg was permanently impaired by 10%. ER 20-21, 30.<sup>4</sup>

Under the Longshore Act, a permanent 10% disability to the leg (including the knee) entitles a worker to 28.8 weeks of compensation.<sup>5</sup> Even though ICTSI's own expert found Mr. Robirds's knee to be 10% impaired in December 2012, ICTSI did not pay him permanent partial disability compensation until April 3, 2013. And even at that point, ICTSI paid him a lump sum of \$18,098.00, equivalent to only 14.4 weeks of benefits, or 5% impairment of the right leg. That same day, ICTSI notified Mr. Robirds that it would not pay him any more compensation. ER 20, 30-31.

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<sup>4</sup> In his summary of Dr. Youngblood's report, the ALJ incorrectly stated that the doctor had diagnosed a 5% impairment in each knee rather than a 10% impairment in only the right knee. ER 21. This mistake is irrelevant because a 5% disability to each leg entitles a claimant to the same compensation as a 10% disability to one leg. *See infra* p. 8 n.5; 33 U.S.C. § 908(c)(22).

<sup>5</sup> Workers who entirely lose the use of one leg are generally entitled to two-thirds of their average weekly wage for a period of 288 weeks. 33 U.S.C. § 908(c)(2). Workers who suffer a partial loss of use of a leg are entitled to a portion of that 288 weeks of compensation proportionate to that loss of use. *Id.* § 908(c)(19). Thus, workers who suffer a 10% impairment to one leg are entitled to 28.8 weeks of compensation, and those who suffer a 5% impairment are entitled to 14.4 weeks of compensation. *Potomac Elec. Power Co. v. Dir., OWCP*, 449 U.S. 268, 271 n.4 (1980).

Mr. Robirds then filed a claim for benefits under the Longshore Act, contending that he was due more in permanent partial disability compensation than he had received because his right knee was 19% impaired, not 5%. *See* ER 24. In addition, Mr. Robirds sought additional compensation under 33 U.S.C. § 914(e), alleging that ICTSI failed to pay him all the compensation he was due between November 15, 2012, and April 13, 2013, when ICTSI finally controverted its liability for permanent partial disability compensation. *See* ER 29 & n.15.

The ALJ agreed with Mr. Robirds that his right knee was 19% impaired and therefore ordered ICTSI to pay a total of 54.72 weeks of permanent partial disability compensation, with a credit for payments already made. ER 28, 34. Regarding the § 914(e) issue, the ALJ held that Dr. Youngblood's finding that Mr. Robirds's right knee was 10% impaired put ICTSI on notice that Mr. Robirds was entitled to at least 28.8 weeks of permanent partial disability compensation starting from November 15, 2012. ER 30. At that point, ICTSI had only paid Mr. Robirds four days' worth of permanent partial disability compensation, so ICTSI was required to either pay the rest of the compensation due, or to file a notice of controversion in a timely fashion. ICTSI did neither and, therefore, pursuant to § 914(e), ICTSI owed Mr. Robirds additional compensation in the amount of 10%

of the benefits due for the period of November 20, 2012 to April 3, 2013. ER 30-31.<sup>6</sup>

With regard to interest, the ALJ awarded interest on the 54.72 weeks of permanent partial disability compensation that was now past due. ER 29. However, the ALJ denied interest on the 10% additional compensation due under § 914(e), citing *Cox v. Army Times Publishing Co.*, 19 BRBS 195, 1987 WL 107356 (Ben. Rev. Bd. 1987). ER 31. In *Cox*, the Board held that interest is not due on late § 914(e) payments because § 914(e) payments were penalties on the employer for failing to controvert a claim, rather than compensation to the claimant. *Id.* at \*3.

Mr. Robirds appealed to the Benefits Review Board. ER 78 (Certified Index 145-49). In a published, en banc decision, the Board overruled *Cox*, and held that interest attaches to overdue § 914(e) payments because those payments are “compensation” rather than penalties. The Board reasoned that, although assessments of additional compensation under § 914(e) have some penalty-like

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<sup>6</sup> The ALJ credited Employer’s \$718.19 advance payment for November 16-19, 2012 as voluntary compensation. See ER 30-31. If the employer voluntarily pays some but not all of the compensation due, the § 914(e) assessment is computed based only on the difference. See *Nat’l Steel & Shipbldg. Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979).



characteristics, they are predominantly compensation-like in that they are calculated as a percentage of the claimant's benefit entitlement and are paid directly to the claimant. ER 9-11 (citing *Ingalls Shipbldg., Inc. v. Dalton*, 119 F.3d 972, 977 (Fed. Cir. 1997)). Moreover, § 914(e) payments have the same characteristics as § 914(f) payments, and the courts of appeals—including the Ninth Circuit in *Tahara*, 511 F.3d at 953—have held that § 914(f) payments are “compensation” rather than penalties. ER 10.

Having held that ICTSI was liable for interest on its past-due § 914(e) payments, the Board then held that this interest should be calculated on a post-judgment basis, starting from the date the ALJ entered the § 914(e) award. ER 12 & n.16 (citing *Brown v. Alabama Dry Dock & Shipbldg. Corp.*, 28 BRBS 160, 1994 WL 476009 (Ben. Rev. Bd. 1994), and *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990)). One Board member filed a concurring opinion noting that she was “dubious that this appeal is not moot.” ER 14-15.

Mr. Robirds filed a motion for reconsideration, arguing that the Board erred in awarding interest only on a post-judgment basis. ER 77 (Certified Index 12-20). The Board summarily denied the motion. ER 1.

Mr. Robirds then filed a petition for review with this Court. ICTSI filed a cross-appeal.

## STANDARD OF REVIEW

This appeal raises a question of law. The Court reviews legal questions de novo, but affords deference to the Director's interpretations of the Longshore Act under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Price*, 697 F.3d at 825-33. The Board's interpretations of the Act are not entitled to any special deference. *See id.* at 832-33; *Dyer v. Cenex Harvest States Coop.*, 563 F.3d 1044, 1047, 1051 (9th Cir. 2009).

## SUMMARY OF ARGUMENT

The Board correctly held that Longshore Act claimants are entitled to interest on overdue payments of additional compensation under 33 U.S.C. § 914(e). Section 914(e) payments are "compensation" within the meaning of the Longshore Act. This Court has already held that additional compensation awarded under a similar provision, § 914(f), is "compensation" under the Longshore Act. *Tahara*, 511 F.3d at 952-54. This Court has also held that interest "is mandatory under the [Act] as a necessary and inherent component of compensation." *Price*, 697 F.3d at 834 (internal quotation marks and citations omitted). There is no reason to treat additional compensation under § 914(e) differently from additional compensation under § 914(f) or from other types of compensation under the Longshore Act. Thus, interest should be awarded when § 914(e) payments are late.

The Board erred, however, in concluding that this interest only accrues as of the date of a formal ALJ decision ordering an employer to pay § 914(e) compensation. The general rule is that interest on Longshore Act compensation is calculated on a pre-judgment basis, *i.e.*, from the date the payment was owed. Again, there is no reason to treat § 914(e) compensation differently. The Court should reverse the Board’s erroneous decision regarding the interest accrual date and remand for the agency to recalculate the amount of interest owed.

### **ARGUMENT**

#### **I. Interest is due on § 914(e) payments because they constitute “compensation.”**

It is well-established that Longshore Act claimants are entitled to interest on compensation payments. As this Court explained in *Price*, interest “is mandatory under the [Act] as a necessary and inherent component of compensation because it ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled.” 697 F.3d at 834 (internal

quotation marks and citations omitted).<sup>7</sup> Thus, if 33 U.S.C. § 914(e) payments are “compensation,” interest should attach to them under *Price*.

This Court has not yet addressed whether § 914(e) payments are “compensation.”<sup>8</sup> But it has held that payments required by § 914(f)—a neighboring provision that requires employers to pay an additional 20% of overdue compensation owed under a formal award—are compensation. *Tahara*, 511 at 952-54. The logic of *Tahara* applies with equal force to § 914(e), and compels the conclusion that § 914(e) payments are compensation rather than penalties. And, as compensation, they are subject to interest under *Price*.

The question in *Tahara* was whether a Longshore Act employer that failed to timely pay § 914(f) compensation was liable for the attorney’s fees incurred by the claimant in obtaining that compensation. Section 28(a) of the Act authorizes fee-shifting where the employer fails to pay any “compensation” within 30 days of receiving written notice of a claim for “compensation.” 33 U.S.C. § 928(a). The

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<sup>7</sup> See also *Matulic*, 154 F.3d at 1059; *Sproull*, 6 F.3d at 900; *Hunt*, 999 F.2d at 421-22; *Found. Constructors*, 950 F.2d at 625.

<sup>8</sup> So far, the only court of appeals to address the nature of § 914(e) payments is the Federal Circuit, which held based on the language and structure of the Longshore Act that § 914(e) payments are not “fines” or “penalties” for purposes of the Federal Acquisition Regulation but rather are meant to compensate the claimant. *Dalton*, 119 F.3d at 977-79.

employer in *Tahara* failed to timely pay the claimant, Quentin Tahara, the § 914(f) compensation he was owed. With the assistance of an attorney, Tahara successfully obtained a judgment enforcing his right to that additional compensation. *Tahara*, 511 F.3d at 952. The employer argued that it was not liable for Tahara’s attorney’s fees because § 914(f) payments were penalties rather than the “compensation” required to trigger fee-shifting under 33 U.S.C. § 928(a).

This Court rejected that argument, holding that § 914(f) payments are compensation. The decision was primarily based on the Longshore Act’s plain language, which “defines compensation as ‘money allowance payable to an employee . . . as provided for in [the Act].’” *Id.* at 953 (quoting 33 U.S.C. § 902(12)). Section 914(f) awards “fall[] squarely within this definition” as “a money allowance payable to an employee[.]” *Id.* (citing *Newport News Shipbldg. & Dry Dock Co. v. Brown*, 376 F.3d 245, 248 (4th Cir. 2004)).

This straightforward reading of the Act’s definition of “compensation” was buttressed by the fact that the Act “expressly characterizes at least nine types of payments it authorizes as penalties or fines” but “never refers to a § 914(f) award as a penalty or fine.” *Id.* (citations and internal quotation omitted). Further, unlike those fines and penalties, which are paid into a “special fund” in the Treasury of the United States, § 914(f) compensation is payable directly to the claimant, like disability compensation under the Act. *Id.* (citing 33 U.S.C. § 944(c)(3)). This

Court also found its conclusion that § 914(f) payments are “compensation” to be supported by the Act’s legislative history. *Id.* at 954 (“Since the LHWCA’s enactment in 1927, the title of what is now § 914 has remained ‘payment of compensation.’”) (citing Longshoremen’s and Harbor Workers’ Compensation Act, § 14, 44 Stat. 1424, 1432 (1927)).

The same factors that convinced the Court in *Tahara* that § 914(f) payments constitute “compensation” apply with equal force to § 914(e) payments. Like § 914(f) payments, § 914(e) payments do not number among the many sections of the Act that explicitly provide for the payment of fines or penalties.<sup>9</sup> And, unlike those fines and penalties (but like § 914(f) payments), § 914(e) payments are not paid into the special fund established by 33 U.S.C. § 944. As the Fourth Circuit explained, “Congress created a simple system for categorizing payments made by employers under the LHWCA: payments going directly to an employee are

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<sup>9</sup> Compare 33 U.S.C. § 914(f) with, e.g., *id.* §§ 914(g) (imposing penalty for failing to notify OWCP that final compensation payment has been made), 930(e) (imposing penalty for failing to send required reports or making false statements or misrepresentations in such reports); see *Tahara*, 511 F.3d at 953; *Dalton*, 119 F.3d at 977.

compensation, *see* 33 U.S.C. § 902(12), while payments going to the LHWCA special fund are penalties or fines, *see id.* § 944(c)(3).” *Brown*, 376 F.3d at 249. Section 914(e) payments, like § 914(f) payments, fall squarely on the “compensation” side of that line.<sup>10</sup>

*Tahara* involved liability for attorney’s fees rather than interest. But its holding that § 914(f) payments are “compensation” means that interest attaches to those payments under the logic of *Price*. The only court of appeals to directly consider the question agreed. *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 910-11 (3d Cir. 1994) (affirming award of interest on § 914(f) payment, noting “the truism that a dollar tomorrow is not worth as much as a dollar today. Allowing an employer to delay compensation payments interest-free would reduce the worth of such payments to the claimant, undermining the remedial intent of the Act.”) (quoting *Found. Constructors*, 950 F.2d at 625).

The Benefits Review Board has also long awarded interest on § 914(f) awards. *See McKamie v. Transworld Drilling Co.*, 7 BRBS 315, 320 (Ben. Rev.

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<sup>10</sup> Although the courts (and even the Director) have referred to compensation under § 914(e) and § 914(f) as a “penalty” on occasion, those cases are not controlling “because they do not deal with the meaning of the word ‘penalty’ . . . . [They] merely use the word ‘penalty’ as a convenient way of distinguishing the § 914(e) payments from underlying awards.” *Dalton*, 119 F.3d at 978-79; *Tahara*, 511 F.3d at 953-54 (citing *Dalton*).

Bd. 1977) (attached as addendum). Given their similarity in language and function, there is no justification for treating § 914(e) and § 914(f) differently.

Thus, the Board's holding that interest attaches to § 914(e) compensation should be affirmed.

**II. Interest on overdue § 914(e) payments begins accruing from the date the worker becomes entitled to additional compensation under § 914(e), not the date of the ALJ's award.**

The law of this Circuit is clear: interest on Longshore Act compensation “accrues from the date a worker becomes entitled to compensation, rather than from the date of an ALJ's award.” *Price*, 697 F.3d at 834; *accord Matulic*, 154 F.3d at 1059; *Hunt*, 999 F.2d at 422 n.1. While this Court has not explicitly addressed this question under either § 914(e) or § 914(f), the Board has long held that pre-judgment interest attaches to § 914(f) compensation. *McKamie*, 7 BRBS at 316, 320 (awarding interest on § 914(f) compensation starting on the first day the claimant became entitled to that compensation, not the later date when an ALJ ordered the employer to pay it). There is no reason to depart from this rule in the § 914(e) context. The Board therefore erred in holding that Mr. Robirds is entitled only to post-judgment interest on his overdue § 914(e) compensation. That



holding should be reversed and the case remanded to calculate the amount of interest he is entitled to.<sup>11</sup>

The Board tried to justify its departure from the baseline rule that pre-judgment interest attaches to Longshore Act compensation by citing *Brown*, 28 BRBS 160, 1994 WL 476009, and *Bonjorno*, 494 U.S. 827. ER 12. But these decisions are inapposite.

The Board's *Brown* decision does not support its refusal to award pre-judgment interest here. In fact, to the extent *Brown* is relevant, it supports the opposite conclusion. The ALJ in *Brown* awarded disability compensation and pre-judgment interest on that compensation. 1994 WL 476009, at \*1. The employer paid the compensation but refused to pay the interest on the ground that the ALJ had no authority under the Longshore Act to award pre-judgment interest. *Id.* The Board affirmed the award of pre-judgment interest based on court of appeals and Board case law holding that pre-judgment interest was mandatory under the Act.

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<sup>11</sup> Remand is necessary because the ALJ did not make a finding on when the next installment of compensation was due after ICTSI stopped paying disability compensation in November 2012.

*Id.* at \*2 (citations omitted).<sup>12</sup> It is not clear why the Board thought *Brown* justified an award of only post-judgment interest for overdue § 914(e) payments below. *Brown*'s only reference to § 914(e) is citing *Cox* for the proposition that interest is not available at all for such payments. *Id.* But the Board overruled *Cox* in this case. ER 10.

*Bonjorno* is also inapposite. The Board cites *Bonjorno* for the proposition that “[t]he purpose of post-judgment interest is ‘to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.’” ER 11 n.16. The Supreme Court used that language in *Bonjorno* to describe the purpose of 28 U.S.C. § 1961, a statute that requires interest “calculated from the date of the entry of the judgment” (*i.e.*, post-judgment interest) on money judgments obtained in civil actions in the federal district courts. That statute applies only to district court judgments, not awards obtained in administrative tribunals, such as the Longshore Act award here. *Hobbs v. Dir., OWCP*, 820 F.2d 1528, 1531 (9th Cir.

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<sup>12</sup> At the claimant's request, the Board modified the award to add that the claimant was also entitled to post-judgment interest on the pre-judgment interest awarded by the ALJ, holding that requiring the employer to pay post-judgment interest on past-due pre-judgment interest served the Longshore Act's purpose of making the claimant whole. 1994 WL 476009 at \*2-4. That issue was not before the Board in this case, as the ALJ here did not award any interest at all on the § 914(e) payment.

1987) (rejecting argument that 28 U.S.C. § 1961 governs Longshore Act attorney’s fee award), *overruled in part on other grounds by Anderson v. Dir., OWCP*, 91 F.3d 1322, 1324-25 & n.3 (9th Cir. 1996).

In contrast, the purpose of Longshore Act interest is not to compensate plaintiffs for the time between the “ascertainment of the damage” and payment. Instead, it is to “ensure[] that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled.” *Price*, 697 F.3d at 836 (quoting *Matulic*, 154 F.3d at 1059). That is why the baseline rule is to award interest on a pre-judgment basis, running from the time compensation was owed. Neither *Bonjorno* nor *Brown* justifies the Board’s departure from that rule. The § 914(e) compensation here was owed in the 2012-2013 time period, when ICTSI stopped paying disability benefits to Mr. Robirds without controverting its liability for those benefits. Interest on that § 914(e) compensation should be calculated from that time, not from when the ALJ’s order was issued in 2017.

ICTSI suggests that the Third Circuit’s *Barry* decision requires a different result. *See* ICTSI Br. at 9. Not so. It is true that, before affirming the Board’s ruling awarding interest on overdue § 914(f) compensation, *Barry* characterizes the employer’s appeal as a challenge to “the Board’s decision to award *Barry post-judgment* interest.” 41 F.3d at 910 (emphasis added). But the issue of whether

interest should be awarded on a pre- versus post-judgment basis was not litigated in that case because the Board decision affirmed in *Barry* was not limited to post-judgment interest. See *Barry v. Sea-Land Servs., Inc.*, 27 BRBS 260, 1993 WL 545206, at \*3 (Ben. Rev. Bd. 1993) (“[W]e modify the award to reflect claimant’s entitlement to interest on the late penalty [*i.e.*, the § 914(f)] payment, to be calculated by the district director.”).

While the Board did not specifically state that it was awarding pre-judgment interest, that is the more likely interpretation of its decision in *Barry*. The only authority the Board cited for the proposition that interest applies to § 914(f) payments was *McKamie*, which, as explained above, holds that such interest accrues on a pre-judgment basis. *Barry*, 1993 WL 545206, at \*3; *supra* p. 18. This was also the Director’s contemporaneous understanding of the Board’s holding in *Barry*, as expressed in her brief to the Third Circuit. See Brief for Respondent Director, OWCP, *Barry*, 41 F.3d 903 (No. 94-3026), 1994 WL 16167479, at \*6 (“The Board also held that, as the Director contended, the ALJ had erred in failing to declare interest due on the [§ 914(f) compensation] *from the date*

*it fell due* (i.e., the day following expiration of the ten-day period for unaugmented payment on the award) until that amount was paid[.]” (emphasis added).<sup>13</sup>

It is not clear why the Third Circuit characterized the Board’s decision in *Barry* as an award of post-judgment interest. It could relate to the fact that all § 914(f) payments are “post-judgment” in the sense that § 14(f) applies only if the employer fails to pay disability benefits due under the terms of a formal compensation order. But for *Barry* to support ICTSI’s position, it would need to stand for the proposition that interest does not begin accruing until after a second formal order awarding § 914(f) compensation is issued. *Barry* does not stand for that proposition because that issue was not litigated by the parties or discussed in

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<sup>13</sup> Before the Third Circuit, Sea-Land argued that no interest attaches to overdue § 914(f) payments at all, but did not challenge the Director’s characterization of the Board’s holding or argue in the alternative that interest, if awarded, should accrue only on a post-judgment basis. See Brief for Petitioner, *Barry*, 41 F.3d 903 (No. 94-3026), 1994 WL 16167476, at \*16-17; Reply Brief for Petitioner, *Barry*, 41 F.3d 903 (No. 94-3026), 1994 WL 16167477, at \*6.

the decision.<sup>14</sup> Thus, the Third Circuit’s stray mention of “post-judgment interest” is dicta at best and of no persuasive value on that issue here.

ICTSI also argues that interest on § 914(e) compensation cannot be calculated on a pre-judgment basis because “[i]t is often unknown whether compensation is actually ‘due’ (or how much is due) until a compensation order has been issued.” ICTSI Br. at 2. It is true that those facts are sometimes unknown or honestly disputed. But the Act provides a remedy for those situations: the employer can file a timely controversion of the worker’s claim, which simultaneously triggers the Longshore program’s adjudication process and protects the employer from any additional § 914(e) liability on the disputed compensation.

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<sup>14</sup> Indeed, it likely that little or no “true” post-judgment interest (*i.e.* interest that accrued after the ALJ ordered Sea-Land to pay § 914(f) compensation) was even at stake in *Barry*. Sea-Land paid all the § 914(f) compensation the ALJ ordered it to pay before it filed an appeal to the Board, which it would have had to do within 10 days of the ALJ’s order. *See Barry*, 1993 WL 545206, at \*1 n.3 (noting that Sea-Land had already paid the § 914(f) compensation it owed); 1994 WL 16167476, at \*4 (Sea-Land Br.) (“Sea-Land paid the penalty and then filed a notice of appeal with the Benefits Review Board.”); 33 U.S.C. § 921(a).

33 U.S.C. §§ 914(d)-(e). For whatever reason, ICTSI did not do that here.<sup>15</sup>

Section 914(e) liability is the consequence.

In any event, the questions of whether and how much compensation is due are frequently known by the employer and the injured worker. *See Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 103 (2012) (noting “the many [Longshore] cases in which no formal orders issue, because employers make voluntary payments or the parties reach informal settlements”). Indeed, ICTSI paid disability compensation to Robirds for over a year—from September 2011 through November 2012—without any formal compensation order. ER 19-20. There is no dispute that those compensation payments were timely and in the correct amount. ICTSI’s argument that interest should accrue only on a post-judgment basis because it is impossible to know how much compensation is due without an award should be rejected.

The better rule is for interest to accrue from the time a claimant becomes entitled to additional compensation under § 914(e). A key premise of the Act is

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<sup>15</sup> Before the ALJ, ICTSI argued that a form it submitted on November 20, 2012, qualified as an adequate controversion notice. ER 30. The ALJ held that this form was inadequate and that ITCSI did not validly controvert Robirds’s entitlement to permanent partial disability compensation until April 3, 2013. ER 30-31. ICTSI did not appeal this finding to the Board and did not raise the issue in its opening brief to this Court, so any argument that its November 2012 filing was a valid controversion has been forfeited. *See* ER 4 n.5; ICTSI’s Opening Brief.

that compensation “shall be paid periodically, promptly, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer.” 33 U.S.C. § 914(a) (emphasis added). Such a rule would be more consistent with that premise, prevent unnecessary hearings, and remove any incentive for employers to delay the payment of § 914(e) compensation. Finally, it would make § 914(e) interest consistent with this Court’s prior precedent that interest on Longshore Act compensation is computed on a pre-judgment basis. *Price*, 697 F.3d at 834; *Matulic*, 154 F.3d at 1059; *Hunt*, 999 F.2d at 422 n.1.

## CONCLUSION

For the reasons above, the Director asks the Court to hold that: (1) § 914(e) payments are “compensation,” such that interest is awardable on late § 914(e) payments; and (2) like interest on other compensation, interest on overdue § 914(e) payments accrues from the date the worker becomes entitled to that § 914(e) compensation. The Court should affirm the Board’s decision on the first point, but should reverse the Board’s decision as to the interest accrual date and remand for the agency to calculate the proper amount of interest owed.



Respectfully submitted,

KATE S. O'SCANNLAIN  
Solicitor of Labor

BARRY H. JOYNER  
Associate Solicitor

SEAN G. BAJKOWSKI  
Counsel for Appellate Litigation

MARK A. REINHALTER  
Counsel for Longshore

s/Cynthia Liao  
CYNTHIA LIAO  
Attorney

U.S. Department of Labor, Office of the Solicitor  
200 Constitution Ave, N.W., Room N-2119  
Washington, D.C. 20210  
(202) 693-5355  
[liao.cynthia.f@dol.gov](mailto:liao.cynthia.f@dol.gov)

Attorneys for the Director, Office  
of Workers' Compensation Programs

## **STATEMENT OF RELATED CASES**

The § 914(e) interest issue is also present in *Scarborough v. Wagner*, 9th Cir. No. 19-72288, which is currently pending before this Court.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Director, Office of Workers' Compensation Programs, believes oral argument is unnecessary because this appeal presents a narrow legal issue and the legal arguments have been fully presented in the briefs.

## **CERTIFICATE OF COMPLIANCE**

I certify that this brief was produced using Microsoft Word, in Times New Roman font, 14-point typeface, and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief also complies with Fed. R. App. P. 28.1(e)(2)(B) and Ninth Cir. R. 28.1-1 because it contains 5,854 words, excluding the material referenced in Fed. R. App. P. 32(f).

s/Cynthia Liao  
CYNTHIA LIAO  
Attorney

## **ADDENDUM**

*McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (Ben. Rev. Bd. 1977)

WILLIAM F. McKAMIE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
TRANSWORLD DRILLING COMPANY	)	BRB Nos. 76-456
	)	and 76-456A
and	)	
	)	
AMERICAN MOTORISTS INSURANCE	)	DECISION
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	

**Digest  
Section**

**Syllabus**

- |                 |  |        |
|-----------------|--|--------|
| 369[a];<br>2054 | A Deputy Commissioner's approval of a settlement agreement, ordering that a Longshoremen's Act claim be paid in a lump sum is an award under Section 14(f). Thus, an employer which has failed to pay compensation pursuant to the approval within ten days after it has become due is subject to the 20 percent penalty imposed by that section. The employer's contention that an approval of a settlement agreement is not an award, and that Sections 14(b) and 14(e) providing that compensation is to be paid within 14 days after it is due is therefore applicable, is without merit. In an order approving a settlement agreement, a Deputy Commissioner should specifically refer to the ten-day payment limitation. | p. 318 |
| 663             | Payment of Longshoremen's Act compensation based on a Deputy Commissioner's order approving a settlement agreement becomes due when the order is filed in the Office of the Deputy Commissioner, not at the later time of its receipt by the parties.  | p. 319 |
| 2054            | An amount for which an employer is liable as a penalty imposed by Longshoremen's Act Section 14(f) for late payment of compensation is additional compensation, and six percent annual interest on that amount from the time the original compensation was ordered is mandatory.   | p. 320 |

Appeals from the Decision and Order of Louis Scalzo, Administrative Law Judge, United States Department of Labor.

B. Ralph Bailey (Bailey & Leninger), New Orleans, Louisiana, for the claimant.

Frederick R. Bott (Deutsch, Kerrigan & Stiles), New Orleans, Louisiana, for the employer/carrier.

Ronald E. Meisburg (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C.,

for the Director, Office of Workers' Compensation Programs,  
United States Department of Labor.

Before: Smith, Chairman, Hartman and Miller, Members.

Miller, Member:

These are appeals by the employer/carrier and the claimant from a Decision and Order (76-LHCA-813) of Administrative Law Judge Louis Scalzo pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended to claims arising out of employment on the outer continental shelf by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333(c) (hereafter referred to as the Act).

On October 21, 1975, Deputy Commissioner R.J. Shea, pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), executed and filed a compensation order approving an agreed settlement ordering that \$14,000 be paid to the claimant in a lump sum and \$1,500 be paid to the claimant's attorney. The carrier received the approval of settlement by certified mail on October 24, 1975. The carrier sent drafts for the ordered amounts to its attorney by letter dated October 28, 1975. The drafts were mailed by the attorney on November 8, 1975. Claimant argues that he is entitled to additional compensation plus interest under the provisions of Section 14(f) of the Act, 33 U.S.C. §914(f), because of carrier's failure to pay the agreed settlement within ten days of the entry of the compensation order.

After a formal hearing on the issue of the applicability of Section 14(f) of the Act, 33 U.S.C. §914(f), the administrative law judge found that the compensation ordered by the deputy commissioner became due on October 21, 1975, the date upon which the order was filed and thus became effective, and that payment

of the compensation was made on November 8, 1975, the date upon which the claimant received the draft. The administrative law judge ordered payment to the claimant of additional compensation of \$2800 under Section 14(f) which provides:

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 21 and an order staying payments has been issued by the Board or court.

The administrative law judge also ordered the payment of interest at the rate of six percent per annum on the \$14,000 for the period from October 21, 1975, through November 8, 1975.

The employer/carrier (hereafter referred to as the employer) appeal, contending that the approval of a settlement agreement does not constitute an "award" under Section 14(f) and that if there is any ambiguity in a statute providing for a penalty it should be strictly construed in favor of the person against whom the penalty is sought. Employer does not contend that there is no "time limit applicable to the payment of compensation due under a settlement approved by the commissioner." However, it argues that the provisions of Sections 14(b) and 14(e), which provide that compensation payable without an award shall be paid within fourteen days after it is due, are applicable. 33 U.S.C. §§914(b), (e).

There is no doubt that proceeds due a claimant under an approved settlement constitute compensation within the definition of "compensation" in Section 2(12) of the Act, 33 U.S.C. §902(12), as "the money allowance payable to an employee or to his dependents as provided for in this Act...." The central issue of the employer's

appeal is whether that compensation is payable under the terms of an "award" within the meaning of Section 14(f) of the Act.

The Board finds that there is no ambiguity in the Act with respect to the applicability of Section 14(f) and that the administrative law judge was correct in holding that the approval of an agreed settlement constitutes an award for purposes of that section.

Under the Act, compensation is payable either voluntarily or pursuant to an award. Section 14(e) provides that if any installment of compensation payable without an award is not paid within fourteen days after becoming due, and timely notice of controversy is not filed, then an additional ten percent of the past due compensation is also payable. Section 14(f) provides that if compensation payable under the terms of an award is not paid within ten days after it becomes due, absent the initiation of review proceedings and the issuance of a stay of payments order, then an additional twenty percent of the past due compensation is also payable.

It is clear that when a compensation order is filed, either the claim is rejected or an award is made. See 33 U.S.C. §§919(e), 921(e). Upon approving an agreed settlement under Section 8(i), the deputy commissioner is required to file a compensation order effectuating the agreed settlement. 20 C.F.R. §702.241. That compensation order obviously does not reject a claim but makes an award. The compensation provided for is payable under the terms of the award. The provisions of Section 14(f) are therefore applicable.

The Board notes that this result is consistent with the holding in Pistorio v. Einbinder, 351 F.2d 204 (D.C. Cir. 1965), concerning

the application of Section 22 of the Act, 33 U.S.C. §922, which provides for modification of compensation orders. In that case the court held that "section 922 accords no different status to an award evolved by agreement than to one determined after hearing." The Board concludes that Section 14 of the Act accords no different status to awards by deputy commissioners than to awards by administrative law judges.

Therefore, a Section 14(f) assessment is mandatory inasmuch as the compensation award was not paid within ten days after it became due. This would be the case even if the compensation order was not considered filed until received by the parties, and payment was considered made when the draft was mailed, as employer argues. Moreover, we cannot accept employer's arguments on either of these points. The law is clear that payment becomes due when the order is filed in the office of the deputy commissioner. The law on this point is set out in detail in the Decision and Order of the administrative law judge, 5 BRBS 30 (ALJ) at 35-36. Moreover, the compensation in this case was paid on November 8, 1975, the day the claimant received the draft. Under the common law, although payment by check is only conditional payment of an obligation, if the check is honored and paid by the drawee bank, the time of payment relates back to the time the check was delivered to the obligee. Duke v. Sun Oil Co., 320 F.2d 853 (5th Cir. 1963). See generally 60 Am Jur. 2d Payment §§11,45.

Considering the brevity of time allowed to employers for payment pursuant to awards, and despite the apparently ample notice given to the employer that Section 14(f) was applicable by entitling the compensation order Compensation Order/ Award of Compensation/ Approval



of Agreed Settlement and by separately setting off the phrase "Award of Compensation" in the Order, the Board suggests that deputy commissioners should hereafter include specific reference to the ten day period for payment in orders approving agreed settlements.

The claimant appeals contending that interest should have been assessed on the additional \$2800 due under Section 14(f) of the Act for the period of November 1, 1975, to the date that amount was paid, at the rate of six percent per annum. The Board agrees with the claimant. The \$2800 is additional compensation, payable under Section 14(f), which became due on November 1, 1975, when the employer failed to pay the \$14,000 awarded by October 31, 1975. Interest on unpaid compensation past due is mandatory. Ryan v. McKie Co., 1 BRBS 221, BRB No. 74-160 (Dec. 10, 1974); See also Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971).

The claimant's attorney has requested approval of a fee for services successfully rendered in this appeal before the Board. Because notice of the fee request apparently has not been served on the opposing counsel, the Board declines to award a fee at this time. Hilton v. Todd Shipyards Corp., 545 F.2d 1177 (9th Cir. 1977); Green v. Atlantic Container Lines, Ltd., 2 BRBS 385, BRB No. 75-174 (Nov. 5, 1975). The attorney for the claimant may serve opposing counsel with notice of the fee request within 30 days of receipt of this Decision and shall notify the Board of that service. Opposing counsel may respond to the fee request within 20 days after receipt of the notice from the claimant's attorney.

Accordingly, the administrative law judge's finding that the provisions of Section 14(f) are applicable to a compensation order approving a settlement is affirmed. The administrative law judge's

Decision and Order is modified, however, to provide for the assessment of interest on the \$2800 due under Section 14(f). The case is remanded to the Deputy Commissioner for the Seventh Compensation District for determination of the amount of interest due on the \$2800 and for the entry of an appropriate award.

Dated this 30th day  
of December 1977.

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