No. 14-73181

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARI NAVALO,

Petitioner

v.

COCHISE CONSULTANCY, INC. and ACE AMERICAN INSURANCE COMPANY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal arises from a claim filed by Ari Navalo (Navalo or Claimant), against his former employer Cochise Consultancy, Inc. (Employer), for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or Act), as

extended by the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq*. The Administrative Law Judge (ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d). She issued an order dated April 26, 2013, which became effective on May 14, 2013, when it was filed in the office of the district director. ER 1; 33 U.S.C. § 921(a).

On September 16, 2013, Navalo applied for a supplementary order declaring that the Employer had defaulted in the payment of compensation due under the ALJ's order. ER 113. The district director, who had jurisdiction over that application under 33 U.S.C. § 918(a), denied it on December 5, 2013.[1] ER 122.

Navalo appealed the denial to the Benefits Review Board (Board) on December 18, 2013, within the thirty-day period provided by 33 U.S.C. § 921(a), thereby invoking the Board's review jurisdiction under 33 U.S.C. § 921(b)(3).[2] On August 27, 2014, the Board issued a final Decision and

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[1] Although referred to in the statute as "deputy commissioner," the title of the official has been changed to "district director." 20 C.F.R. § 702.105.

[2] A challenge to a district director's decision denying an application for a supplemental order of default is appealed directly to the Benefits Review Board. *See Bray v. Director, OWCP*, 664 F.2d 1045, 1048 (5th Cir. 1981). Had the application been granted, it would have been reviewed by a federal district court in an enforcement action under 33 U.S.C. § 918(a).

Order, affirming the district director's refusal to issue an order declaring default. ER 38.

Navalo was aggrieved by the Board's decision, and filed a petition for review with this Court on October 14, 2014, within the sixty days allowed under 33 U.S.C. § 921(c). Jurisdiction is proper in this Circuit because the district director who filed and served the compensation order is located in Seattle. ER 34, 122; 42 U.S.C. § 1653(b); *Pearce v. Director, OWCP*, 603 F.2d 763, 770 (9th Cir. 1979) (initial judicial review under 42 U.S.C. § 1653(b) occurs in the courts of appeals).[3] Consequently, under 33 U.S.C. § 921(c) and 42 U.S.C. § 1653(b), this Court has jurisdiction over this appeal.

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[3] *Pearce* suggests, in dicta, that section 1653(b) could be read to confer jurisdiction based on the location of either the district director or the ALJ. 603 F.2d at 770-71. This issue was squarely addressed and properly analyzed in *Hice v. Director, OWCP*, 156 F.3d 214, 218 (D.C. Cir. 1998). In *Hice*, the ALJ was located in Washington, D.C., but the district director who filed the compensation order was in Baltimore, Maryland. The D.C. Circuit correctly held that the location of the district director controls, noting that cases are assigned to the district director closest to the claimant's residence, while ALJs may travel nationwide to hear cases, and that every case involves a district director, while some cases (like *Pearce* and this appeal) do not involve an ALJ. *Id*. at 217-18.

STATEMENT OF THE ISSUE

The Employer paid the Claimant's compensation at the maximum compensation rate allowable under the statute. Was the district director correct to find that the Employer was not in default of payment, and deny the Claimant's request for a supplementary order declaring default?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Navalo worked for the Employer as a security escort in Iraq. ER 3. On December 3, 2004, the convoy he was protecting was attacked, and he suffered a gunshot wound to the chest. ER 4, 21.

II. PROCEEDINGS BELOW

A. The ALJ's Decision

The ALJ found that the Claimant's average weekly wage (AWW) was $2,594.56. ER 29. She found that, after a period of temporary total disability, when he was unable to work, the Claimant had two periods of permanent partial disability during which he had earnings, but his wages were lower than his AWW.[4] *Id*. at 29-30. She determined that, from June 19, 2007, to

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[4] Compensation for temporary total disability is appropriate where the claimant is unable to work, but has not yet reached maximum medical improvement. Compensation for permanent partial disability is paid when the claimant is permanently unable to earn the wages he was earning at the

February 17, 2008, the Claimant earned an average of $619.80 per week, *id*. at 30, and beginning May 1, 2012, and continuing, the Claimant earned an average of $480 per week, *id*. at 31.

The ALJ awarded compensation under section 908(c)(21), which provides that, for permanent partial disability, the claimant's compensation shall be two-thirds of the difference between his AWW and his wage-earning capacity after the injury. 33 U.S.C. § 908(c)(21). She began with the AWW, stating that the "Claimant agrees [with the Employer] that the 'average weekly wage has been conclusively established at $2,594.56' with a maximum compensation rate of $1,047.16 per week." *Id*. at 29 (quoting Claimant's post-hearing brief, ER 58, 73); see 33 U.S.C. § 906(b)(1) (setting a maximum compensation rate of twice the applicable national average weekly wage).

Subtracting the Claimant's post-injury wages from his AWW, the ALJ calculated a figure of $1,974.76 ($2,594.56 - $619.56) for the first period of partial disability, *id*. at 30, and $2,114.56 ($2,594.56 - $480) for the second, *id*. at 31. She thus found that the Employer owed the claimant weekly compensation amounting to two-thirds of $1,974.76 ($1,316.51) for the period from June 19, 2007 to February 17, 2008; and two-thirds of $2,114.56

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time of his injury, but has retained or recovered some wage-earning capacity. 33 U.S.C. § 908(c)(21).

($1,409.71) beginning May 1, 2012 and continuing. *Id*. at 30, 31. She did not restate her previous observation that the maximum compensation rate of $1,047.16 applied.

Finally, the ALJ ordered that "[t]he Employer shall pay permanent partial disability benefits for the physical disability to the Claimant based on his alternate wage earning capacity as described above," that "[a]ll calculations of disability payments are to be based on the Claimant's stipulated average weekly wage of $2,594.56," and that "[t]he District Director shall make all calculations necessary to carry out this Order." *Id*. at 32.[5]

B. The District Director's Calculations

On May 14, 2013, the district director filed and served the ALJ's order with an attached compensation and interest calculation performed by a claims examiner.[6] The calculations indicated that the Claimant was entitled to $1,316.51 per week (two-thirds of $1,974.76) from June 19, 2007, to February 17, 2008; and to $1,409.71 per week (two-thirds of $2,114.56) beginning May

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[5] It is common for ALJs to leave such calculations to the district director. *See Keen v. Exxon Corp*., 35 F.3d 226, 227 (5th Cir. 1994); *Severin v. Exxon Corp*., 910 F.2d 286, 288 (5th Cir. 1990).

[6] Although the Claims Examiner's May 14, 2013 "compensation and interest calculation" is captioned "Amended," to the Director's knowledge, this was the initial calculation performed by the district director. *See* ER 39 n.1.

1, 2012, and continuing. ER 34. The calculations failed to apply the maximum rate provision. They also indicated that the Employer was entitled to a credit of $38,145.54 for temporary total disability compensation paid from December 4, 2004 to August 15, 2005, and was liable for interest of $1,180.20. *Id*.

No party appealed the ALJ's order within 30 days after its May 14, 2013 filing and service, so it became final. *See* 33 U.S.C. § 921(a).

In letters to the district director dated July 11, 2013, and August 2, 2013, ER 97, the Claimant argued that: (1) the Employer was not entitled to a credit for temporary total disability payments made from December 4, 2004, to August 15, 2005; (2) the Employer was paying the fiscal year 2005 maximum rate of $1,047.16, rather than the $1,409.71 cited in the claims examiner's calculations;[7] and (3) the claims examiner's interest calculation was incorrect. The Employer responded in a letter dated August 15, 2013, arguing that the credit for prior temporary total disability payments was correct, and that the Claimant could not receive a compensation rate higher than the relevant

[7] The Claimant's letter's reference to $1,407.71 appears to be a typographical error. The ALJ referenced a compensation rate of two-thirds of $2,114.56, ER 31 – which is how the claims examiner reached $1,409.71 – but also referred to the FY 2005 maximum rate ($1,047.16), ER 29.

maximum rate, which was, at the time of his FY 2005 injury, $1,047.16.[8] ER 106.

On August 27, 2013, the claims examiner issued an Amended Compensation and Interest Calculation. ER 108-09. She amended the compensation rates for permanent partial disability for the periods from June 19, 2007, to February 30, 2008, and from May 1, 2012, forward, to reflect that they were subject to the FY 2005 maximum rate of $1,047.16 per week. She also eliminated the credit her previous calculation gave the Employer for compensation paid for temporary total disability from December 4, 2004, to August 15, 2005, and reduced the amount of interest due.[9] *Id.*

On September 3, 2013, the Claimant wrote to the district director, effectively arguing that he was entitled, for the periods of permanent partial disability addressed by the claims examiners' amended calculations, to a compensation rate higher than the applicable maximum rate. He reiterated this argument in a letter dated September 9, 2013, asserting that maximum

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[8] *See* http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (reporting annual maximum compensation rates).

[9] The district director's determinations regarding the amount of interest owed and the credit to the employer for advance payments of compensation under 33 U.S.C. § 914(j) were not at issue before the Board, and are not at issue in this appeal.

compensation rates apply only to compensation for death or permanent total disability, not to compensation for permanent partial disability. *See* ER 111 n.1. He also argued that the Employer was too late to challenge the calculations that were filed and served on May 14, 2013, because it had not appealed within 30 days, and that he was entitled to additional compensation under 33 U.S.C. § 914(f).[10] ER 111. In a letter dated September 16, 2013, the Claimant requested that the district director issue a supplementary order declaring default under 33 U.S.C. § 918(a). ER 113.

On December 5, 2013, the district director issued a letter concluding that the Employer had paid compensation at the proper rate, and declining to issue a default order or to assess additional compensation under section 914(f). ER 122. The letter stated that: (1) the maximum rate set in 33 U.S.C. § 906(b)(1) applies to all compensation payable under the Act, including that payable under 33 U.S.C. § 921(c)(21), ER 123-24; (2) the applicable maximum rate in the Claimant's case was $1,047.16 per week, which the ALJ referenced in her decision, and which the Employer had paid or was paying for the relevant periods of permanent partial disability, ER 123, 124; and (3) the

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[10] Section 914(f) provides that, if the compensation due under an order is not paid within 10 days after becoming due, an additional twenty percent of the unpaid amount shall be added to the compensation due. 33 U.S.C. § 914(f).

Claimant was not entitled to additional compensation under section 914(f), ER 123. The letter concluded that the district director "also declines to enter a default order in the issue at hand, as there is no evidence that payment of any of the compensation to which the claimant is entitled is found to be in default." ER 124. The Claimant appealed to the Board.

C. The Board's Decision

After determining that it had jurisdiction to hear the Claimant's appeal of the district director's refusal to issue a supplementary order declaring default, ER 42-43, the Board affirmed that denial. It found that the ALJ had noted the applicability of the $1,047.16 maximum compensation rate, and the Claimant's agreement to that rate, in her decision. *Id*. at 44. It further found that "the administrative law judge did not explicitly order the payment of any particular amount of compensation," but simply ordered payments based on the Claimant's AWW of $2,594.56, and ordered the district director to make all calculations necessary to carry out the order. *Id*.

The Board noted that because making calculations is ministerial, "it is logical that [the district director] may make any additional calculations or revisions to ensure accuracy in effectuating an administrative law judge's compensation order or in complying with the Act . . . . As the district director was tasked with making calculations to effectuate the administrative law

judge's Order, and as the August calculations, but not the May calculations, effectuated the statutory maximum rate, we reject the claimant's assertion that the district director's action was *ultra vires*." *Id*.

The Board also rejected the Claimant's contention that the statutory maximum does not apply to awards for permanent partial disability compensation under 33 U.S.C. § 908(c)(21). It noted the Supreme Court's holding that the cap "applies, globally, to all disability claims." ER 45 (quoting *Roberts v. Sea-Land Services*, 132 S.Ct. 1350, 1358 (2012)). Finally, the Board found that $1,047.16 – the maximum rate in effect at the time of the Claimant's injury, when he first became disabled – was the correct maximum rate under *Roberts*. It found that the Employer had paid, and continued to pay, at that rate, and was therefore not in default. The Board consequently affirmed the district director's denial of the Claimant's request for a supplementary order declaring default. ER 45-46.

SUMMARY OF ARGUMENT

As both the ALJ and Board noted in their decisions, the Claimant acknowledged the applicability of the FY 2005 statutory maximum compensation rate of $1,047.16 per week. ER 29 (*citing* ER 58, 73), 43-44. While the claims examiner's initial calculation erroneously failed to apply that maximum rate, her ministerial error cannot override either Congress' intent to cap weekly compensation at a statutorily determined maximum rate, or the ALJ's recognition that such a rate applied. Because the Employer paid compensation at the applicable maximum rate for all relevant periods of disability, the district director's refusal to declare a default based on the claims examiner's initial, erroneous calculation of the compensation due was correct.

STANDARD OF REVIEW

This appeal raises a question of law. The Court reviews legal questions *de novo*, but affords respect to the Director's position under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944) and *U.S. v. Mead Corp*., 533 U.S. 218 (2001). *Price v. Stevedoring Serv. of Am*., 697 F.3d 820, 824-33 (9th Cir. 2012) (en banc). The Board's interpretations are not entitled to any special deference. *Id*.

ARGUMENT

I. THE DISTRICT DIRECTOR'S DENIAL OF THE CLAIMANT'S APPLICATION FOR A SUPPLEMENTARY ORDER DECLARING DEFAULT SHOULD BE AFFIRMED.

A. The Act limits the weekly compensation payable to any claimant to a maximum rate set at twice the applicable national average weekly wage. The maximum rate applicable to Navalo is $1,047.16.

Section 6(b)(1) of the Longshore Act provides that "[c]ompensation for disability or death . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary" before October 1 of each year. 33 U.S.C. § 906(b)(1). As the Supreme Court held in *Roberts*, 132 S.Ct. at 1358, that cap on compensation "applies globally, to all disability claims."[11]

Under section 6(c), the initial maximum rate that applies to a disabled employee is the one in effect on the date that he is "newly awarded compensation" under section 6(c). And an employee is newly awarded compensation when he first becomes disabled, and thus entitled to compensation. *Roberts*, 132 S.Ct. at 1355. The Claimant first became

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[11] Thus, to the extent that the Claimant still contends that the section 906(b)(1) maximum applies only to compensation for permanent total disability or death – but not to compensation for permanent partial disability under 33 U.S.C. § 908(c)(21) – *Roberts* clearly refutes that argument.

disabled and entitled to compensation when he was shot in December 2004. Because December 2004 is in fiscal year 2005 (which began October 1, 2004), Claimant is subject to the FY 2005 maximum rate of $1,047.16 for all periods of disability.[12] Indeed, the Board and ALJ found that the Claimant recognized the applicability of that maximum rate in his post-hearing brief to the ALJ. ER 29, 43 (citing Claimant's post-hearing brief, ER 58, 73).

B. The ALJ's decision recognized that the maximum compensation rate applied to Navalo, and the claims examiner's failure to use that rate was a ministerial error that cannot override the ALJ's intent or the statute's requirement.

The Claimant suggests that the ALJ intended him to receive compensation exceeding the applicable maximum rate. An objective reading of the ALJ's full decision, however, belies that assertion. The ALJ specifically noted in her decision that the Claimant agreed he was subject to the maximum rate of $1,047.16 per week. ER 29. One page later, she calculated the Claimant's compensation based on two-thirds of the Claimant's average

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[12] Because his disability has been either temporary total or permanent partial throughout, the Claimant has remained subject to the FY 2005 maximum rate throughout the course of his disability. *Roberts*, 132 S.Ct. at 1354. Although the maximum rate increases each fiscal year in step with increases to the national average weekly wage, only those receiving compensation for permanent total disability or death are entitled to receive those increases, under the "currently receiving" clause of section 906(c). 33 U.S.C. § 906(c); *Roberts*, 132 S.Ct. at 1354 n.2.

weekly wage during various periods. *Id*. at 30. While she did not reiterate the applicability of the maximum rate at that time, her choice against redundancy is far from a holding that the maximum rate does not apply. Indeed, such a holding would be contrary to both the statute and the Supreme Court's holding in *Roberts*, 132 S.Ct. at 1358.

Moreover, as the Board noted, ER 44, the ALJ never ordered a specific compensation rate – much less one exceeding the applicable maximum rate – because she left the calculations necessary to carry out her order to the district director. ER 32. The claims examiner's inadvertent failure to apply the Act's maximum compensation rate in the initial calculations was her own error.

Even if the ALJ had ordered a higher rate than the statute allows – and even if that error had gone unnoticed until the Claimant requested a supplemental order of default – the district director would still have had the authority to correct the error. In *Bunol v. George Engine Co*., 996 F.2d 67 (5th Cir. 1993), an administrative law judge ordered the Louisiana Insurance Guaranty Association (LIGA) to pay compensation to an injured employee. Although the body of the ALJ's decision indicated that the employee was entitled to compensation for temporary total disability from July 31, 1979, through December 18, 1980, and permanent partial disability after December

18, 1980, and continuing, the ALJ's order awarded both types of compensation beginning July 31, 1979. *Id*. at 69.

When LIGA failed to timely pay the award, the employee applied for a supplementary order, which the district director granted. *Id*. at 68. In the supplementary order, the district director noted that the ALJ's order appeared to erroneously award both types of disability compensation during the period between July 31, 1979, and December 18, 1980, and corrected that error to reflect that the period of permanent partial disability did not begin until after December 18, 1980. *Id*. at 69-70. The court found the district director's correction permissible, and the supplementary order enforceable. It found that "to preclude correction of errors in the calculation of benefits would serve no purpose." *Id*. at 70. That principle holds true whether it is the ALJ or the district director who has made the calculation error.[13]

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[13] Indeed, if a timely appeal were necessary for the district director to make corrections, then the correction that was made at the Claimant's request – the elimination of a $38,146 credit previously given to the Employer – would also be invalid, because the Claimant failed to appeal within 30 days. *See* ER 42 n.5. As noted above, the Claimant did not raise these issues until July 11, 2013, 58 days after filing and service of the ALJ's decision and accompanying calculations. *See supra* at 7. Yet the Claimant clearly believes that the corrections that favored him should stand. The Director agrees, as all of the recalculations were ministerial, and were made to give effect to the ALJ's decision.

C. The district director's refusal to issue a default order was correct because the Employer was paying the Claimant the maximum compensation allowed by the Act.

The Claimant's primary argument is that, because the Employer did not timely appeal after the district director issued the initial, but erroneous, calculation on May 14, 2013, that calculation became final; consequently, the district director's amended calculation of August 27, 2013, was ultra vires and void. Pet. Br. at 16. In short, the Claimant argues not only that the Employer was bound to pay more than the Act allows, but that the district director was required to find default even where the Employer had compensated the Claimant at the highest rate allowed by the statute.

The Claimant's argument is without merit. First, this appeal is not from the ALJ's decision, but from the district director's denial of a request for an order declaring default. Whether the Employer appealed the ALJ's decision, therefore, is irrelevant.[14] Second, the Employer's failure to appeal the ALJ's decision (or the initial calculation of benefits) does not prevent the district director from correcting a ministerial error in that calculation. More to the

[14] Indeed, the time for requesting a default order does not begin until 30 days after compensation becomes due and payable, 33 U.S.C. § 918(a), which is when the time to appeal expires, 33 U.S.C. § 921(a).

point, it does not compel the district director to issue a default order that would only perpetuate the initial error. *See Bunol*, 996 F.2d at 70.

Simply put, the district director's ministerial error does not give the Claimant the right to collect compensation at a rate clearly prohibited by the Act. The Claimant received the correct amount due him under the Act: $1,047.16 per week, the FY 2005 maximum rate. The district director, therefore, correctly declined to issue a supplemental order declaring default.[15]

Indeed, the issuance of a supplementary order would likely have been futile. Section 918(a) gives a district court authority to enter judgment on a supplementary order only if "it is in accordance with law." 33 U.S.C. § 918(a); *Cf. Pleasant-El v. Oil Recovery Co., Inc*., 148 F.3d 1300, 1308 (9th Cir. 1998) (section 18(a) grants district courts general authority to determine whether supplementary order is lawful). A supplementary order that finds default based on an employer's failure to comply with an erroneous calculation purporting to establish a compensation rate higher than the statutory maximum is not in accordance with law.

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[15] The Employer would have been better served by promptly asking the district director to correct the mistaken calculation rather than remaining silent while paying at the maximum rate. The fact remains, however, that a claimant is not entitled to compensation at a rate higher than the statutory maximum.

CONCLUSION

For the foregoing reasons, the Court should affirm the district director's decision to deny the Claimant's request for a supplementary order.

Respectfully submitted,

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STATEMENT OF RELATED CASES
Pursuant to Ninth Circuit Rule 28-2.6

The Director is aware of no related cases.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Fed. R. App. P. 32(a)(5) and (6)

I certify that the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 4,004 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE