INTEREST

The Board affirms the award of interest, noting that such an award ensures claimant is fully compensated for his injury. Vanover v. Foundation Constructors, 22 BRBS 453 (1989), aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991).

The Ninth Circuit affirms the Board's decision to affirm the award of interest. Although the Act has no express provision for the awarding of interest, it serves the purpose of fully compensating injured workers. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), aff'g Vanover v. Foundation Constructors, 22 BRBS 453 (1989).

Interest is awardable under the Act despite the absence of express statutory authorization. Quave v. Progress Marine, 912 F.2d 798, 24 BRBS 43 (CRT) (5th Cir. 1990), reh'g granted on other grounds, 918 F.2d 33, 24 BRBS 55 (CRT)(5th Cir. 1990), cert. denied, 500 U.S. 916 (1991).

There is no statutory authorization for assessment of prospective post-judgment interest on attorney's fee awards. Section 1961, 28 U.S.C. §1961, allows assessment of interest on money judgments of attorney's fee awards in a civil case in district court. Section 1961 does not, however, apply to agency awards of an attorney's fee. Hobbs v. Director, OWCP, 820 F.2d 1528 (9th Cir. 1987), aff'g Hobbs v. Stan Flowers Co., Inc., 18 BRBS 65 (1986); *see also Johnson v. Director, OWCP,* 183 F.3d 1169, 33 BRBS 112(CRT)(9th Cir. 1999); *Anderson v. Director, OWCP,* 91 F.3d 1322, 30 BRBS 67(CRT)(9th Cir. 1996); *Bellmer v. Jones Oregon Stevedoring Co.,* 32 BRBS 245 (1998).

The Board reaffirms its holding in Hobbs, 18 BRBS 65 (1986), aff'd, 820 F.2d 1528 (9th Cir. 1987), that interest is not awardable on outstanding attorney's fees. Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

The Board noted that interest is not payable on attorney's fee awards. Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223 (1988).

Since an attorney's fee is not considered compensation under the Act, there is no legal authority under the Act for awarding interest on an attorney's fee. Fisher v. Todd Shipyards Corp., 21 BRBS 323 (1988); *see also Bellmer v. Jones Oregon Stevedoring Co.,* 32 BRBS 245 (1998).

The Fifth Circuit holds that interest is not available on an attorney's fee award, as neither the statute nor case law provides for it. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995), *aff'g* 24 BRBS 84 (1990).

In a case in which a fee award became final and counsel filed suit in district court to enforce the fee award, the court held that counsel was entitled to pre- and post-judgment interest on the fee award, noting that interest provides an incentive for attorneys to represent claimants. Guidry v. Booker Drilling Co., 901 F.2d 485, 23 BRBS 82 (CRT)(5th Cir. 1990).

The Board rejects the contention that Guidry, 901 F.2d 485, 23 BRBS 82 (CRT)(5th Cir. 1990), mandates an award of interest on an attorney's fee award. The Board notes that the instant case has not become final and enforceable as all avenues of appeal are not exhausted, and that the Fifth Circuit did not cite contrary precedent (Hobbs). Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61 (1991)(decision on remand).

Majority of the Board concludes that administrative law judge erred in awarding interest on the medical expenses as there was no evidence in the record indicating that claimant had in fact made any payments to the health care providers. Thus, the Board concluded that the purpose of providing interest, i.e., to ensure that the employee is fully compensated, would not be served by awarding claimant interest. With regard to the interest awarded on the outstanding medical bills owed to the providers, the Board concluded that the equitable principles which mandate the award of interest on unpaid compensation are not applicable to an award of medical benefits because the cash needs of medical professionals, like those of attorneys, cannot be likened to those of an injured employee if payment is not forthcoming. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988) (Feirtag, J., dissenting).

Interest cannot be assessed on past due medical benefits that claimant has not paid himself. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd on other grounds mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

The Ninth Circuit holds that interest is payable on sums owed for medical services, in effect, overruling Pirozzi, 21 BRBS 294. Employers would get a windfall without the obligation to pay interest on such sums, and medical providers would lose incentive to treat injured workers who are unable to advance the cost of their medical treatment. Hunt v. Director, OWCP, 999 F.2d 419, 27 BRBS 84 (CRT)(9th Cir. 1993), rev'g Bjazevich v. Marine Terminals Corp., 25 BRBS 240 (1991).

The Board held that interest is not to be imposed on Section 14(e) assessments, reasoning that the purpose of awarding interest would not be furthered by imposing interest on such assessments. McKamie, 7 BRBS 315 (1977), in which the Board had allowed interest on unpaid Section 14(f) penalties, was distinguished. The Board remanded the case for the administrative law judge to identify the local interest rate in effect on September 3, 1982, the date on which his Order denying reconsideration was filed with the deputy commissioner, in accordance with 28 U.S.C. §1961 and Grant, 17 BRBS 20 (1985) (decision on reconsideration). The Board instructed the administrative law judge to modify his previous award of interest to one which incorporates the appropriate rate. Cox v. Army Times Publishing Co., 19 BRBS 195 (1987).

Interest is mandatory, and may be raised as an issue at any time. The Board affirms the administrative law judge's determination that interest is assessed only on those benefits due after employer's Section 33(f) offset is applied. Employer can only be said to have the use of claimant's money to the extent of the net amount due claimant. Moreover, interest is to be calculated on a simple, not compound, basis. Jones v. U.S. Steel Corp., 25 BRBS 355 (1992).

Awards of interest under the Act are mandatory. Canty v. S.E.L. Maduro, 26 BRBS 147 (1992).

In awards filed after October 1, 1982, interest is to be computed pursuant to 28 U.S.C. §1961. Bingham v. General Dynamics Corp., 20 BRBS 198 (1988); Holliman v. Newport News Shipbuilding and Dry Dock Co., 20 BRBS 114 (1987), aff'd, 852 F.2d 759, 21 BRBS 124 (CRT) (4th Cir. 1988); Perry v. Carolina Shipping Co., 20 BRBS 90 (1987); Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

The Board follows the general American rule regarding the calculation of interest, that when interest is allowable, it is to be computed on a simple rather than compound basis in the absence of express authorization otherwise. 28 U.S.C. §1961 does not expressly authorize compounding interest in cases under the Act and although it provided guidance in determining an interest rate, in Grant, 16 BRBS 267, the Board did not incorporate 28 U.S.C. §1961 into the Act. Santos v. General Dynamics Corp., 22 BRBS 226 (1989).

The Board reaffirms its holding in *Santos,* 22 BRBS 226, that pre-judgment interest awards under the Act should be computed on a simple basis. The Board also reaffirms its holding in *Grant,* 16 BRBS 267, that interest should be awarded at the rate provided at 28 U.S.C. §1961, rather than at the rate provided at 26 U.S.C. §6621. *B.C. v. Stevedoring Service of America,* 41 BRBS 107 (2007).

The Board rejected employer's argument that Section 5(a) precludes an award of interest

under the Act. It noted that the purpose of Section 5(a) is to make the Act a claimant's exclusive remedy against an employer for a work-related injury and that, although not addressed in the Act, interest satisfies the purpose of the Act and is mandatory. Thus, the Board concluded that, as interest is awarded on compensation payable under the Act, it cannot be said that claimant sought recovery "at law or in admiralty" in violation of Section 5(a). The Board rejected employer's argument that administrative law judges do not have the powers conferred on the district court by 28 U.S.C. §1961 and cannot award interest. The Board acknowledged that Section 1961 does not give the administrative law judge the authority to award interest, but it noted its previous reliance on Section 1961 was limited to using that section as a guide in setting the interest rate and not as authority to award interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (Dolder, C.J., concurring and dissenting).

In a case where employer paid the awarded benefits but refused to pay the awarded interest, claimant asked the Board to assess interest on the unpaid interest. The Board noted the definitions of pre-judgment and post-judgment interest as well as the courts' agreement in allowing interest on interest, and it concluded that post-judgment interest assessed on awarded but unpaid pre-judgment interest serves the purpose of the Act by making claimants whole. Such interest is to be calculated from the date the administrative law judge issued his order. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (Dolder, C.J., concurring and dissenting).

The Board held that the administrative law judge erred by refusing to award claimant interest on his past due benefits because claimant did not have a compensable disability until the effective date of the 1984 Amendments. The purpose of interest is not to punish employer, but to make claimant whole, as employer had use of the money until an award issued. The award was therefore modified to allow interest on all unpaid accrued benefits. Smith v. Ingalls Shipbuilding Division, Litton Systems Inc., 22 BRBS 46 (1989).

The Board follows Smith, 22 BRBS 46 (1989), holding that interest is due on all unpaid accrued benefits irrespective of claimant's entitlement to benefits prior to enactment of the 1984 Amendments. The Board therefore modifies award to allow interest on all unpaid accrued disability and death benefits. In addition, interest is due on untimely paid funeral expenses, as funeral expenses are included in the term "compensation," 33 U.S.C. §902(12). Adams v. Newport News Shipbuilding and Dry Dock Co., 22 BRBS 78 (1989).

Where the Board modified the administrative law judge's date of permanency to an earlier date, the Special Fund's liability should have commenced sooner. Employer is entitled to reimbursement of overpaid compensation from the Special Fund in a lump sum with interest. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), vacated on other grounds, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(en banc).

Where employer failed to pay an award of benefits in a timely manner, and employer is liable for a Section 14(f) penalty, the Board held that employer is liable for interest on the late penalty payment. This issue can be raised for the first time in a response brief. *Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), *aff'd*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994).

Where the employer was liable for a Section 14(f) penalty due to its untimely payment of compensation, the Third Circuit upheld the Board's imposition of an award of interest on the late penalty payment. The court followed the reasoning of the Ninth Circuit in *Foundation Constructors, Inc. v. Director, OWCP,* 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991, where the Ninth Circuit concluded that allowing an employer to delay compensation payments interest- free would reduce the worth of such payments to the claimant, thereby undermining the remedial intent of the Act. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

The Board holds that, in a hearing loss case, interest is to be computed as of the date that compensation becomes due under Section 14(b), that is on the fourteenth day after employer is notified of the injury under Section 12 or has knowledge of the injury. Employer has no legal obligation to pay benefits before this time. The Board rejects the contention that interest should be due from the date of last exposure to injurious noise as contrary to the statute. The Board notes the caselaw that the purpose of interest is to make claimants whole, and that this purpose is fulfilled where employer has withheld or delayed benefits after the date it became liable for benefits under Section 14(b). In these cases, the Board holds that interest is due from the date the parties stipulated employer received notice of the injury. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996) (*en banc*).

In following *Renfroe*, 30 BRBS 101 (1996), the Board concludes that the administrative law judge's finding that benefits became due as of the date of a company-administered audiogram cannot be affirmed. The administrative law judge did not discuss whether the record established the requisite knowledge, at the time the audiogram results were reported, that claimant suffered from a work-related hearing loss. The case is remanded for findings under the applicable standard. *Meardry v. Int'l Paper Co.*, 30 BRBS 160, 163 (1996).

In a case of first impression, the Fifth Circuit held that pre-judgment interest accrues from the date benefits are "due" under Section 14 and not from the date of injury. The court determined that to permit interest from the date of injury would be to introduce uncertainty to a straightforward compensation scheme as employer would not necessarily know the proper amount due until it is aware of the injury under Section 14. Where claimant filed a claim for a work-related hearing loss in 1992, and employer timely controverted the claim and voluntarily began paying benefits within the period prescribed by Section 14, the Fifth Circuit held that claimant is not entitled to pre-judgment interest. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

In a case arising in the Eighth Circuit, the Board affirmed the administrative law judge's reliance on the Ninth Circuit's decision in *Hunt,* 999 F.2d 418, 27 BRBS 84 (CRT), and held that claimant is entitled to interest on past-due medical benefits, whether the costs were initially borne by claimant or the medical providers. In so doing, the Board acknowledged that the Ninth Circuit adopted the reasonable interpretation of the Director, and the Board overruled its decisions to the contrary in *Pirozzi,* 21 BRBS 294, and *Caudill,* 22 BRBS 10. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

The Ninth Circuit reversed the administrative law judge's denial of interest and remanded the case to the administrative law judge for a determination of when the payments became due and a determination of the total interest accrued. In doing so, the court noted that interest on a disability award is mandatory and necessary because it ensures that the delay in payment of compensation does not diminish the amount of compensation to which claimant is entitled, and accrues from the date a benefit became due and not from the date of the administrative law judge's award. The court rejected employer's argument that claimant is not entitled to interest because he refused to accept its longstanding tender of benefits, noting that employer retained the principal amounts of the payments to which claimant was entitled and enjoyed the unrestricted use of those funds. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).