

INTEREST

Although the Longshore Act does not provide for interest to be paid on past due disability benefits, the Board and the courts have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *modified on recon.*, 17 BRBS 20 (1985); *Morris v. Washington Metro. Area Transit Authority*, 12 BRBS 208 (1980); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in part and rev'd on other grounds sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979). Interest may be assessed against employer on overdue medical expenses, whether reimbursement is owed to the provider or to the employee. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). Interest is assessed on all past due benefits including amounts due under Section 14(f), 33 U.S.C. §914(f). *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1977). Interest is due on untimely paid funeral expenses. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Interest is payable on an overdue award of interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (Dolder, C.J., concurring and dissenting). However, interest is not payable on a Section 14(e) assessment. *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987). An attorney's fee award is not "compensation"; thus, interest is not assessed on past due attorney's fee awards. *Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65 (1986), *aff'd sub nom Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987); *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982).

Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982). However, interest may be waived by the parties as an item of compromise in a settlement agreement under Section 8(i), 33 U.S.C. §908(i). *Clefsted v. Perini North River Associates*, 9 BRBS 217 (1978). The Board vacated an administrative law judge's order which accepted a stipulation that waived claimant's entitlement to interest on past-due benefits. The Board held that as this case did not involve a Section 8(i) settlement interest is mandatory and cannot be waived. Permitting such a waiver would violate Sections 15(b) and 16 of the Act. Accordingly, the Board remanded the case to the administrative law judge to make findings of fact or accept a proper stipulation that reflects claimant's entitlement to interest as appropriate. *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010). Interest is payable to claimant by employer, *see Morris*, 12 BRBS 208; *Watkins*, 8 BRBS 556; or to claimant by the Special Fund, *see Maltese v. Universal Terminal & Stevedoring Corp.*, 12 BRBS 123 (1979); *Grace v. Jacksonville Shipyards, Inc.*, 10 BRBS 945 (1979); or by the Special Fund to employer for benefits paid by employer in excess of its liability under Section 8(f), 33 U.S.C.

§908(f), *see Lewis v. American Marine Corp.*, 13 BRBS 637 (1980), depending on who had use and income from the use of money properly owed to claimant. *Id.* Where the deputy commissioner caused a three-month delay which resulted in compensation payments to claimant being past due, the Board held employer liable to claimant for interest on such past due compensation payments. *Garner v. Olin Corp.*, 11 BRBS 502 (1979).

Interest is computed from the date each compensation payment becomes overdue. Since compensation is due claimant from the date of disability, interest on payments which are not timely made accrues from the date of disability as well. *Canamore v. Todd Shipyards Corp.*, 13 BRBS 911 (1981). In a schedule award case for permanent partial disability, interest attaches when claimant's condition reaches maximum medical improvement. *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). In a hearing loss case, the Board held that 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. *Renfro v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*); *see also Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

Originally, the Board mandated that interest be paid at a rate of six percent. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1978). In *Grant*, 16 BRBS 267, however, the Board replaced the fixed six percent interest rate with the rate employed by the United States District Courts pursuant to 28 U.S.C. §1961. Section 1961 provides for an assessment of interest on monetary awards under district court judgments. Prior to 1982, Section 1961 provided that the applicable interest rate was that applied in state courts. Section 1961 was amended in 1982 to provide for a uniform interest rate based on the 52-week United States Treasury bill yield immediately prior to the date of judgment. 28 U.S.C. §1961. The Board adopted the Treasury bill rate in order to fully compensate claimants for the loss of the use of their benefits and to ensure uniformity with federal proceedings.

The Board clarified the method used to calculate the interest rate pursuant to Section 1961 on reconsideration in *Grant*, 17 BRBS 20. The Board held that the Treasury bill rate of the amended statute applies to Decisions and Orders filed after October 1, 1982, the effective date of the amendments, even if a portion of the period of liability is prior to that date. Pre-amendment section 1961 applies to all decisions filed before October 1, 1982. In *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985), applying *Grant*, the Board held that, since the administrative law judge's Decision and Order was filed in the deputy commissioner's office on May 5, 1983, interest must be assessed on unpaid compensation based on the 52-week U. S. Treasury bill yield immediately prior to the date of judgment. In *B.C. [Christensen] v. Stevedoring Service of America*, 41 BRBS 107 (2007), the Board reaffirmed the use of the Section 1961 rate, rejecting the contention that the rate set forth in 26 U.S.C. §6621 should be utilized.

The Board has followed 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, used as a guide in setting interest rates under the Act, does not expressly authorize compounding interest. *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989); *see also Estate of C.H. [Heavin] v. Chevron, USA, Inc.*, 43 BRBS 9 (2009); *Christensen*, 41 BRBS 107; *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992).

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The Board affirmed 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 affirmed the award of interest. Although the Act has no express provision for awards of interest, the court adopted the Director's reasonable construction that such awards serve the purpose of fully compensating injured workers. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

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 Div., Litton Systems Inc.*, 22 BRBS 46 (1989).

The Board followed *Smith*, 22 BRBS 46, 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 modified the 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 & Dry Dock Co.*, 22 BRBS 78 (1989).

The Fifth Circuit relied on its decision in *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, to affirm the award of interest despite the absence of express statutory authorization for such an award. *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *reh'g granted on other grounds*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

An award of interest is mandatory, and may be raised as an issue at any time. The Board affirmed 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 on accrued but unpaid benefits are mandatory. The Board held that employer, rather than FIGA, is liable for the interest award on the facts of this case. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

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

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).

As interest on a disability award is mandatory and as the administrative law judge did not address the issue, the Board remanded the case for the administrative law judge to assess interest on the late compensation payment. *L.W. [Washington] v. Northrop Grumman Ship Systems*, 43 BRBS 27 (2009).

The Special Fund is liable for interest on overdue payments made pursuant to Section 10(h). *Evangelista v. Bethlehem Steel Corp.*, 19 BRBS 174 (1986).

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*).

The Board held that under both Section 702.241(b) and Section 702.243(a), (b), of the regulations, the 30-day automatic approval provision of Section 8(i) was properly tolled until the case record was returned to the district director from the Eleventh Circuit. Thus, contrary to claimant's contention, the district director's consideration and approval of the parties' Section 8(i) settlement is timely as it occurred within 30 days of his receipt of the remanded case, and employer timely paid with regard to this approval. Thus, employer is not liable for interest and penalties. *Jenkins v. Puerto Rico Marine*, 36 BRBS 1 (2002).

The Board held that the administrative law judge erred in awarding interest on the medical expenses as there was no evidence 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, dissenting); *see also 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 held 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).

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).

Where employer failed to pay an award of benefits in a timely manner, and employer is liable for a Section 14(f) assessment, the Board held that employer is liable for interest on the late assessment 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) assessment due to its untimely payment of compensation, the Third Circuit upheld the Board's imposition of an award of interest on the late assessment payment. The court followed the reasoning of the Ninth Circuit in *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT), 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).

In a case where employer paid the awarded benefits but refused to pay the awarded interest, claimant sought an assessment of interest on the unpaid interest award. 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 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, in which the Board had allowed interest on an unpaid Section 14(f) assessment, was distinguished. *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987).

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, 1170 n.1, 33 BRBS 112, 113 n.1(CRT) (9th Cir. 1999); *Anderson v. Director, OWCP*, 91 F.3d 1322, 1325 n.3, 30 BRBS 67, 69 n.3(CRT) (9th Cir. 1996); *Bellmer v. Jones Oregon Stevedoring Co.*, 32

BRBS 245, 246 n.1 (1998); *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *Ping v. Brady-Hamilton Stevedore Co.*, 21 BRBS 223 (1988); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

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. The interest award is predicated on 28 U.S.C. §1961(a), which states that “[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court.” *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

The Board rejected the contention that *Guidry*, 901 F.2d 485, 23 BRBS 82(CRT), mandates an award of interest on the attorney's fee award in this case. The Board stated that the fee award in this case had not become final and enforceable, and noted that the Fifth Circuit had not cited contrary precedent (*Hobbs*). *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991).

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).

The Board held 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 rejected 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 case law stating 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 held that interest is due from the date the parties stipulated employer received notice of the injury. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*).

In following *Renfroe*, 30 BRBS 101, the Board concluded 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. *Meadry v. Int'l Paper Co.*, 30 BRBS 160 (1996).

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 this case, both the administrative law judge's initial decision and his order denying reconsideration were filed prior to October 1982. Thus, the applicable statute for determining interest is pre-amendment Section 1961, which specifies that the local state interest rate in effect on the date of filing is the appropriate rate to be utilized. 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 *Grant*, 17 BRBS 20. 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).

In awards filed after October 1, 1982, interest is to be computed pursuant to 28 U.S.C. §1961 using the Treasury bill rate used by the district courts. *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988); *Holliman v. Newport News Shipbuilding & 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); *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 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 reaffirmed 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. [Christensen] v.*

Stevedoring Service of America, 41 BRBS 107 (2007). See also *Estate of C.H. [Heavin]* v. *Chevron, USA, Inc.*, 43 BRBS 9 (2009).