SECTION 18

Section 18(a)

Section 18(a) provides that if an employer fails to pay compensation due under any award for a period of 30 days after the compensation is due, the claimant may, within one year after the default, request that the deputy commissioner issue a supplemental order declaring the amount due. After investigation, notice, and hearing pursuant to Section 19, the deputy commissioner shall issue a supplementary order declaring the amount of the default. This order is filed in the same manner as the compensation order, and the claimant may then seek enforcement in the U.S. District Court where the injury occurred or where employer has its principal place of business or maintains an office by filing a copy of the supplementary order. It further states that "such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law." Section 18(a) provides for review of the district court's order as in any other suit and for proceedings to execute the judgment. No fee shall be required for filing the supplementary order or for entry of judgment, and the claimant is not liable for costs in a proceeding for review of the judgment unless the court directs otherwise. Lastly, it states that the court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

Essentially, Section 18 offers a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards. *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983). Under Section 18(a), a claimant can obtain judgment for defaulted payments due under a non-final award, *i.e.*, one which is being appealed, or from a final order. Section 21(d) provides an alternate method for enforcement of a final order. *See* Section 21(d). The court in *Providence Washington* discussed the differences between the two methods of enforcement. *See also, e.g., Cassell v. Taylor*, 243 F.2d 259 (D.C. Cir. 1957); *Leonard v. Walter*, 356 F. Supp. 56 (D.D.C. 1973); *Brown v. Avondale Indus., Inc.,* 46 BRBS 1 (2012).

Section 18(a) enforcement is triggered by employer's failure to pay compensation within 30 days after it becomes due. Under the applicable procedures, a compensation order issued by an administrative law judge must be filed by the deputy commissioner/district director, 33 U.S.C. §919(e), and the order becomes effective when so filed. 33 U.S.C. §921(a); *Carillo v. Louisiana Ins. Guar. Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009). It is final unless an appeal with the Board is filed within 30 days; however, even if an appeal is filed, the award becomes effective when filed and the payment of the amounts required by it becomes due at that time. Employer's obligation to pay is not stayed pending final decision unless the Board grants a stay of payments on the grounds that irreparable injury to the employer would otherwise ensue. 33 U.S.C. §921(b)(3). In addition, unless a stay

is granted, employer is liable for an additional 20 percent assessment on compensation not paid within 10 days after it becomes due under Section 14(f). Employer thus must pay the benefits due under an award within 10 days of the date the order is filed in the office of the deputy commissioner/district director in order to avoid this assessment.

Section 18 applies only to the enforcement of compensation awards, which includes medical benefits payable to claimants. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992); *see Ware v. Dresser Offshore Services, Inc.*, 9 BRBS 160 (1978), *aff'd*, 598 F.2d 618 (5th Cir. 1979) (table). An attorney's fee award is not compensation and is not enforceable under Section 18 but must be enforced under Section 21. *Wells v. Int'l Great Lakes Shipping Corp*., 14 BRBS 868 (1982). *Accord Wells v. Int'l Great Lakes Shipping Corp*., 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982). Thus, attorney's fees awards, unlike compensation orders, are not enforceable where an appeal is pending. *Wells*, 14 BRBS at 868; *Bruce v. Atl. Marine, Inc.*, 12 BRBS 65 (1980), *aff'd on other grounds*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981) (attorney's fee award is not enforceable until the compensation order is final). *See also Christensen v. Stevedoring Services of Am., Inc.*, 430 F.3d 1031, 39 BRBS 79(CRT) (9th Cir. 2005); *Thompson v. Potashnik Constr. Co.*, 812 F.2d 574 (9th Cir. 1987) (attorney's fee awards not enforceable under Section 21(d) while appeal of compensation award and/or fee award pending).

Section 18(a) provides that claimant may take a certified copy of the deputy commissioner's supplemental order to the appropriate United States District Court for enforcement. The district court's role is to determine whether the order was issued in accordance with law. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Providence Washington*, 765 F.2d at 1384, 17 BRBS at 138(CRT). *See generally Leonard v. Walter*, 356 F. Supp. 56 (D.D.C. 1973) (discussing Section 18(a) enforcement and Section 21 review in a pre-1972 Amendment case).

Supplemental orders declaring a default issued by the deputy commissioner/district director pursuant to Section 18 are final when issued and are not subject to review by the Board. *Pleasant-El*, 148 F.3d 1300, 32 BRBS 141(CRT); *Schmit v. ITT Fed. Elec. Int'l*, 986 F.2d 1103, 26 BRBS 166(CRT) (7th Cir. 1993); *Providence Washington*, 765 F.2d 1381, 17 BRBS 135(CRT); *Patterson*, 719 F.2d 126, 16 BRBS 10(CRT); *Jones & Laughlin Steel Corp. v. Wertz*, 720 F.2d 324 (3d Cir. 1983); *Davis v. Strachan Shipping Co.*, 5 BRBS 414 (1977). Such orders include the amount due under the award plus the additional assessment under Section 14(f); thus, the assessment of additional compensation on the defaulted amount pursuant to Section 14(f) also is not appealable to the Board. *Providence Washington*, 765 F.2d 1381, 17 BRBS 135(CRT); *Patterson*, 719 F.2d 126, 16 BRBS 10(CRT).

Where no default order is outstanding, the enforcement proceedings of Section 18 cannot apply and the Board retains jurisdiction to review a determination regarding the Section 14(f) assessment. *See Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d

Cir. 1994), *aff'g* 27 BRBS 260 (1993) (employer paid benefits due, including Section 14(f) amount; nothing left to enforce); *McCrady v. Stevedoring Services of Am.*, 23 BRBS 106 (1989) (appeal raising a legal issue regarding the propriety of the assessment rather than enforcement); *Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (deputy commissioned denied Section 14(f) compensation; Section 18 does not apply where no default order is issued); *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *aff'd in pert. part*, 830 F.2d 1188 (D.C. Cir. 1987) (table) (employer paid all compensation due, including the Section 14(f) assessment). Thus, where the district director finds no amount is in default or employer pays the amount due, it may seek review of the order awarding a Section 14(f) amount before the Board. In such cases, enforcement procedures do not apply as there is nothing to enforce.

In addition, where the underlying compensation order is ambiguous or does not permit the calculation of benefits due, further proceedings may be necessary before the Board or an administrative law judge. The Fifth Circuit has held that where a compensation order is ambiguous or unclear and thus does not explicitly answer a question which emerges during the period of payment, further proceedings to address the ambiguity may be instituted under Section 18. *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981). The court held that where such an error is asserted with regard to a matter of law or fact in a supplementary order, the Board has jurisdiction to hear an appeal. *Id*. In *Bray*, claimant contracted occupational bronchitis in 1965 from exposure to industrial fumes. This condition was aggravated by subsequent exposure to fumes from 1965 to 1967. In 1969, the deputy commissioner awarded claimant temporary total, temporary partial and permanent partial disability benefits, holding two carriers liable. Carriers paid claimant benefits until 1979 when the total benefits paid reached $24,624.10, at which time they ceased payment pursuant to Section 14(m) of the Act, 33 U.S.C. §914(m) (1970) (repealed 1972). Claimant filed a request for formal hearing, contending that the 1969 compensation order awarded benefits for two injuries, thereby entitling claimant to $48,000. The deputy commissioner rejected claimant's argument, and the Board declined to hear the appeal, holding that it had no jurisdiction. The Fifth Circuit held that the proceedings instituted in 1979 were not an appeal from the 1969 order, but were properly styled an application for a declaration of default in payment of compensation under Section l8(a). The court also held that the Board had jurisdiction to hear claimant's appeal as there was no amount found in default.

Moreover, where an award does not specify the amount of compensation due, it may not be enforceable without further administrative proceedings. *See Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008); *Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990); *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994). Section 18(a) allows for hearings under Section 19, and Section 702.372 of the regulations provides for hearings in cases where the deputy commissioner/district director investigates a request for a supplementary order declaring a default and the parties are unable to agree. In *Hanson v. Marine Terminals Corp.*, 34 BRBS

136 (2000), the Board addressed the argument that these provisions conflict with the holdings in *Providence Washington* and other cases regarding enforcement proceedings and the lack of jurisdiction under Section 21 to review a supplemental order. The Board reasoned that where the dispute concerns the interpretation or clarification of findings made in a final compensation order, *see Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT); *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988), the case must go to an administrative law judge for proceedings before a district director can assess additional compensation or determine if the employer is in default. In such cases, the amount of compensation is in dispute or cannot be determined without further action. However, if the amount of the default is uncontested and the district director finds payment was not made within 10 days, the proper action is the issuance of a supplemental default order with is then subject to review under Section 18. A disagreement as to whether payment was made within ten days does not trigger a requirement for a hearing, as this issue is reviewable by the district court under Section 18 in determining whether the default order was issued in accordance with law. In *Hanson*, the Board held that as the only issue was whether payment was made within 10 days, the administrative law judge properly dismissed the claim as that issue is reviewable under Section 18 in determining whether the default order was issued in accordance with law.

An award is not enforceable if a stay of payments is granted under Section 21(b)(3) or (c). In *Henry v. Gentry Plumbing & Hearing Co*., 704 F.2d 863, 15 BRBS 149(CRT) (5th Cir. 1983), the Fifth Circuit addressed an employer's request for a stay of payments of the award which was raised during enforcement proceedings. The district court in *Henry* granted enforcement, finding the supplementary order was in accordance with law, and enforcement of that judgment under Section 18 was stayed upon employer's posting a supersedeas bond pending its appeal to the Fifth Circuit. Employer asserted, however, that it should be granted a stay of the entire award pending resolution of its administrative appeal to the Board, rather than one pending decision on its appeal of the default judgment under Section 18. The court rejected this argument. The court stated that although employer appealed the compensation order to the Board, as provided by Section 21(b), it made no request to the Board for a stay of payment, and only the Board has the authority to stay payments pending its decision on the administrative appeal and then only if payment under the compensation order would cause irreparable injury to the employer. Thus, while enforcement of a default judgment under Section 18 can be stayed by a court pending its appeal of that order, a general stay of payments cannot be granted under Section 18 pending an administrative appeal of the original award to the Board since Section 21(b)(3) of the Act vests such power exclusively in the Board. *Henry*, 704 F.2d at 865, 15 BRBS at 150(CRT).

Section 18(a) specifically provides that the action must be brought within one year after the default. Thus, an employee, who brought suit to enforce the compensation order against his employer 16 years after the award was barred from procuring a judgment on the filing

of the deputy commissioner's supplemental order certifying the amount in default. *Cassell v. Taylor,* 243 F.2d 259 (D.C. Cir. 1957).

Digests

Where employer unilaterally terminated compensation payments due under an award because it believed that the Section 33(g) bar was applicable and the Board affirmed the administrative law judge's finding that the claim was barred under Section 33(g), it reversed the award of disability benefits through the date a new order denying benefits was entered and the Section 14(f) assessment on those benefits. The Board held that as the right to benefits terminated on the date of the unapproved third party settlement, no further payments were due. The Board stated that claimant's remedy was to immediately seek a default order under Section 18(a) when employer terminated payment. In this case, while Section 18(a) allows claimant to request a default order within one year, claimant waited 15 months to institute proceedings. The Board nonetheless cautioned "that an employer's unilateral termination of compensation under Section 33(g)(1) is done at the risk of incurring liability for an additional assessment under Section 14(f), if it is eventually found that Section 33(g) does not apply." *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

Claimant appealed a letter from the associate director, OWCP, postponing the date on which the Special Fund was to assume liability for paying awarded compensation pursuant to Section 8(f) until the date a credit for a third party recovery would be recouped. The Board held that this letter constituted a final decision which was appealable to the Board under Section 21(b)(3) of the Act. The letter was of no legal effect, however, as it was either an improper modification of the administrative law judge's award under Section 22 or a determination that no default would be declared under Section 18. If a proceeding under Section 18, the Board held that the suspension of benefits was not permissible as the associate director did not refuse to initiate payments because of an event post-dating the administrative law judge's award. Rather, the basis for the refusal to pay was the assertion of a credit resulting from a third party action which was addressed by the administrative law judge who allowed employer a credit for the net recovery. The decision made no mention of a credit for the Special Fund, and the Director did not participate in proceedings before the administrative law judge or assert the Special Fund's entitlement to a credit. Since the Director did not participate before the administrative law judge, the Board stated that he could not obtain a new hearing on the issue of a credit by using Section 18. The Board thus held the associate director's action was void and reinstated the administrative law judge's decision. *Maria v. Del Monte/S. Stevedore,* 21 BRBS 16 (1988) (McGranery, J., dissenting), *vacated on recon. en banc,* 22 BRBS 132 (1989).

The Board vacated its decision in *Maria,* 21 BRBS 16, holding that the letter was not an attempted modification of the administrative law judge's Decision and Order but, rather, a notification to claimant that the Fund was suspending compensation until a statutory credit

was recouped. The associate director's actions in withholding compensation were similar to those of employer in *Shoemaker*, 20 BRBS 214. The Director on behalf of the Fund may take the same action as an employer, taking the risk that the suspension of benefits may be unjustified and that the Fund may be liable under Section 18. The Board rejected the argument that Section 18(a) does not apply to a default by the Special Fund and held that claimant's remedy in this case, as in any case involving a unilateral termination of compensation, was to seek a default order pursuant to Section 18. The parties' arguments regarding the propriety of the suspension could be raised in those proceedings. *Maria v. Del Monte/S. Stevedore*, 22 BRBS 132 (1989) (en banc), *vacating on recon.*, 21 BRBS 16 (1988).

The regulation accompanying Section 18(a), 20 C.F.R. §702.372, provides that when a deputy commissioner receives an application for a supplemental default order, he shall institute proceedings as if the claim were an original claim, and may, if appropriate, transfer the case to an administrative law judge. As this case was transferred to the administrative law judge pursuant to Section 18(a) solely for a determination as to whether disputed medical expenses should be paid, the administrative law judge exceeded the scope of his authority in raising the issue of D.C. Act jurisdiction *sua sponte*. *Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169 (1988).

The Board held it had jurisdiction where the deputy commissioner declined to issue a default order. Section 18(a) requires that a deputy commissioner's order finding an employer in default be enforced by a district court. The Board, however, retains jurisdiction in cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring enforcement of the penalty under Section 18. Section 18 makes no provisions for district court review of a deputy commissioner's order denying Section 14(f) compensation where no default order has been issued. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

The Board held that it had jurisdiction to decide whether employer was liable for a Section 14(f) penalty. Although Section 18(a) states that a default on the part of employer is enforceable in federal district court, the Board retains jurisdiction of cases which involve only questions of law regarding the propriety of a Section 14(f) penalty, and which do not require enforcement of default orders. Since no default order had been issued in this case, the Board addressed claimant's Section 14(f) argument. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986).

The Board held that where employer has paid compensation and the Section 14(f) assessment, there is no basis for district court enforcement proceedings under Section 18(a), and the Board retains jurisdiction over the issue of the propriety of the Section 14(f) assessment. The Board rejected the notion that employer must subject itself to enforcement proceedings in district court in order to challenge an assessment under Section 14(f). By paying the full amount due and then appealing to the Board, claimant immediately receives

the additional amounts allegedly owed to him and employer maintains its right to press its legal argument. Section 18(a) applies only in the event of non-payment of compensation or penalty, and there is no statutory basis for payment and a challenge in the district court. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on other grounds on recon.*, 23 BRBS 312 (1990). *Accord Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993) (employer paid penalty; nothing left to enforce).

The Board rejected the Director's argument that the Board lacked jurisdiction where employer paid the benefits due, including the Section 14(f) amount, holding that the Board retains jurisdiction in cases involving the propriety of the deputy commissioner's award of a Section 14(f) penalty and not requiring Section 18 enforcement of the penalty. *McCrady v. Stevedoring Services of Am.*, 23 BRBS 106 (1989).

The Fifth Circuit rejected employer's argument that Rule 4 of the Federal Rules of Civil Procedure (FRCP), requiring that it be served with a summons and complaint, applies in enforcement proceedings under Section 18(a). The court held that Section 18(a) states the applicable procedures, directing the district court to enter judgment without further process where a copy of the supplementary order is filed. Thus, there is no place for additional procedural requirements such as those contained in Rule 4, and since the proper enforcement procedures "are provided for in [the] Act," Rule 81(a)(6) of the FRCP does not make the Federal Rules applicable. The court found that this construction comports with the purpose of the Act, as engrafting Rule 4 onto Section 18(a) procedures would frustrate Congressional intent to promptly compensate injured workers. The court also rejected employer's arguments that its due process rights were violated because it did not receive notice that claimant had filed for a supplemental order and an opportunity for a hearing, finding any errors harmless as employer knew that payments were due and it had not made them and employer raised no issues regarding calculation of the amount due. The court further held that while employer may have had a colorable argument regarding the administrative law judge's failure to identify the liable carrier, that issue should have been raised before the administrative law judge or Board and could not be raised before the court in enforcement proceedings. *Jourdan v. Equitable Equip. Co.*, 889 F.2d 637, 23 BRBS 9(CRT) (5th Cir. 1989).

In a case involving enforcement under Section 21(d), the First Circuit held that service of process under Rule 4 of the FRCP is necessary for enforcement under that section, discussing the distinctions in procedure between Sections 21(d) and 18(a). The court stated that, assuming, arguendo, that *Jourdan*, 889 F.2d 637, 23 BRBS 9(CRT), was correctly decided, that did not mean the same result applied under Section 21(d). With regard to Section 18(a), the court noted that its requirements that an employer receive administrative notice and an opportunity to be heard prior to enforcement could support a conclusion that the specified procedure preempts application of Rule 4 to Section 18(a). *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

The Fifth Circuit held that in Section 18(a) enforcement proceedings, the party liable for benefits may not obtain review of the underlying compensation order in the district court but must seek review before the Board. The district court's scope of review is limited to the lawfulness of the supplemental default order. The court rejected LIGA's contention that due process required that it be afforded an initial, pre-enforcement check (*i.e.*, a hearing) against compensation orders issued in violation of established procedural safeguards and that the district court was the proper forum to decide such constitutional issues. The court stated that the comprehensive appellate scheme under Section 21 assured the aggrieved party of meaningful, post-deprivation review and that LIGA's due process claims could be asserted before the Board and subsequently in the circuit court. Moreover, the Board's power to stay compensation awards to prevent irreparable injury assures that post-deprivation review will be meaningful, because irreparable injury occurs only when post-deprivation remedies will be inadequate to make the aggrieved party whole. *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989).

The Fifth Circuit held that where the administrative law judge's compensation order provided that employer was to receive a credit for wages paid but did not specify the amount of the credit or provide a method of computation based on facts in the record, the order was not a "final decision" which was "due" and "effective," and employer's failure to pay compensation under the decision accordingly did not subject it to Section 14(f) liability. The court stated that to be effective, "the order must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties." As the order here did not do so, the district court properly declined to enforce a default order issued by the deputy commissioner pursuant to Section 18(a) of the Act. *Severin v. Exxon Corp.*, 910 F.2d 286, 289, 24 BRBS 21, 23(CRT) (5th Cir. 1990).

The Fifth Circuit held that medical benefits paid to a claimant are included in "compensation" for purposes of enforcement proceedings under Section 18(a). The court therefore held that the district court erred in dismissing claimant's petition for enforcement of the deputy commissioner's supplementary order compelling employer to pay claimant's medical expenses on the ground that medical expenses are not included in compensation. Nonetheless, the court affirmed the district court's dismissal of claimant's petition on the ground that the administrative law judge's underlying compensation order was not final and enforceable since it did not specify the amount of the medical expenses to be awarded and the method for calculating them. The court also held that the deputy commissioner further compounded this error by issuing the supplementary order without resolving the amount of medical expenses that was at issue in an informal conference and by simply accepting the amount claimant asserted was in default. The court further held that employer may not raise the issue of the reasonableness of claimant's medical expenses in an enforcement proceeding but should raise it as a substantive matter before the administrative law judge. *Lazarus v. Chevron U.S.A., Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992).

The Seventh Circuit affirmed a district court's enforcement of an award, holding that the court properly limited its review of a supplementary default order to whether it was issued in accordance with law. The court agreed with the Fifth Circuit's decision in *Abbott*, 889 F.2d 626, 23 BRBS 3(CRT), that the underlying compensation order is not subject to review in enforcement proceedings. The Seventh Circuit also rejected employer's argument that Section 18(a) violates its rights to due process by allowing the entry of a supplemental default order without an additional hearing where an employer fails to pay a compensation award within 30 days, concluding that employer's due process rights were satisfied by the hearing before the administrative law judge on the merits of the claim and the appellate procedures of Section 21. In addition, the court rejected employer's argument that Section 18(a) violates Article III by allowing the deprivation of an employer's property without prior review by an Article III judge. *Schmit v. ITT Fed. Elec. Int'l*, 966 F.2d 1103, 26 BRBS 166(CRT) (7th Cir. 1993).

The Fifth Circuit rejected LIGA's assertion that it was deprived of due process, noting that LIGA fully participated in the pre-deprivation hearing before the administrative law judge. The court also distinguished the case from *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), noting that although the administrative law judge seemingly awarded overlapping periods of temporary total and permanent partial disability, this was merely a clerical error which the deputy commissioner corrected in the supplemental default order. The award thus became final and enforceable under the terms of *Severin*. The court therefore affirmed the district court's enforcement of the award. *Bunol v. George Eng. Co.*, 996 F.2d 67, 27 BRBS 77(CRT) (5th Cir. 1993).

The Fifth Circuit held, consistent with *Severin*, that an administrative law judge's decision does not become final and enforceable until the deputy commissioner furnishes the calculations directed by the decision. The fact that employer could have made the calculations on its own is not determinative in this case in view of the specific directive that the deputy commissioner make the calculations. Thus, the district court properly declined to enforce the assessment of a Section 14(f) penalty for late payment. *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994).

The Eleventh Circuit held that the district court construed its authority under Section 18(a) too narrowly as allowing only review of the supplemental order to ensure that it complied with the requirements of that section. The court stated that while a district court lacks authority to consider the validity of the underlying compensation order, in this case employer's arguments went exclusively to the imposition and enforcement of the supplemental order, and Section 18(a) gives the district court a general grant of authority to determine whether that order is lawful. The court remanded the case to the district court to address employer's constitutional arguments, but rejected its contention that Rule 6(a) of the FRCP applies in calculating the 10-day period for payment under Section 14(f). *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998).

In affirming a Section 14(f) assessment, the district court held that the district director undertook the necessary "investigation" of the claim as required under Section 18. Moreover, as employer had actual notice of the claim for the supplementary default order from claimant's counsel, the district director's failure to give employer notice did not prejudice its rights. *Zea v. W. State, Inc.*, 61 F. Supp. 2d 1144 (D.Ore. 1999).

The Board discussed the regulation at 20 C.F.R. §702.372 in relation to the enforcement of a Section 14(f) assessment. It determined that this regulation, which allows for a hearing, applies only when there is no agreement on the amount of the compensation due under the initial compensation order. If a factual matter is raised regarding the compensation due which must be resolved before the district director can issue a default order, the case is properly decided by an administrative law judge. In this case, the dispute centered on the propriety of the Section 14(f) penalty itself, as employer alleged its payment was not made in 10 days due to claimant's concealing his correct address. The Board affirmed the administrative law judge's dismissal of the claim, as there was no dispute regarding the original compensation order or the amount in default. Under these circumstances, sole authority rests with the district court, pursuant to Section 18, to determine whether the default order was issued in accordance with law, and employer may raise its defenses when claimant seeks enforcement of the default order in district court. *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000).

The Ninth Circuit held that the Section 14(f) penalty is mandatory and self-executing; the statute does not allow consideration of equitable factors, though the court reserved judgment on a case presenting fraud or physical impossibility. The use of the mandatory term "shall" in Section 14(f) requires the district director to add the 20 percent assessment if he finds more than ten days has elapsed between the date the amount became due and the date it was received. Thus, the court stated that after the district director makes a factual determination that a penalty is due and owing and issues a supplemental order of default, Section 18(a), which confers enforcement jurisdiction on the district court, provides that the district court's inquiry is solely whether the supplemental order of default is in accordance with law. Therefore, the court reversed the district court's holding which equitably estopped claimant from raising the Section 14(f) penalty where claimant received his compensation late because employer sent the check to an incorrect address provided by claimant. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002).

The D.C. Circuit held that the Board did not have jurisdiction to address a supplementary compensation order declaring payments in default issued pursuant to Section 18(a) of the Act. In this case, the OWCP issued a supplementary compensation order finding employer in default for failure to pay benefits at a rate including Section 10(f) adjustments pursuant to *Brandt/Holliday*, and it awarded claimant a Section 14(f) assessment of 20 percent on the shortfall. Because employer raised the issue of whether claimant's benefits were subject to adjustments under Section 10(f) pursuant to *Brandt/Holliday* and this issue had

not been explicitly addressed in prior proceedings, the Board had held that the Section 10(f) payments were not the subject of a compensation order and the propriety of such was properly raised before it; following *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), the Board held that prospective benefits were not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that it was implicit in the original compensation order that Section 10(f) adjustments were payable consistent with *Brandt/Holliday*, as that was the law at the time, and the current proceedings thus involved a supplementary default order under Section 18(a). The court joined the other appellate courts holding that the Board lacks jurisdiction to address issues raised in a default order. *Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002).

The district court granted enforcement of the administrative law judge's award of compensation benefits as a sum certain was awarded. The court denied enforcement of the award of future medical benefits and interest, however, as the administrative law judge's order did not specify any amount owed for these items. The court remanded the case to the district director to make any determinations as to whether amounts are owed on these claims. *Cohen v. Pragma Corp.*, 445 F. Supp. 2d 15 (D.D.C. 2006).

The Board rejected claimant's assertion that employer's failure to make voluntary payments in 1995 is subject to consideration under Section 18(a) or Section 21(d). These sections require the issuance of a compensation order entering an award of benefits. Similarly, Sections 18(a) and 21(d) are inapplicable with regard to claimant's assertion that employer did not pay 22 weeks of temporary total disability compensation in 1993, as the administrative law judge did not award compensation for this period. Although it was determined that claimant was disabled during this period, he did not timely request reconsideration of the administrative law judge's decision or appeal the omission of an award covering this period of disability. *Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012).

Section 702.372(a) of the regulations provides that where employer is in default, *i.e.*, not making awarded payments when due, claimant applies to the district director for an order declaring the amount of the default. The district director institutes proceedings, as with any other claim, and if the parties cannot agree on the compensation due under the initial order, the procedures of Section 702.316, apply. Thus, where a question arises as to the interpretation or clarification of findings made in a final compensation order, the case must go to an administrative law judge for findings of fact before a district director can determine if the employer is in default. The Board then has the authority to review the administrative law judge's decision. In this case, the decisions issued by the administrative law judge clearly allowed for the proper calculation of benefits due in that they set out claimant's average weekly wage, residual wage-earning capacity and period of disability. As these decisions are unambiguous, the one-year limitations period in Section 18(a) was applicable for requesting a default order. *Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012).

The Board reversed the administrative law judge's dismissal of claimant's allegation that employer "wrongfully deducted $8,889.99 from [his] subsequent bi-weekly indemnity payments (payments made after February 13, 2003)" to the extent that the disputed payments fall within the period of permanent total disability compensation awarded by the administrative law judge in his April 2008 decision. These payments fall within the scope of Section 18(a) as claimant timely requested that the district director review these payments within one year of the administrative law judge's April 2008 decision. The Board remanded the case for the administrative law judge to resolve any factual dispute arising with regard to the amount of permanent total disability benefits owed to claimant, as well as the amount of benefits paid by employer pursuant to the 2008 decision. If, as a result of the administrative law judge's findings of fact, claimant believes employer defaulted on compensation due, he may again apply to the district director for a default order pursuant to Section 18(a). However, the Board affirmed the administrative law judge's dismissal under Section 18(a) of claimant's allegation of underpayments relating to employer's bi-weekly permanent partial disability payments from October 17, 1996 to May 1, 1997, and temporary total disability payments from February 13, 2003 to February 24, 2005, as claimant sought a default order in 2008, more than one year after the alleged defaults. *Brown v. Avondale Indus., Inc.*, 46 BRBS 1 (2012).

The court holds that Section 18(a) requires a claimant to obtain a supplementary compensation order from the district director before he can seek enforcement in district court. Section 21(d), however, which applies to final compensation orders, does not require that the claimant first obtain a supplementary compensation order from the district director. A claimant can apply directly to the district court for enforcement of a compensation award and a Section 14(f) assessment. *Combs v. Elkay Mining Co.*, 881 F. Supp. 2d 728 (S.D.W.Va. 2012) (Black Lung case additionally holding that regulation at 20 C.F.R. §725.601 is not to the contrary).

In this case, Claimant had fallen at work and filed a claim, and the ALJ awarded benefits and an attorney's fee based on the parties' stipulations. Four years later, Employer stopped paying benefits, claiming it had identified available suitable alternate employment, and Claimant requested a declaration of default. The district director declared Employer in default, issued default orders requiring Employer to pay overdue benefits (as well as an attorney's fee). Claimant took the default orders to federal district court pursuant to Section 18(a). After Claimant filed this suit, Employer paid her the full amount owed, including penalties and interest, and moved to dismiss the court case as moot. The Ninth Circuit affirmed the district court's decision finding Claimant's Section 18(a) default claim moot and denying her request for an employer-paid attorney's fee under Section 28(a). The Ninth Circuit agreed with the district court that there was no remaining controversy to address because Claimant received the relief she sought before any adjudication occurred. It also concluded there was no successful prosecution because Claimant received no relief from the district court and cannot rely on the rejected "catalyst theory" to obtain a fee.

Berry v. Air Force Central Welfare Fund, 115 F.4th 948, 58 BRBS 13(CRT) (9th Cir. 2024).

Section 18(b)

Section 18(b) provides that "where a judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion" and to the extent he deems it advisable given the existing commitments for payments from the Special Fund, "make payment from such fund upon any award made under this Act, and in addition, provide any necessary medical, surgical and other treatment required by Section 7…." It further provides that employer is liable for reimbursing the fund, and for purposes of enforcement, the Secretary is subrogated to all the rights of the claimant as against the employer and may bring an action seeking reimbursement from the employer under this section or Section 21(d) to recover the amount of the default.

For an discussion of the purpose of Section 18(b), *see Director, OWCP v. Peabody Coal Co.*, 554 F.2d 310, 327, 6 BRBS 1, 22 (7th Cir. 1977) (discussing the section in the context of a Black Lung claim). In *Sicker v. Muni Marine Co*., 8 BRBS 268 (1978), the Board suggested that Section 18(b) may be an avenue for claimant to get compensation if the liable employer was unreachable.

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Section 18(b) of the Act does not provide authority for *mandating* that the Special Fund pay a compensation award where a claimant's employer's insurance company has been adjudicated insolvent. Such payments may be made in the Secretary's discretion. In any event, the issue of whether the Special Fund could potentially pay a claimant's benefits in such a situation cannot even be considered until an order stating the amount of the employer's default in payments has been obtained from a U.S. District Court. *See* 33 U.S.C. §918(a). No such order was obtained in this case. Accordingly, the Board declined to hold the Special Fund responsible for paying the compensation awarded in this case. Employer remains primarily liable for paying claimant's award and was properly held liable by the administrative law judge. *Meagher v. B.S. Costello, Inc.*, 20 BRBS 151 (1987), *aff'd*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989).

The First Circuit rejected employer's argument that an employer fully discharges its statutory liability once it has secured the payment of compensation under Section 4(a) by obtaining insurance and affirmed the Board's holding that an employer remains primarily liable for actually paying a claimant's benefits. Thus, employer was properly liable where its insurance carrier became insolvent, and the court agreed that this liability could not be judicially shifted to the Special Fund under Sections 18 and 44(c). The Fund is liable only if employer is unable to satisfy a district court's default judgment, which was not obtained in this case. The court acknowledged the hardship to employer in making payments from its own resources where it complied with the statute by obtaining insurance, but held it was

obligated to follow the statute's plain language. *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989).

The Special Fund is not liable for medical benefits under Section 8(f); the statute provides that it may be liable for medical benefits only in two instances, one being under Section 18(b) where employer defaults. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Where employer is insolvent and employer's carrier is not liable under the Act because it was not employer's longshore carrier, the Secretary of Labor, in her discretion, may satisfy the judgment from the Special Fund under Section 18(b). *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Where claimant is unable to collect benefits from the liable employer due to the employer's bankruptcy, claimant should contact the Director, OWCP, with regard to payment of benefits, as the Director may, in his or her discretion, satisfy the judgment with payments from the Special Fund. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

The Board declined to modify or void its previous decision holding employer directly liable for benefits, as neither carrier could be held liable, despite the fact of the employer's discharge in bankruptcy. Enforceability of a decision is not a matter for the Board's review. Rather, Section 18(b) provides for the contingency that the liable employer is insolvent. Under that section, claimant may be able to obtain benefits from the Special Fund at the discretion of the Secretary. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

Where carrier was insolvent and LIGA was thus responsible for benefits, the Board held that as LIGA could not be liable for pre-insolvency attorney's fees under its authorizing statute, it was not liable for these fees and employer remained primarily liable. *See Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992). In remanding for entry of a fee award, the Board noted that employer had filed for bankruptcy, but stated that a determination of its liability was not affected by this filing and that while counsel's ability to enforce any award would be different matter, it was not an issue for the Board to resolve, citing Sections 21(d) and 18(b). *Marks v. Trinity Marine Grp.*, 37 BRBS 117 (2003); *see also Zamora v. Friede Goldman Halter,* 43 BRBS 160, 162 n.6 (2009).

While claimant may seek benefits from the Special Fund pursuant to Section 18(b) as a result of the insolvency of the liable employer, HOC, the Board held that Section 18(b) requires that a "judgment" first be entered against the insolvent employer. As the administrative law judge did not issue an order holding HOC liable for benefits in this case, but merely held that Brown & Root is not liable as a general contractor, the Board remanded the case for adjudication of any remaining issues relative to the disability and survivor's claims, and for entry of an order explicitly finding HOC liable for those benefits.

The Board stated that thereafter claimant may proceed pursuant to Section 18. *Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009).