

SECTION 44
(new section)

The Board holds that the language of Section 44(c)(1) of the Act required the employer to make payment to the Special Fund, irrespective of the fact that the employer had already paid claimant benefits under a state workers' compensation act. Sections 3(e) and 14(j) were distinguished. Wong v. Help Unlimited of Tampa, Inc., 19 BRBS 255 (1987).

Under Section 44(j)(4) of the pre-Amendment Act, the Special Fund may be liable for an independent medical examination ordered by the Secretary. Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1 (1987).

The Board states that Section 2(11) cannot be construed as limiting compensation for death to only a situation where the death was work-related, given that the version of Section 9 which is applicable in this case (Section 9 as amended in 1972) provides that an employee's death is also compensable where he died from causes unrelated to his work injury but had been permanently and totally disabled by the work injury as of the time of his death. Board accordingly holds that the deputy commissioner did not err in imposing a Section 44(c)(1) assessment on employer despite the fact that claimant's death was not work-related, since both prerequisites to Section 44(c)(1) applicability--a compensable death and the absence of any survivor eligible to receive death benefits--have been met in this case. Swasey v. Willamette Iron & Steel Co., 20 BRBS 52 (1987).

United States Court of Appeals for the First Circuit affirms Board's holding that an employer is liable for actually paying a claimant's benefits if its insurance carrier becomes insolvent, under Section 4(a), and that this liability cannot be judicially shifted to the Special Fund, under Sections 18 and 44(c). B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 22 BRBS 24 (CRT) (1st Cir. 1989), aff'g 20 BRBS 151 (1987).

The Board holds that Section 44(c) does not authorize a credit to employer against subsequent assessments as a way of reimbursing employer for overpayments. Section 44(c) allows only for annual assessments. If employer were to receive a credit, it would require recalculation of all other employers' assessments to account for their proportionate use of the Fund, which would create an administrative burden and jeopardize the fiscal integrity of the Fund. Parks v. Metropolitan Stevedore Co., 26 BRBS 172 (1993).

The Board defers to the Director's position that employer is entitled to a hearing on its claim

for Section 8(f) relief even though claimant withdrew his claim, since it may affect employer's assessment under Section 44(c). The Board notes that Section 44 contains no specific requirement for including payments of state compensation in the calculation of employer's assessment, but that the form employer must file in order to determine its assessment states that compensation paid under a state act and credited against any Longshore obligation must be reported. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting).

The First Circuit holds that the Secretary's interpretation of Section 44 in dual liability cases is entitled to deference. When employer is liable for the same amount under both the Maine Act and the Longshore Act, employer's payment of compensation under the state act is considered to be payment under the Longshore Act for purposes of employer's assessment under Section 44. *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 29 BRBS 11 (CRT) (1st Cir. 1994).

The Fourth Circuit holds that employer is required to continue to contribute to the Special Fund even though it had terminated its maritime business and is no longer a "self-insurer" under the Act. The court reasoned that employer still benefits from the Fund, in that the Fund continues to compensate employees of National Metal, and other beneficial provisions of the Act. The court stated that employer should bear a commensurate burden. *National Metal & Steel Corp. v. Reich*, 55 F.3d 967, 29 BRBS 97(CRT) (4th Cir. 1995).

If there are no persons entitled to death benefits for the death of an employee, the employer must pay \$5,000 to the Special Fund under Section 44(c)(1). *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

The Ninth Circuit holds that payments by the Special Fund to claimants are "payable by" the United States even though the Fund is financed by private employers and the funds are not the property of the United States. Having found that the Social Security Act garnishment provision, 42 U.S.C. §659, impliedly repealed the Anti-Alienation provision of Section 16 of the Longshore Act, the court holds that claimant's benefits, which are paid by the United States, are properly being garnished pursuant to a state court order to satisfy claimant's delinquent spousal support payments. *Moyle v. Director, OWCP*, 147 F.3d 1116, 32 BRBS 107(CRT) (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1454 (1999).