BRB Nos. 13-0288
and 13-0288A

ALFRED F. WAKELEY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
KNUTSON TOWBOAT COMPANY	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	DATE ISSUED: Mar. 14, 2014
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	ORDER on
Cross-Respondent	)	RECONSIDERATION

Claimant has timely filed a motion for reconsideration of the Board's Decision and Order in *Wakeley v. Knutson Towboat Co.*, BRB Nos. 13-0288/A (Dec. 19, 2013) (unpub.). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer has filed a response brief, urging rejection of claimant's motion. Claimant filed a reply brief. For the reasons set forth below, we deny claimant's motion and affirm the Board's decision.

The facts are well known to the parties, and we will not repeat them here except as necessary. On remand from the Board's initial decision in *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010), the administrative law judge found that claimant sustained a work-related injury, and she awarded claimant compensation for temporary total disability from July 15 to October 1, 2006, permanent total disability from October 2, 2006 to February 28, 2007, and permanent partial disability from March 1 to July 31, 2007. The administrative law judge found that employer failed to timely controvert the claim, and she ordered employer to pay an additional 10 percent assessment under Section 14(e), 33 U.S.C. §914(e), for compensation due from July 15 to October 1, 2007.

On reconsideration, the administrative law judge rejected claimant's contention that he is entitled to interest on the amount due for the Section 14(e) assessment. Order at 2.

Claimant appealed the administrative law judge's denial of interest on the Section 14(e) assessment. BRB No. 13-0288A. Claimant urged the Board to overrule its decision in *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), upon which the administrative law judge relied in finding that interest is not due on a Section 14(e) assessment. However, subsequent to employer's filing its response brief, employer submitted a letter to the Board stating that it, "concedes claimant is entitled to interest on the penalty awarded by the ALJ. The insurer voluntarily paid claimant the amount it estimates is due as interest pending calculation by the District Director." Emp. Oct. 23, 2013 Letter at 1. Employer also provided a copy of Form LS-208 with its letter. Therefore, the Board concluded that claimant's appeal of the administrative law judge's denial of interest on the Section 14(e) assessment was moot as he had received the relief he sought; no controversy between the parties remained on this issue. *Wakeley*, slip op. at 4; *see* 33 U.S.C. §921(b)(3). Claimant's appeal was dismissed.

On reconsideration, claimant concedes that, while the issue of his entitlement to interest on the Section 14(e) assessment awarded in this case is moot, the issue is not moot as a matter of law and policy under the Act. Claimant contends the Board should address the issue and overrule *Cox* for future cases.

"Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999)); *see also Alvarez v. Smith*, 558 U.S. 87 (2009). Claimant concedes that the mootness doctrine applies in this case, as employer paid claimant interest on its Section 14(e) assessment. Moreover, contrary to claimant's urging, the Board does not have the statutory authority to issue advisory opinions in the absence of a controversy between the parties to the appeal. 33 U.S.C. §921(b)(3); *see generally Foster*, 347 F.3d at 745; *Sample v. Johnson*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985); *Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 160 (1982).

Claimant has not shown that an exception to the mootness doctrine applies. The "capable of repetition, yet evading review" exception "applies only when (1) the challenged action is too short in duration to be fully litigated before cessation or expiration, *and* (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000); *Reimers v. State of Oregon*, 863 F.2d 630 (9th Cir. 1989). In this case, neither ground for this exception is applicable. The Board may see *Cox*

challenged in another case where the issue is not moot.[1] Moreover, claimant has not shown that he is likely to be subject to employer's declining to pay interest on a Section 14(e) assessment in this claim or a future claim. Thus, claimant's reliance on *Already, LLC v. Nike*, 133 S.Ct. 721 (2013) is misplaced. In that case, the Supreme Court stated that a defendant cannot automatically moot a case by ending its unlawful conduct once it is sued. Instead, the defendant must show that its allegedly wrongful behavior could not reasonably be expected to recur. *Already, LLC*, 133 S.Ct. at 727. Employer's initial refusal to pay interest on the Section 14(e) assessment in this case was not "unlawful conduct," as *Cox* is controlling authority on this issue. In addition, it is unlikely that there will be another Section 14(e) assessment in this case. *See generally Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998) (period of assessment ends with notice of controversion or its equivalent). Thus, employer bore no burden in relationship to the application of the mootness doctrine. Claimant has not demonstrated error in the dismissal of his appeal on the ground of mootness. Therefore, his motion for reconsideration is denied.

[1] In his reply brief, claimant contends that the Board will "never review" its holding in *Cox* because "every carrier will concede the issue on appeal, pay the small benefit, and keep the law to intimidate other claimants from seeking interest at the [Office of Workers' Compensation Programs and Office of Administrative Law Judges] levels." Reply Brief at 1. This argument is specious at best. Moreover, if employers were to voluntarily pay interest on Section 14(e) assessments, we fail to see how this will harm claimants as they will be in the same position as if the law were in their favor.

Accordingly, claimant's motion for reconsideration is denied and the Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge