BRB No. 06-0210

JOSEPH D. WARREN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING	)	DATE ISSUED: 10/26/2006
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Claimant's Motion for an Order of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Denying Claimant's Motion for an Order (Case No. 14-133395) of District Director Karen P. Staats rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989).

In a Decision and Order Awarding Benefits, Administrative Law Judge Gerald M. Etchingham awarded claimant compensation for a work-related hearing impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge also ordered employer to pay interest on the award, with the district director to make all calculations necessary to implement the Decision and Order. *Warren v. Lockheed Shipbuilding*, Case No. 2003-LHC-00743 (July 18, 2005). Thereafter, the district director calculated the amount of compensation and interest due, computing interest on a simple basis. Claimant subsequently filed a motion requesting that the

district director issue a compensation order awarding compound interest on his past-due compensation.[1] In an Order dated October 21, 2005, the district director denied claimant's motion that the award of interest be calculated on a compound basis. *Warren v. Lockheed Shipbuilding*, Case No. 14-133395 (Oct. 21, 2005).

On appeal, claimant challenges the district director's award of simple interest on claimant's award of past-due compensation. Specifically, citing the Board's holding in *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on reconsideration*, 17 BRBS 20 (1985), that the proper interest rate for interest on past-due compensation under the Act is the rate set forth at 28 U.S.C. §1961, claimant avers that such interest must be compounded annually consistent with Section 1961(b).[2] Alternatively, claimant avers that interest on past-due compensation should be calculated in accordance with the provisions of 26 U.S.C. §6621.[3] Employer responds, asserting that the district director's

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[1] Interest is compounded when accrued interest is added to the principal and the whole is treated as new principal for the calculation of future interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160, 165 n.7 (1994), *citing* 45 Am. Jur.2d Interest & Usury §83. *See also Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989).

[2] 28 U.S.C. §1961 (2005) provides in relevant part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court…. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
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> (b) Interest shall be computed daily to the date of payment except as provided in Section 2516(b) of this title and Section 1304(b) of title 31, and shall be compounded annually.
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> * * *
>
> (c)(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section

[3] The interest rate set forth at 26 U.S.C. §6621 is the rate employed by the Internal Revenue Service for over- and under-payments of taxes. *See Grant*, 16 BRBS at 270.

award of simple interest at the rate provided at 28 U.S.C. §1961 is correct and should be affirmed.

Although there is no express provision in the Act for the payment of interest on past-due compensation, United States Courts of Appeals and the Board have uniformly approved interest awards as consistent with the Congressional purpose of ensuring that claimants receive the full amount of compensation due. *See Matulic v. Director, OWCP*, 154 F.3d 1052, 1059, 32 BRBS 148, 153(CRT) (9th Cir. 1998); *Sproull v. Director, OWCP*, 86 F.3d 895, 900-901, 30 BRBS 49, 52(CRT) (9th Cir. 1996); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625, 25 BRBS 71, 76-77(CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors, Inc.*, 22 BRBS 453 (1989). *See also Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 907-908, 31 BRBS 150, 152-53(CRT) (5th Cir. 1997); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 910-11, 29 BRBS 1, 10(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260, 265 (1993); *Grant*, 16 BRBS at 269-70. Cases under the Act generally involve pre-judgment interest, *i.e.*, interest accrued on unpaid benefits during the period prior to issuance of the administrative law judge's Decision and Order. *See Matulic*, 154 F.3d at 1059, 32 BRBS at 153(CRT); *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).

The Board held in *Grant*, 16 BRBS 267, that 28 U.S.C. §1961 is to be used as a guide in determining the proper interest rate applicable when awarding interest on past-due compensation under the Act. *Grant*, 16 BRBS at 270-71, *on reconsideration*, 17 BRBS at 22-23.[4] In holding that Section 1961 should serve as the guide for interest awards under the Act, the Board in *Grant* specifically rejected the argument that the Board instead should apply the interest rate at 26 U.S.C. §6621, which is employed by the Internal Revenue Service (IRS) for over-and under-payments of taxes. *Id.*, 16 BRBS at 270-71. The Board has since consistently utilized Section 1961 for guidance in determining interest rates under the Act in accordance with its holding in *Grant. See Santos v. General Dynamics Corp.*, 22 BRBS 226, 228 (1989). *See also Meardry v. Internat'l Paper Co.*, 30 BRBS 160, 164 n.3 (1996); *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160, 163 (1994).

[4] In utilizing 28 U.S.C. §1961 for guidance in determining interest rates for awards of pre-judgment interest under the Act, the Board was cognizant that Section 1961 is a post-judgment interest provision, applicable by its terms to awards of post-judgment interest on United States district court judgments. *See Grant*, 16 BRBS at 271. In its decision on reconsideration in *Grant*, the Board explained that because there is no general federal statute providing for pre-judgment interest on judgments of the United States district courts, Section 1961 represented the most appropriate guide to employ. 17 BRBS at 23 n.4.

In *Santos,* 22 BRBS 226, the Board was similarly presented with the issue of whether interest on past-due compensation under the Act should be calculated on a simple or compound basis. The Board cited its holding in *Grant* that 28 U.S.C. §1961 provides guidance in determining the appropriate interest rate under the Act, explaining that Section 1961 had not actually been incorporated into the Act by virtue of the Board's decision in *Grant. Santos,* 22 BRBS at 228. The Board therefore held that the compounding provision at Section 1961(b) does not expressly authorize the compounding of interest on compensation awards under the Act.[5] *Id.* The Board acknowledged that compounding an award of pre-judgment interest may be appropriate in a particular case, but held that this result was not warranted on the facts presented in *Santos. Id.* Accordingly, the Board rejected the claimant's argument that compound interest was necessary to make him whole and to compensate him for not having the use of his money during the time when compensation was delayed. *Id.* at 227-28.

In the seventeen years since the Board's decision in *Santos* was issued, the Board consistently has held that, absent particular facts or circumstances that would warrant an award of compound interest, interest on past-due compensation should be calculated on a simple basis. *See Meardry,* 30 BRBS at 164 n.3; *Jones,* 25 BRBS at 360. To date, no United States Court of Appeals has held that an award of interest on past-due compensation under the Longshore Act must be calculated on a compound basis. As the federal cases cited by claimant do not represent precedent that is directly contrary to that of the Board, we decline to overturn our longstanding precedent that, under normal circumstances, pre-judgment interest awards under the Act should be calculated on a simple basis. The federal decisions cited by claimant are not Longshore Act cases but, rather, involve various other federal causes of action. As argued by claimant, these cases may signal a trend on the part of at least some federal courts toward the approval of compound pre-judgment interest awards to accomplish the purpose of making the plaintiff whole. In none of these cases, however, has a United States Court of Appeals adopted a rule that pre-judgment interest must be compounded as a matter of law.[6]

[5] In this regard, the Board cited the general American rule that interest, when allowable, should be calculated on a simple rather than compound basis in the absence of express authorization otherwise. *Santos,* 22 BRBS at 228 (*citing Stovall v. Illinois Cent. Gulf R.R. Co.,* 722 F. 2d 190, 192 (5th Cir. 1984)).

[6] Claimant cites the statement by the United States Court of Appeals for the Seventh Circuit in *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279, 1331-32 (7th Cir. 1992) that "compound prejudgment interest is the norm in federal litigation." The Seventh Circuit reaffirmed this statement in its subsequent opinion in *American Nat'l Fire Ins. Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 924, 937-38 (7th Cir. 2003), but specifically refused to adopt a rule that pre-judgment interest must be compounded as a matter of law. 325 F.3d at 938 n.11. *See also Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d

Rather, circuit courts which have addressed the issue of interest have held that, as a general rule, the determination whether to award compound or simple pre-judgment interest is within the discretion of the trial court. *See, e.g., American Nat'l Fire Ins. Co. v. Yellow Freight Systems, Inc.*, 325 F.3d 937 (7th Cir. 2003); *Hughes Aircraft Co. v. United States*, 86 F.3d 1566, 1575 (Fed. Cir. 1996); *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1098 (6th Cir. 1996). *See also Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071 (2d Cir. 1995)(determining whether to grant pre-judgment interest and the applicable rate is a matter for the district court's broad discretion). We therefore decline claimant's invitation to overturn well-settled precedent that, in the absence of particular facts and circumstances warranting the imposition of compound interest, interest on past-due compensation under the Act should be computed on a simple interest basis.

We further reject claimant's alternative argument that interest on past-due compensation should be awarded at the rate provided at 26 U.S.C. §6621, rather than at the 28 U.S.C. §1961 rate, an argument that was considered and rejected by the Board in its decision in *Grant*, 16 BRBS at 270-71. The Board's utilization of Section 1961 for guidance in determining the rate to apply to interest awards under the Act also represents longstanding Board precedent, and there are no United States Court of Appeals decisions in cases arising under the Act to the contrary. The sole case cited by claimant supporting application of the 26 U.S.C. §6621 rate, *Scalamandre v. Oxford Health Plans (N.Y.), Inc.*, 823 F.Supp. 1050, 1063-64 (E.D. N.Y. 1993), reflects merely that federal courts have employed the Section 6621 rate in making pre-judgment interest awards in Employee Retirement Income Security Act (ERISA) cases. There is no suggestion by claimant that the Section 6621 interest rate is widely applied to other federal causes of action in which that rate is not expressly made applicable by statute or regulation.[7] We therefore reject claimant's alternative argument that pre-judgment interest awards under the Act should be made at the rate set forth in 26 U.S.C. §6621, rather than at the 28 U.S.C. §1961 rate. The district director's award of interest at the rate set forth at 28 U.S.C. §1961, computed on a simple interest basis is affirmed.

Accordingly, the Order Denying Claimant's Motion for an Order of the district director is affirmed.

1538, 1555 (Fed. Cir. 1995) (specifically declining to rule that pre-judgment interest must be compounded as a matter of law).

[7] In cases arising under the Black Lung Benefits Act, simple interest on past-due benefits is paid at the 26 U.S.C. §6621 rate pursuant to a specific regulatory provision. *See* 20 C.F.R. §725.608(a), (d)(3).

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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REGINA C. McGRANERY
Administrative Appeals Judge