SECTION 14—PAYMENT OF COMPENSATION

Section 14 of the Act contemplates an orderly system for the payment of compensation for injured employees whereby the employer either makes timely voluntary payments of compensation or gives timely notice that the right to compensation is controverted.

The courts have stated that the Act is designed to encourage payment of compensation by employers voluntarily and without the need to resort to formal adversary proceedings. *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978). Thus, employer bears the burden of bringing disputes to the attention of the agency through the notice of controversion. That notice brings the administrative process into play, setting into motion the district director's (formerly deputy commissioner's) formal claim resolution procedures. *Id. See* 20 C.F.R. §702.252. An employer which fails to timely pay or controvert a claim is subject to an additional 10 percent assessment. 33 U.S.C. §914(e).

Once a formal Order awarding benefits is issued, employer must pay the award promptly; failure to do so adds an additional 20 percent to unpaid benefits. 33 U.S.C. §914(f).

Section 14 also provides for a credit for advance payments of compensation against the benefits ultimately found due. 33 U.S.C. §914(j).

Section 14(a) - (c)

Section 14(a) provides that compensation shall be paid "periodically, promptly, and directly" to the employee, without an award, except where liability for compensation is controverted by the employer. 33 U.S.C. §914(a); 20 C.F.R. §702.231. Section 14(a) does not require that employer pay compensation pending a hearing on a controverted claim, and thus, it serves as a protection for employers who would otherwise be faced with attempting to recoup compensation from workers who later are found not to be entitled to compensation. *Sample v. Johnson*, 16 BRBS 146(CRT) (W.D. Wash. July 27, 1984), *rev'd on other grounds*, 771 F.2d 1335, 18 BRBS 1(CRT) (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1985).

Section 14(b) provides that the first installment of compensation becomes due on the 14th day after employer has been notified pursuant to Section 12 or after employer has knowledge of an injury or death. *See* Sections 12(d)(1), 14(e) for further discussion of "knowledge." Thereafter installments shall be paid semi-monthly unless the deputy commissioner determines they shall be paid monthly or otherwise. *See* 20 C.F.R. §702.232; *Baldwin v. Healy-Cruse*, 6 BRBS 418 (1977). Payments made to an employee under a non-occupational health insurance plan are not compensation for the purposes of Section 14(b). *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981).

Section 14(c) provides that upon either making the first payment or suspending payment for any cause, employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary. *See* Form LS-206, Payment of Compensation without Award; Form LS-208, Notice of Final Payment or Suspension of Compensation Payments.

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The Eleventh Circuit held that since employer never notified the deputy commissioner that it had begun payment of compensation, as is required by Section 14(c), it would be inequitable to allow employer to credit the wages it paid claimant during the period for which claimant was entitled to total disability benefits against its liability for the total disability benefits. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *aff'g and rev'g Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., concurring and dissenting).

The First Circuit stated that the provisions at Section 14(c), (g) requiring employer to file forms with the district director at the time compensation is first paid and on the suspension or termination of compensation are intended to permit the Department of Labor to keep track of payments and to take remedial action on its own initiative; these provisions do not confer rights on claimant and cannot be enforced by claimant. *Neely v. Benefits Review Board*, 139 F.3d 276, 32 BRBS 73(CRT) (1st Cir. 1998).

Section 14(d) - Notice of Controversion

Section 14(d) sets out the procedure which must be followed to timely controvert the right to compensation. Under Section 14(d) as amended in 1984, if employer controverts the right to compensation, it must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice under Section 12. *See Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984).

Employer must file on or within the 14th day after it has knowledge of the injury not knowledge of the claim. *Id*. *See Wall v. Huey Wall, Inc.*, 16 BRBS 340 (1984). Thus, a notice filed shortly after claim was filed is not timely if employer had earlier knowledge of the injury. *Davenport v. Apex Decorating Co., Inc.*, 13 BRBS 1029 (1981). A mistaken belief that a state, rather than the federal, workers' compensation act applies does not excuse employer's duty to file the notice. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978); *Spencer*, 16 BRBS 205; *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981). The same holding applies where employer terminates payments because claimant files a Jones Act claim; employer must file a notice of controversion. *Ramos v. Universal Dredging Corp*., 15 BRBS 140 (1982) (Kalaris, J., concurring). For further discussion of "knowledge," *see* Section 14(e).

The notice must be given in accordance with the form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death and the grounds for controversion. *See* LS-207, Notice of Controversion. The fact that claimant and his attorney are aware of employer's position does not affect the duty to file a notice; the Department of Labor must be notified. *Rowe v. W. Pacific Dredging*, 12 BRBS 427, 434 (1980).

The Board has held that the title of the document is not determinative of whether employer has complied with Section 14(d). If a document contains all the information required by Section 14(d), it may be considered equivalent to a notice of controversion. *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1984); *Spencer*, 16 BRBS at 209. In *Spencer*, 16 BRBS 205, the Board held that employer's pre-hearing statement, which included all of the relevant information, constituted the notice of controversion. In *White*, the Board held that a notice of suspension of payments which includes all the information required by Section 14(d) is the functional equivalent of a notice of controversion. *Accord Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). The Board overruled the decision in *Garner v. Olin Corp.*, 11 BRBS 502 (1979), to the extent it was inconsistent with this holding. In *Garner*, after affirming a Section 14(e) assessment, but limiting it to benefits due between the date a controversy arose and the date a controversion was filed several months later, the Board rejected employer's argument that its notice of suspension of

compensation filed within 14 days satisfied Section 14(d), stating that a notice of suspension would not necessarily contain all of the information required by that section. *Accord James v. Sol Salins, Inc.*, 13 BRBS 762 (1981).

The filing of an answer to a state compensation claim does not constitute the filing of a notice of controversion. *Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989); *Moore v. Paycor, Inc.*, 11 BRBS 483 (1979).

Where employer does not make voluntary payments or file a notice of controversion as required by Section 14(d), then employer is liable for a 10 percent assessment on compensation under Section 14(e), *infra*. *See White*, 17 BRBS at 78.

The Board held Section 702.251 and the "form prescribed by the Director" as delineated in Section 14(d) [the LS-207], mandate the employer also directly serve its notice of controversion on the claimant. The failure to timely do so subjects an employer to liability for additional compensation under Section 14(e). *Fowler v. M.T.C. East*, 58 BRBS 1 (2024) (Boggs, J. dissenting), *motion for recon pending*.

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Where employer filed its notice of controversion within two weeks of its having knowledge of claimant's injury, the Board held the notice was timely, rejecting claimant's argument that a notice should have been filed within 14 days of the date his job was terminated by employer. *Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988).

The Board initially held that an "excuse" from filing, *inter alia*, notices of controversion granted by the deputy commissioner in May 1987 due to the volume of hearing loss claims was not valid under Section 14(e) and thus addressed whether the administrative law judge properly found employer's "answer" to the claim was the equivalent of a notice of controversion. The Board held as a matter of law that this document, which did not provide the grounds upon which the right to compensation was controverted, could not constitute a controversion under Section 14(d). Even though the title of the document is not determinative, in this case, employer's "answer" was not a controversion because it stated that employer did not controvert the claim unless new evidence established that the claim was not compensable. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989) (en banc) (Brown, J., concurring), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Fifth Circuit affirmed the Board's holding that the "excuse" was invalid and that employer's letter accepting liability subject to the admission of contrary evidence did not constitute a controversion pursuant to Section 14(d). *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Board held that a notice of suspension which was filed within 14 days of the cessation of payments by employer and provided the information required by Section 14(d) of the Act, was the functional equivalent of a notice of controversion and precluded application of an assessment pursuant to Section 14(e). *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

The filing of a timely answer in a state compensation claim does not excuse the employer's duty to file a controversion under the Act within 14 days of awareness of the injury. *Maddon v. W. Asbestos Co.,* 23 BRBS 55 (1989).

The Board held that employer's LS-206, Notice of Voluntary Payment of Compensation, forms filed for two injuries were not the functional equivalent of timely filed notices of controversion under Section 14(d). Employer listed only the rates at which voluntary payments of compensation were made for each injury. The forms did not state that the right to compensation was being controverted or provide grounds therefor. *Hawthorne v. Ingalls Shipbuilding, Inc.,* 28 BRBS 73 (1994), *modified on other grounds on recon.,* 29 BRBS 103 (1995).

The Board held that employer's LS-202, First Report of Injury, form was inadequate to meet the requirements of a notice of controversion under Section 14(d). The form merely stated in seven places "no injury admitted" and was not responsive to the questions posed by the form. The form did not state that the right to compensation was being controverted or provide specific reasons for such an action as is required by Section 14(d). Moreover, the purpose of Form LS-202 involves the requirements of Section 30 of the Act, and the form states on the reverse side that "If the employer controverts the right to compensation he must also file a notice of controversion with the deputy commissioner. . . ." The Board thus reversed the administrative law judge's finding that employer timely controverted the claim and held that claimant was entitled to a Section 14(e) assessment from the date of the notice of injury to the date employer filed an actual notice of controversion. *Snowden v. Ingalls Shipbuilding, Inc.,* 25 BRBS 245 (1991) (Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992) (Brown, J., dissenting).

On reconsideration en banc, the Board affirmed its decision that employer's LS-202, First Report of Injury, was inadequate to meet the requirements of a notice of controversion under Section 14(d). It did not state that the right to compensation was controverted or the grounds therefor as is required by the statute. The Board also was persuaded by claimant's contention that it was not employer's intent to controvert the claim with this form at the time it filed it because it was relying on the May 1987 "excuse" from filing controversions,

and such in hearing loss claims which had been granted by the deputy commissioner. *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 346 (1992) (en banc) (Brown, J., dissenting), *aff'g on recon.* 25 BRBS 345 (1991) (Brown, J., dissenting).

The Board held that the validity of employer's notice of controversion must be determined with reference only to the contents of the notice itself. The Board rejected the Director's contention that the administrative law judge should assess its validity with reference to employer's other actions and filings, as the Fourth Circuit requires for motions for modification (*Pettus, Greathouse, Borda*). Rather, as with a claim for compensation (*Craig, Alario*), the sufficiency of employer's notice of controversion is determined by the document alone, *i.e.*, whether it complies with Section 14(d)'s requirement that the notice state the grounds upon which the right to compensation is controverted. As employer's notice in this case stated the reasons, the Board held that the notice of controversion was valid. Moreover, as the notice was timely filed, employer was not liable for a Section 14(e) assessment. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004).

After discussing the administrative review scheme of longshore cases and the legislative history of the Act, the Third Circuit held that if this scheme is inadequate to address a "wholly collateral claim," district court jurisdiction is not precluded over that claim. In this case, Kreschollek challenged the constitutionality of Section 14 of the Act - specifically, whether he was deprived of his due process rights due to lack of a hearing before voluntary benefits were terminated by the filing of a notice of controversion. Acknowledging that the legislative history and administrative scheme preclude district court jurisdiction over ordinary challenges, the court concluded that because Kreschollek had alleged a sufficiently serious irreparable injury--lack of a pretermination hearing—he raised a matter of constitutional right such that the administrative process was inadequate to afford him full relief; therefore, district court jurisdiction was not precluded in this instance. Further, the court held that the district court's exercise of jurisdiction over this collateral claim would have no bearing on the merits of Kreschollek's claim of entitlement to benefits. *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 30 BRBS 21(CRT) (3d Cir. 1996).

Following remand, the Third Circuit affirmed the district court's holding that the government did not deny claimant's rights to due process when employer unilaterally suspended his longshore benefits as there was no government action involved, and claimant did not have a property interest in the continued receipt of these benefits. The Third Circuit found controlling the Supreme Court's holding in *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), wherein the Court held that there is no state action when an employer terminates its voluntary payment of benefits, and that an employee has no property interests in unadjudicated benefits under the Pennsylvania workers' compensation statute. The Third Circuit rejected claimant's contention that because there is pervasive regulation of workers' compensation by the Longshore Act, there is necessarily state action. *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 34 BRBS 48(CRT) (3d Cir. 2000).

The Board reversed the administrative law judge's imposition of a Section 14(e) assessment in this modification case. Section 14(d) requires that employer pay benefits or controvert the claim after receiving notice or knowledge of the *injury*, not of the claim. The parties stipulated that employer filed a timely notice of controversion after claimant's injury occurred. The fact that claimant filed a modification claim pursuant to Section 22 based on the same injury as the prior claim does not require that employer file a new notice of controversion. *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005).

Section 14(e) - Failure to Pay or Controvert

In General

Section 14(e) provides that if employer fails to pay compensation voluntarily within 14 days after it becomes due, as set out in Section 14(b), employer shall be liable for an additional 10 percent added to unpaid installments unless employer filed a timely notice of controversion, as provided in Section 14(d), or the deputy commissioner (now district director) excuses such nonpayment after a showing by employer that, because of circumstances beyond its control, it could not make timely payments. The requirements for a notice of controversion are discussed in Section 14(d) of the desk book, *supra*.

Under Section 14(b) compensation is "due" on the 14th day after employer receives notice or has knowledge of the injury. Employer must then pay compensation within 14 days of this date, *i.e.,* 28 days from the date of notice, in order to timely pay compensation. If it controverts claimant's entitlement, it must file its controversion within 14 days of it notice or knowledge in order to timely controvert under Section 14(d). Failure to timely pay or controvert triggers Section 14(e).

The Board has noted that some case law refers to the additional assessment as a "penalty." The Board stated that this terminology has arisen primarily out of convenience, and the language of the statute describes it as an additional amount of compensation. The Board also stated that these payments are not purely punitive in nature, as they exist not only to give employers a financial incentive to pay compensation voluntarily and promptly, but also compensate claimants for the inconvenience and expense of self-support during a time when earning capacity is reduced or destroyed and compensation is not being paid. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pert. part sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979). *Cf. Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992) (Board referred to Section 14(e) "penalty," without addressing whether it was in fact a penalty, and affirmed finding Florida Insurance Guaranty Association was not liable for it under its enabling statute which stated FIGA was not liable for penalties and attorney's fees).

The Federal Circuit held that a Section 14(e) payment was not a penalty in addressing whether it was a "fine or penalty" and thus non-reimbursable under a Navy contract in *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997), concluding that these payments are not penalties. The court based its holding on a construction of the provisions of the Act, beginning with the fact that Section 14 is entitled "Payment of Compensation." The court concluded that while Section 14(e) helps to ensure that the requirements of the Act are followed, the ten percent assessments also compensate claimants for their inconvenience and expense during times when they were not paid compensation and address a wrong to the individual rather than to the state. The court also

addressed holdings which casually described the payment as a "penalty," *citing Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 534 (1983); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Nat'l Steel & Shipbuilding, Co. v. Bonner*, 600 F.2d 1288, 1294 (9th Cir. 1979); *Newport News Shipbuilding*, 594 F.2d 986, 9 BRBS 1089, but found that these cases did not construe the term and used it as a convenient way to distinguish a Section 14(e) payment from the underlying award. The Ninth and Fourth Circuits reached similar conclusions regarding the 20 percent assessment for late payment in Section 14(f). *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). *Cf. Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998) (Section 14(f) payments are properly characterized as "penalties" and are thus distinct from compensation; attorney's fee award thus denied). *See* Section 14(f), *infra.* In view of this precedent, in *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring) (subsequently vacated, 839 F. App'x 201 (9th Cir. 2021)), the Board held that Section 14(e) payments are "compensation" and not penalties. Thus, post-judgment interest is awardable on a Section 14(e) assessment of additional compensation, and the Board overruled its decision to the contrary in *Cox v. Army Times Publ'g Co.*, 19 BRBS 195 (1987).

In order to escape Section 14(e) liability employer must pay compensation, controvert liability, or obtain an excuse from the district director based on a showing that due to circumstances beyond its control it could not pay benefits. *See Frisco v. Perini Corp.*, 14 BRBS 798 (1981) (rejecting employer's argument it should not be liable while claimant's coverage under the Act was in dispute), *citing Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981).

The Board has held that the purpose of Section 14(e) is to encourage the prompt payment of benefits to ensure that employees receive the full amount due. *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984). *See Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978). Controversion serves to notify claimant and the deputy commissioner that employer disputes liability and will not pay without adversarial proceedings. *Id.; Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980). A Section 14(e) assessment, therefore, is not due where employer timely controverts the claim even if the ultimate result is an award of benefits, an unfavorable disposition for employer. *Id.*

Employer is not liable under Section 14(e) where it timely controverts but later abandons the defenses listed in its controversion and adopts new ones. *Pruner v. Ferma Corp.*, 11 BRBS 201 (1979).

In order to avoid the assessment under Section 14(e), employer must file its notice of controversion on or within the 14th day after it has knowledge of the injury not knowledge of the claim. *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984). *See Wall v. Huey Wall, Inc.*, 16 BRBS 340 (1984). Thus, employer does not avoid the assessment by filing its notice in relation to the filing of the claim where it had prior knowledge of the injury. *See Davenport v. Apex Decorating Co., Inc.*, 13

BRBS 1029 (1981). Filing under a state act due to a mistaken belief that it, rather than the federal act, applies will not relieve employer of the assessment. *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978); *Spencer*, 16 BRBS 205; *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981). The same holding applies where employer terminates payments because claimant has filed a Jones Act claim; employer must file a notice of controversion. *Ramos v. Universal Dredging Corp*., 15 BRBS 140 (1982) (Kalaris, J., concurring).

In this case, the Board addressed an issue of first impression: "whether service on a claimant is a required part of filing an employer's notice of controversion under Section 14(d) of the Act, 33 U.S.C. §914(d), such that failure to do so makes the employer liable for additional compensation under Section 14(e), 33 U.S.C. §914(e)." After a discussion of the undisputed facts, the parties' respective positions, and an extensive analysis of the pertinent provisions of the Act and accompanying regulations, the Board held: "the Act is silent on whether the filing in Section 14(d) includes service;" therefore, "the regulation implemented by the Secretary of Labor [Section 702.251] permissibly fills a silent statutory gap and, pursuant to its straightforward terms, service on the claimant [by the employer or its carrier] is a required component of filing a notice under Section 14(d)." The failure to timely do so subjects an employer to liability for additional compensation under Section 14(e). In reaching this conclusion, the Board stated inclusion of service as a part of filing is well within the Secretary's general authority, as the administrator of the Act, to make all regulations necessary to that administration and specific authority, as exemplified in Sections 12(c), 19(a), and 19(b), to regulate how the statutory notice and filing requirements of the Act are met. In this regard, the Board noted both the regulation enacted by the Secretary, Section 702.251, ["[a] copy of the notice must also be given to the claimant.]" and the "form prescribed by the Director" as delineated in Section 14(d), the LS-207 ["a copy of the completed form must be mailed to the claimant and claimant's representative" – that form also requires verification, via the employer's signature, that it was, in fact, "mailed to the claimant and claimant's representative"], mandate the employer directly serve its notice on the claimant. The Board further stated failure to provide "direct and timely notice" to the claimant of an employer's grounds for controversion discourages "the prompt resolution of claims" and as such falls contrary to the intended purpose of Sections 14(e) and (f). *Fowler v. M.T.C. East*, 58 BRBS 1 (2024) (Boggs, J. dissenting), *motion for recon pending*.

The Board has also rejected employer's arguments that the administrative law judge erred in awarding a Section 14(e) assessment where there was a "substantial medical dispute" on the issue of permanent disability and the deputy commissioner had made no recommendation that compensation be paid. Employer has the option of paying the compensation it believes is due and controverting the remainder. The existence of a dispute regarding disability does not excuse the failure to file a notice of controversion; in fact, it is this circumstance for which controversion exists. Moreover, Section 14(e) is not dependent on whether the deputy commissioner recommended payment of the compensation ultimately found due by the administrative law judge. *Tangorra v. Nat'l Steel & Shipbuilding Co.*, 6 BRBS 427 (1977), *aff'd in part and rev'd in*

part sub nom. Nat'l Steel & Shipbuilding Co. v. Director, OWCP, 607 F.2d 1009 (9th Cir. 1979) (table).

Where two employers are potentially liable, the filing of a notice of controversion by one employer does not preclude the other employer's liability under Section 14(e) where it failed to controvert. *Edwards v. Willamette W. Corp.*, 13 BRBS 800 (1981). The Board also has held, however, that an employer's timely controversion precluded the Special Fund from becoming liable for any additional assessment of compensation under Section 14(e). *Brady v. Bethlehem Steel Corp.*, 13 BRBS 1044 (1981).

The Section 14(e) assessment only applies to "any installment of *compensation* not paid within 14 days." 33 U.S.C. §914(e) (emphasis added). *See* 33 U.S.C. §902(12). Thus, medical expenses and expert witness fees are not subject to the assessment. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981).

The Board has held that the assessment of additional compensation under Section 14(e) is mandatory and therefore may be raised at any time. *McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *Edwards*, 13 BRBS 800; *Johnson v. C & P Tel.*, 13 BRBS 492 (1981); *McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Cuellar v. Garvey Grain Co.*, 11 BRBS 441 (1979), *aff'd sub nom. Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *see also Laber v. Sun Shipbuilding & Dry Dock Co.*, 7 BRBS 956 (1978); *Reed v. Sun Shipbuilding & Dry Dock Co.*, 4 BRBS 130 (1976). The Fourth Circuit has stated that the Section 14(e) "penalty is mandatory unless non-payment [or the failure to timely controvert] is 'due to conditions beyond employer's control.'" *Newport News Shipbuilding & Dry Dock Co v. Graham*, 573 F.2d 167, 171, 8 BRBS 241, 248, (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978). In *Graham*, the court affirmed the Board's decision that the administrative law judge did not err in disregarding the parties' stipulation that all notices had been timely filed.

Thus, the Board has raised the issue *sua sponte*. *See McNeil*, 11 BRBS 576; *Boudreaux v. J. Ray McDermott & Co., Inc.*, 13 BRBS 992.1 (1981), *rev'd on other grounds*, 679 F.2d 452, 14 BRBS 940 (5th Cir. 1982). The Board has also addressed the issue where it was raised by the Director on behalf of claimant for the first time on appeal, *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), and where it was raised by the Director in his response brief. *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981).

The First Circuit affirmed the Board's finding that employer was liable under Section 14(e) where the Board raised the issue on its own motion, but held that employer was entitled to notice and an opportunity to defend against the assessment. The court cautioned that the Board's exercise of this authority "does not require ambushing litigants. If the penalty

were indeed mandatory, notice would be of little use, but Section 14(e) by its terms excuses payment of the penalty when an employer could not timely pay compensation 'owing to conditions over which he had no control.'" *Prolerized New England Co.*, 637 F.2d at 39, 12 BRBS at 819. The court, however, rejected employer's argument that it was unfairly denied an opportunity to be heard here as employer vigorously defended the administrative law judge's decision, which had denied the Section 14(e) assessment, before the Board. *See Burke*, 14 BRBS 198 (Board addressed Section 14(e) argument raised in Director's response brief where employer had notice, responded to Director and defended the administrative law judge's decision).

The Board has declined to address employer's contention that the administrative law judge erroneously awarded a Section 14(e) assessment where employer failed to brief the issue. *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983).

That employer acted in "good faith" is not relevant to Section 14(e). *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). On the other hand, employer's lack of good faith in delaying benefits without a reasonable basis is also irrelevant. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). *Cf. Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978) (Section 14(e) liability does not exist until a controversy arises where employer, who has paid compensation voluntarily, suspends payments upon claimant's return to work and the parties decide in good faith to wait to determine the nature of the disability).

It is also not necessary that claimant show prejudice resulted from employer's late filing of the notice of controversion. *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1962). Furthermore, a claimant may not waive his right to additional compensation under Section 14(e). *Cooper Associates*, 607 F.2d 1385, 10 BRBS 1058; *McNeil*, 11 BRBS at 578; *Harris v. Marine Terminals Corp.*, 8 BRBS 712 (1978).

Consistent with *Prolerized New England Co.*, 637 F.2d 30, 12 BRBS 808, the Board held in a case where a formal hearing was not held (as the facts were not contested) that while a formal hearing is not required prior to the assessment of additional compensation under Section 14(e), employer must be given the "opportunity to be heard" by submitting relevant evidence. *Witthuhn v. Todd Shipyards Corp.*, 3 BRBS 146 (1976).

The administrative law judge is charged with the full development of the facts. 33 U.S.C. §923(a); 20 C.F.R. §702.338. Accordingly, where there is insufficient evidence in the record, the administrative law judge must ask the parties to submit all relevant evidence before making the appropriate findings. *Tezeno v. Consol. Aluminum Corp.*, 13 BRBS 778 (1981); *see also Lorenz v. F.M.C. Corp., Marine & Rail Div.*, 12 BRBS 592 (1980). Thus, where there was no evidence in the record regarding the timely filing of the notice of

controversion and where the evidence regarding the issue was not fully developed at trial, the Board held that the administrative law judge may not infer that no notice of controversion was filed but must seek evidence on the issue; where he failed to do so, the Board remanded the case. *Tezeno*, 13 BRBS at 784; *Cooper v. John T. Clark & Son of Maryland, Inc.*, 11 BRBS 453 (1979). *See Rose v. George A. Fuller Co.*, 15 BRBS 195 (1982) (Ramsey, concurring). Additionally, where the issue of the Section 14(e) assessment is raised on appeal, and the record does not contain sufficient evidence to determine the period of assessment, the Board must remand the case to the administrative law judge for the necessary findings of fact. *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981); *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981); *DeNoble v. Mar. Transp. Mgmt., Inc.*, 12 BRBS 29 (1980).

Section 14(e) applies to payments for partial disability as well as total disability. *Hadel v. I.T.O. Corp. of Baltimore*, 6 BRBS 519 (1977). Section 14(e) also applies to payments falling under the schedule. *Lonergan v. Ira S. Bushey & Sons, Inc.*, 11 BRBS 345 (1979). Although payments made under a state act do not excuse the failure to file a notice of controversion, where employer makes such payments and claimant ultimately is awarded compensation in a greater amount under the federal Act, employer's liability under Section 14(e) is based solely on the difference. *Dygert v. Mfr. Packaging Co.*, 10 BRBS 1036 (1979); *Barton v. Kaiser Steel Corp.*, 2 BRBS 210 (1 975). *See* 33 U.S.C. §903(e).

Similarly, where under the Act, employer pays some compensation voluntarily, fails to controvert the remainder, and claimant ultimately is awarded compensation in an amount greater than that which employer voluntarily paid, employer's liability under Section 14(e) is based solely on the difference. *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979), *remanding in pert. part* 5 BRBS 290 (1977); *Chandler v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 293 (1978). *See* 33 U.S.C. §914(j).

Where employer pays some benefits voluntarily, and claimant notifies employer of a claim that benefits are due at a higher rate, a dispute exists at this point and employer then has 28 days to pay the full amount of additional compensation claimed or 14 days in which to controvert the claim. Where employer fails to do so, and claimant ultimately obtains the greater benefits sought, employer is liable for the Section 14(e) assessment on the entire amount dating back to the date of injury, rather than only on the benefits due from the date of controversy, as this amount is the amount in dispute which employer should have either paid or controverted. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

In summary, if employer does not pay benefits voluntarily after an injury, it must controvert the claim within 14 days of notice or its knowledge of the injury to escape liability under Section 14(e). If employer pays benefits within 28 days of receiving notice/knowledge of an injury, it has paid benefits timely, *i.e.*, within 14 days of when they were due, and is not

liable under Section 14(e). If employer terminates payments, it need not controvert at that time if there is no controversy over additional benefits. If a controversy arises thereafter over the amount of benefits which are due, employer must pay the additional benefits or file a controversion within 14 days of the date of controversy or it is liable for a Section 14(e) on any additional benefits claimant obtains for the prior period. The assessment period ends when employer files a notice of controversion, or its equivalent, or an informal conference is held, whichever comes first.

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The Board affirmed the administrative law judge's finding that a Section 14(e) assessment was not due because the employer timely controverted the claim. The administrative law judge properly found that even though employer used its controversion as a delaying tactic and had no legitimate basis for denying benefits to a minor child, such "good faith" arguments are irrelevant. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The Board held that interest is not due on a Section 14(e) assessment. The Board reasoned that the purpose of interest is to ensure that claimants are fully compensated for their work-related injuries, whereas a Section 14(e) assessment is imposed as an incentive for employers to bring compensation disputes to the attention of the Department of Labor. Awarding interest on a Section 14(e) assessment would not further the purpose of fully compensating claimants, but instead would add an additional penalty for failing to controvert a claim. *Cox v. Army Times Publ'g Co*., 19 BRBS 195 (1987). *Accord Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

In accordance with circuit case precedent addressing Section 14(e) and Section 14(f) and Board law addressing Section 14(f), the Board held there is no basis for treating Section 14(e) payments differently from Section 14(f) payments because they contain substantially similar language and their purposes are similar. Acknowledging that those payments have punitive characteristics, but distinguishing them from penalties because they are linked to a claimant's benefits and paid to the claimant, the Board held that payments under Section 14(e) are "additional compensation." Interest is awardable on past-due compensation; therefore, the Board held that claimant is entitled to post-judgment interest on past-due Section 14(e) payments. Accordingly, the Board overruled its decision to the contrary in *Cox v. Army Times Publ'g Co.*, 19 BRBS 195 (1987). *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

The Board rejected the argument that the Section 14(e) assessment applies to accrued unpaid medical, as well as disability, benefits, reasoning that the plain language of Section 14 limits its application to "installments" of compensation, which medical benefits are not. The Board also held that since Section 14(e) provides for a mandatory assessment of

additional compensation, it may be raised at any time. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

The Board vacated the deputy commissioner's blanket "excuse" for employer from filing controversions or making payments under Section 14(e) due to the large volume of hearing loss claims, on the ground that it was not based on a showing that employer was prevented from making payments or filing notices because of circumstances beyond its control. In addition, the Board reiterated that the purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of the Department of Labor. It is not relevant that claimant was a retiree for whom the benefits were not a source of "replacement income." *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

The Fifth Circuit affirmed the Board's holding that the deputy commissioner abused his discretion in granting the "excuse" under Section 14(e) where employer failed to cite circumstances beyond its control resulting in an inability to file a timely notice of controversion. The Fifth Circuit also affirmed the Board's holding that retirees are entitled to receive Section 14(e) penalty awards as the penalty is designed, in part, to encourage employers to notify the Department of Labor of compensation disputes. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990).

Employer's good faith in voluntarily paying benefits at an average weekly wage it believed to be correct is not relevant to Section 14(e). The Board therefore reversed the administrative law judge's denial of a Section 14(e) penalty due to employer's good faith. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The Board held that employer could not have detrimentally relied on an "excuse" granted by the deputy commissioner due to the large number of cases filed at one time, as employer's knowledge of the injury, and not its receipt of the claim from the deputy commissioner, triggered its duty to pay or controvert. Employer's late payment, therefore, was not excused, and the administrative law judge properly applied a 10 percent penalty pursuant to Section 14(e). The Board rejected employer's contention that Section 14(e) is inapplicable in the instant case because claimant was not being compensated for a loss in wage-earning capacity but for his scheduled hearing loss. The Board noted that the purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of DOL. *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992).

The Board held that while federal pre-emption applies to the Act in general, the administrative law judge erred in applying it here to find that claimant's entitlement to

interest and a Section 14(e) penalty pre-empted the Florida statute which created its insurance guaranty fund, FIGA, and expressly relieved it of liability for interest and penalties. Instead of comparing the laws as he did, the administrative law judge should have determined whether the limit on FIGA's liability required that employer be held directly liable for penalties and interest under the Act. The Board held that the Florida statute limits the liability of FIGA, which cannot be liable for interest and penalties. However, that does not deny claimant any of his rights under the Act, as employer remains primarily liable for benefits under *B.S. Costello v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989). The Board thus vacated the administrative law judge's decision holding FIGA liable for interest and a Section 14(e) assessment and modified the decision to hold employer liable for these payments. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The Federal Circuit held that payments employer made under Section 14(e) were "additional compensation" under the Act and not "fines and penalties," nor were they a form of interest. The court noted other sections of the Act where the word "fine" or "penalty" is expressly used. Thus, payments made pursuant to Section 14(e) were chargeable to Ingalls' Navy contracts. *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997).

The Fifth Circuit rejected employer's contention that the administrative law judge erred in assessing a Section 14(e) penalty based on the date the parties stipulated that employer filed a notice of controversion. Employer contended the administrative law judge overlooked an earlier notice of controversion. The court held employer bound by its stipulation, and thus affirmed the imposition of the Section 14(e) penalty as the form was not filed within 14 days of employer's having notice of the injury. The Fifth Circuit declined to address employer's contention that its notice of final payment form satisfied the prerequisites for a notice of controversion. Employer did not raise this issue before the Board, and the court therefore was precluded from addressing the issue. *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000).

The Board reversed the administrative law judge's imposition of a Section 14(e) assessment in this modification case. Section 14(d) requires that employer pay benefits or controvert the claim after receiving notice or knowledge of the *injury*, not of the claim. The parties stipulated that employer filed a timely notice of controversion after claimant's injury occurred. The fact that claimant filed a modification claim pursuant to Section 22 based on the same injury as the prior claim does not require that employer file a new notice of controversion. *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005).

In this case, the Board addressed an issue of first impression: "whether service on a claimant is a required part of filing an employer's notice of controversion under Section 14(d) of the Act, 33 U.S.C. §914(d), such that failure to do so makes the employer liable for additional compensation under Section 14(e), 33 U.S.C. §914(e)." After a discussion

of the undisputed facts, the parties' respective positions, and an extensive analysis of the pertinent provisions of the Act and accompanying regulations, the Board held: "the Act is silent on whether the filing in Section 14(d) includes service;" therefore, "the regulation implemented by the Secretary of Labor [Section 702.251] permissibly fills a silent statutory gap and, pursuant to its straightforward terms, service on the claimant [by the employer or its carrier] is a required component of filing a notice under Section 14(d)." The failure to timely do so subjects an employer to liability for additional compensation under Section 14(e). In reaching this conclusion, the Board stated inclusion of service as a part of filing is well within the Secretary's general authority, as the administrator of the Act, to make all regulations necessary to that administration and specific authority, as exemplified in Sections 12(c), 19(a), and 19(b), to regulate how the statutory notice and filing requirements of the Act are met. In this regard, the Board noted both the regulation enacted by the Secretary, Section 702.251, ["[a] copy of the notice must also be given to the claimant.]" and the "form prescribed by the Director" as delineated in Section 14(d), the LS-207 ["a copy of the completed form must be mailed to the claimant and claimant's representative" – that form also requires verification, via the employer's signature, that it was, in fact, "mailed to the claimant and claimant's representative"], mandate the employer directly serve its notice on the claimant. The Board further stated failure to provide "direct and timely notice" to the claimant of an employer's grounds for controversion discourages "the prompt resolution of claims" and as such falls contrary to the intended purpose of Sections 14(e) and (f). *Fowler v. M.T.C. East*, 58 BRBS 1 (2024) (Boggs, J. dissenting), *motion for recon pending*.

Principles in Establishing Liability

Employer is liable for the additional assessment under Section 14(e) unless: (1) it timely pays compensation voluntarily; (2) it timely controverts liability; or (3) the deputy commissioner excuses the failure to pay compensation voluntarily upon a showing by employer that, because of conditions beyond its control, it could not make timely payments.

(1) Voluntary Payments - Controversy

Under Section 14(b), compensation becomes due on the 14th day after employer receives notice or has knowledge of an injury. Generally, where employer pays compensation voluntarily within 14 days after it becomes due but subsequently suspends the payments, employer will be liable for a 10 percent assessment under Section 14(e) unless it files a notice of controversion within 14 days after a controversy between the parties regarding additional compensation arises. *See Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982) (Kalaris, concurring). A notice that compensation has been terminated may satisfy this requirement if it contains the information required for a Notice of Controversion. *See* Section 14(d) discussion of documents which may constitute a Notice of Controversion.

In *Universal Terminal & Stevedoring Corp. v. Parker*, 587 F.2d 608, 9 BRBS 326 (3d Cir. 1978), *rev'g in pert. part* 7 BRBS 802 (1978), employer voluntarily paid compensation until claimant returned to work, and employer filed a Section 14(g) notice of termination of payments. Eight months later claimant filed a claim for permanent partial disability. The Board held that claimant automatically was entitled to Section 14(e) payments because employer did not file a notice of controversion within 14 days of suspending compensation. The Third Circuit reversed, holding that the Board's decision requiring that a notice of controversion be filed within fourteen days after the employee returned to work without regard to whether a dispute existed ran afoul of the Act's policy of encouraging the payment of compensation without litigation. The court recognized that often where permanent impairment *may* be involved, the parties wait a reasonable time after the employee returns to work before determining the extent of any disability and that in most cases, after the waiting period, the parties can be expected to reach agreement without the need for formal adjudication. Thus, the court held that when the parties in good faith decide to wait in order to determine the permanency or extent of partial disability, it is unnecessary for the employer to file a notice of controversion until there is a controversy. *See also Mitchell v. Sun Shipbuilding & Dry Dock Co.*, No. 78-1205 (3d Cir. Nov. 17, 1978), *rev'g in pert. part* 7 BRBS 215 (1977).

In *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979), the Board adopted the reasoning of the Third Circuit in *Parker*. However, the Board held that, once a controversy between the parties does arise, employer must file a notice of controversion within 14 days in order to avoid liability under Section 14(e). Accordingly, the Board remanded the case to the administrative law judge for a finding as to when the controversy between the parties

arose. *See Garner v. Olin Corp.*, 11 BRBS 502 (1979). *See also Ivory v. John W. McGrath Corp.*, 13 BRBS 78 (1981); *DeNoble v. Mar. Transp. Mgmt., Inc.*, 12 BRBS 29 (1980); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979); *Keeney v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 224 (1979); *Caraballo v. Ne. Marine Terminal Co., Inc.*, 11 BRBS 514 (1979); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979).

The Board has rejected the argument that there is no controversy until a claim is filed, relying on precedent that employer's duty to file a notice runs from its knowledge of the injury, not knowledge of the claim. *Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984). However, where claimant continues to work after an injury, a different result may be reached. In *Paul v. Gen. Dynamics Corp.*, 13 BRBS 1073 (1981), claimant developed asbestosis from asbestos exposure at work but he continued to work until the time of the hearing. The Board held that as claimant was working, employer had no reason to file a controversion until a controversy arose which, under the facts of the case, did not occur until employer was aware that a notice of claim was being filed. *See also Devillier*, 10 BRBS 649; *Gilmore v. Alabama Dry Dock & Shipbuilding Co.*, 9 BRBS 861 (1979). On the other hand, the Board held that the administrative law judge did not err in assessing a penalty where claimant returned to work and was fired, as employer should have been aware of a controversy when claimant was dismissed. *Rucker v. Lawrence Mangum & Sons, Inc.*, 18 BRBS 74 (1986), *rev'd on other grounds*, 830 F.2d 1188 (D.C. Cir. 1987) (table). *Cf. Jaros v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988) (date claimant was fired irrelevant where employer filed its notice of controversion within two weeks of its having knowledge of claimant's injury).

The Board has rejected the argument that a notice of controversion must only be filed when an employer wholly denies a claim. A notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is voluntarily being paid. *Lorenz v. F.M.C. Corp., Marine & Rail Div.*, 12 BRBS 592 (1980). Employer should pay the compensation it considers due and controvert the remainder. *Alston v. United Brands Co.*, 5 BRBS 600 (1977).

In *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979), *remanding in pert. part* 5 BR3S 290 (1977), the court also held that a controversy exists where employer reduces payments it is making voluntarily. The court stated that the notice requirement is not triggered until the employer has reason to believe a controversy will arise, whether because of the employer's actions in terminating or reducing voluntary payments or because of an employee's claims that greater compensation is due. The court followed this decision in *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor, OWCP [Holston]*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), stating that employer may have had reason to believe a controversy would arise when it terminated its voluntary payments and must have known that a controversy existed when it received notice of a claim for permanent partial disability benefits a few months later. The court found it unnecessary to decide which date

controlled as the administrative law judge found claimant's right to these benefits arose only thereafter.

In cases involving scheduled injuries, where claimant loses no time from work or has returned to work, and the parties wait in good faith to determine the permanency or extent of partial impairment under the schedule, a controversy does not arise (and a notice of controversion need not be filed) until 14 days after employer first gains knowledge of the permanency of claimant's condition and/or extent of impairment. *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981); *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 272 (1981); *Collington v. Ira S. Bushey & Sons*, 13 BRBS 768 (1981). *See also McKee v. D. E. Foster Co.*, 14 BRBS 513 (1981); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

In *Garner v. Olin Corp.*, 11 BRBS 502 (1979), the Board concluded that, where employer unilaterally suspends its voluntary payments of compensation and claimant has not returned to work, a controversy between the parties arises on the date of employer's unilateral suspension. *See also Tezeno v. Consol. Aluminum Corp*., 13 BRBS 778 (1981); *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980). Additionally, where employer voluntarily terminated payments when claimant filed for benefits under the Jones Act, employer should have filed a notice of controversion. *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982) (Kalaris, J., concurring).

Where employer fails to increase claimant's compensation in accordance with the maximum rate under Section 6(b)(1) (which is adjusted each year under Section 6(b)(3)), a controversy exists, and employer is liable for an assessment of additional compensation pursuant to Section 14(e). *See W. v. Washington Metro. Area Transit Auth.*, 21 BRBS 125 (1988). Claimant need not protest employer's failure to increase compensation in order to be entitled to the additional assessment. *Dews v. Intercounty Associates*, 14 BRBS 1031 (1982). Similarly, a claimant's request for additional compensation based on a higher average weekly wage followed by employer's refusal to pay constitutes a controversy for purposes of Section 14, and employer must file a notice of controversion within 14 days from the date of controversy in order to avoid the assessment of additional compensation under Section 14(e). *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981).

Payments made under a non-occupational insurance plan are not compensation for purposes of Sections 14(b) or (e). *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). Similarly, voluntary payments under a state act do not excuse an employer from Section 14(e) liability if it fails to controvert a claim, although the state act benefits will be credited in making the assessment. *Burke v. San Leandro Boat Works*, 14 BRBS 198 (1981).

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Where the record failed to indicate the date upon which employer ceased making voluntary payments of compensation to claimant, the Board held that claimant failed to establish entitlement to a Section 14(e) assessment. *Olson v. Healy Tibbits Constr. Co.*, 22 BRBS 221 (1989).

The Board held that under Section 6(d) of the Act as amended in 1972, the "phase-ups" of Section 6(b)(1), under which the maximum amount of weekly compensation to which a claimant is entitled is increased each year, are applicable to all claimants "newly awarded compensation"--*i.e.*, to all claimants awarded compensation after Section 6(d)'s enactment date--including those newly awarded compensation for temporary total disability. The Board accordingly upheld the administrative law judge's imposition of a Section 14(e) assessment for employer's failure to increase the amount of compensation it was paying claimant, in accordance with Section 6(b)(1), during the period that it was making voluntary payments. *West v. Washington Metro. Area Transit Auth.*, 21 BRBS 125 (1988).

The Board rejected claimant's contention that the administrative law judge erred in denying her an additional assessment from the Special Fund pursuant to Section 14(e). Claimant had argued that because the Special Fund was paying permanent total disability compensation at the time of death and was aware under *Graziano* that it was liable for the payment of death benefits, as a matter of law inasmuch as employer had already paid 104 weeks of disability compensation, it acted in bad faith in terminating its compensation payments and in failing to begin payment of death benefits as of the date of the employee's death. The Board agreed with the Director that pursuant to *Brady*, 13 BRBS 1044, employer's timely filing of a notice of controversion prevented the Special Fund from becoming liable for any additional assessment under Section 14(e). *Bingham v. Gen. Dynamics Corp.*, 20 BRBS 198 (1988).

The Board rejected claimant's argument that employer was required to file another notice of controversion after terminating its voluntary payment of benefits on July 24, 1983. Since an informal conference was held on July 29, 1983, this date is deemed to be the date on which the Department knew of the facts a proper notice would have revealed. *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988).

The Board rejected the argument that there is no "controversy" for purposes of Section 14(e) until a claim is filed; employer must controvert the claim within 14 days of its knowledge of the injury. Moreover, the filing of a timely answer to a state claim does not excuse employer's liability under Section 14. *Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989).

The Board rejected employer's argument that the assessment should only apply to unpaid compensation accruing after the date that claimant notified employer that she contested

employer's average weekly wage computation since the date of injury. As of the date claimant notified employer, a dispute existed between the parties and employer then had 28 days to pay the full amount of additional compensation claimed or 14 days in which to controvert the claim, neither of which employer did. Thus, an additional 10 percent was properly assessed on the full amount. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

On reconsideration, the Board affirmed its holding that employer was liable for a Section 14(e) penalty on all benefits due and unpaid from the date of injury, rather than the date claimant notified employer that she disputed its calculation of her average weekly wage. Although the dispute did not arise until over 2 years after the date of injury, the amount claimant initially contested extended back to the date of injury. The Board rejected employer's argument that *Bonner*, 600 F.2d 1228, supported its contention, finding *Bonner* distinguishable because the controversy in that case arose when the employer reduced its voluntary compensation payments from total to partial. The Ninth Circuit held that the Section 14(e) assessment applied only to the amount due as of the date the controversy arose. While claimant also obtained an average weekly wage adjustment going back to the date of injury, that issue was not raised in *Bonner* until the formal hearing. Thus, there was no controversy regarding average weekly wage until that time. In contrast, in *Browder* the controversy arose when claimant notified employer that she disputed the compensation rate employer used in paying benefits from the date of injury. Once claimant informed employer of the controversy, employer had 28 days to either pay claimant the disputed additional compensation, commencing as of the date of her injury, or to file a notice of controversion to avoid an assessment under Section 14(e). *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991).

Where employer timely controverted the hearing loss claim filed by claimant and began voluntary payments of benefits within 14 days after payment was due, the Fifth Circuit held that employer was not liable for either pre-judgment interest or a Section 14(e) penalty. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

The Board rejected claimant's contention that employer was required to file a notice of controversion at the time employer alleged that claimant reached maximum medical improvement and that suitable alternate employment was available in December 1994. Employer paid benefits from the date of injury in 1990 until May 1996, and it filed a notice of controversion in February 1996 disputing claimant's entitlement to ongoing benefits and stating that its payments were being made under the schedule based on evidence of job availability. Employer thereafter filed notice when it ceased payment benefits in June 1996. The Board held that employer thus timely controverted the claim. *Holland v. Holt Cargo Sys., Inc.*, 32 BRBS 179 (1998).

The Ninth Circuit vacated the administrative law judge's denial of a Section 14(e) penalty and remanded the case for him to determine the date on which the notice of controversion requirement was triggered as the administrative law judge failed to identify a specific date when a controversy arose. The court stated that employer must provide notice of controversion fourteen days after the employer has "reason to believe a controversy will arise," *citing Holston*, 606 F.2d at 879, 11 BRBS at 70, and that it was not required that an actual dispute exist. As the administrative law judge failed to determine this date, he was instructed to find one not earlier than December 8, 1989, when the employer unilaterally discontinued benefit payments, and not later than December 13, 1990, when claimant's attorney spoke with employer's claims manager and informed him of the dispute. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

(2) Timely Controversion - Employer Knowledge

Section 14(b) of the Act provides that employer must pay compensation within 14 days of the date it has knowledge or has been notified of an injury pursuant to Section 12. "Knowledge" for purposes of Section 14 refers to employer's knowledge of claimant's injury or death, not knowledge of the claim. *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 119 (1981); *O'Leary v. Se. Stevedore Co.*, 3 BRBS 419 (1976). *See* Section 14(d) for additional cases. An exception to this rule was recognized in *Paul v. Gen. Dynamics Corp*., 13 BRBS 1073 (1981), where claimant developed asbestosis and continued to work. The Board held employer had no reason to pay compensation or controvert until it was aware that a claim was being filed.

The determination of whether employer has knowledge for the purposes of Section 14 is governed by the same criteria that apply under Section 12(d)(l). *Pilkington,* 14 BRBS at 126; *Chiarella v. Bethlehem Steel Corp.*, 13 BRBS 91 (1981); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978).

An employer has knowledge if it knows of the injury and of such facts that a reasonable person would consider that compensation liability was possible and that further investigation should be made. *Pardee v. Army & Air Force Exch.*, 13 BRBS 1130 (1981); *Willis v. Washington Metro. Area Transit Auth.*, 12 BRBS 18 (1980). Consistent with Section 12(d)(1), employer must know of the injury and that it is work-related. *See Walker v. Sun Shipbuilding & Dry Dock Co.*, 684 F.2d 266, 14 BRBS 1035 (3d Cir. 1982), *aff'g* 14 BRBS 132 (1981) (Miller, dissenting), *cert. denied*, 459 U.S. 1039 (1982); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146 (3d Cir. 1975); *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 299 (1981) (Miller, dissenting). Knowledge of the work-relatedness of an injury may be imputed to the employer where the employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted. *See Jackson*, 15 BRBS 299; *Willis v. Washington Metro. Area Transit Auth.*, 12 BRBS 18 (1980). In *United Brands v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), the court stated that when an employee's injury manifests itself on the job and his supervisor notices his distress, the Act presumes that the injury is work-related and the employer has "knowledge." *See Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), *aff'g in pert. part sub nom. Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978) (D.C. Circuit affirmed a Board decision that Section 14(e) applied, holding employer's knowledge of the employee's death sufficed).

It is the duty of the trier-of-fact, not the Board, to determine when employer had knowledge. *Davenport v. Apex Decorating Co., Inc.*, 13 BRBS 1029 (1981); *Pilkington*,

9 BRBS 473. Where the administrative law judge makes no finding as to whether employer had knowledge, his Section 14(e) finding must be vacated. *Pardee*, 13 BRBS 1130.

In addressing knowledge under Section 12 in *Sun Shipbuilding & Dry Dock Co. v. Walker*, 590 F.2d 73, 9 BRBS 399 (3d Cir. 1978), *rev'g* 7 BRBS 134 (1977), the Third Circuit reversed the Board's affirmance of a finding that employer had knowledge where claimant, who worked as a burner, had a respiratory illness and employer knew burners were exposed to fumes and were susceptible to such illnesses and was aware a burner had been hospitalized. The court relied on the fact that claimant received benefits under employer's accident and health insurance policy and twice certified his illness was not occupational. Moreover, claimant's doctor provided weekly certification for 26 weeks that the injury was not job-related. The court found based on these facts that employer had no knowledge.

The Board affirmed a Section 14(e) assessment, distinguishing the holding in *Walker,* in *Chiarella,* 13 BRBS at 91. In *Chiarella,* the Board held that employer had knowledge of a traumatic injury, even though claimant's doctor had certified on employer's accident and health insurance forms that claimant's disability was not job-related, because claimant sustained his injury at work and on the day of the injury, he informed his foreman who then gave him lighter work. The Board also stated that, unlike *Walker,* claimant's doctor certified only once that claimant's injury was not work-related.

Similarly, the Board has held that a doctor's certification that claimant suffered from a non-occupational illness was insufficient to dispel employer's knowledge of a work-related condition where claimant had previously notified employer that his condition was work-related. *Pilkington,* 14 BRBS at 126.

In several consolidated hearing loss cases, the Board held that employer did not have knowledge under Section 14(b) as of the date it received the reports of claimant's first audiograms because these audiograms did not indicate a compensable hearing loss under the applicable AMA standard. Employer did gain knowledge based on audiograms indicating a loss under a later AMA standard, and Section 14(e) assessments were levied or denied based on whether employer timely controverted the individual claims as of this date. *Bandy v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 110 (1981).

In *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D. C. Cir. 1979), the decedent was an employee of a corporation owned by himself and his wife. The Board relied on Section 35 of the Act as support for imputing employer's knowledge of the employee's death to the carrier. The D. C. Circuit affirmed the Section 14(e) assessment on the ground that carrier obtained knowledge within three days of the employee's death. As carrier took no action for a year after obtaining actual knowledge of the death, the court stated that whether employer's knowledge was imputed to it was irrelevant. However, the court also stated that if it were necessary to the outcome, it would seriously consider

making an exception to the rule that an employer's knowledge is always imputed to its insurer in a case such as this one involving a family business where assessment of the penalty against the insurer could benefit the employer, who was also the widow.

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In a hearing loss case, the Board held that the administrative law judge properly found that employer was not liable for a Section 14(e) assessment. Although employer never controverted the 1983 claim, the Board held that the 1979 claim remained open and employer controverted this claim in a timely manner. Since the two claims were treated as one for adjudication purposes, employer's timely controversion of the 1979 claim was sufficient to prevent a Section 14(e) assessment from being imposed on the award. *Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990).

The Second Circuit affirmed this decision on different reasoning, holding that although employer did not controvert the 1983 claim within 14 days, its advance payment of compensation in 1980 acted as payment on the 1983 claim, thus fulfilling its obligation to pay compensation within 14 days as required by Section 14(e). The court adopted this finding by the administrative law judge instead of the reasoning of the Board. *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

Employer's "knowledge" for purposes of Section 14 is determined under the same standard as employer's knowledge of injury under Section 12(d). *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

The Board held that employer was not liable for a Section 14(e) assessment where it filed a notice of suspension within 14 days of the cessation of payments which provided the information required by Section 14(d) of the Act. This document is the functional equivalent of a notice of controversion and precluded application of an assessment pursuant to Section 14(e). *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

The Board rejected the argument that there is no "controversy" for purposes of Section 14(e) until a claim is filed; employer must controvert the claim within 14 days of its knowledge of the injury. Moreover, the filing of a timely answer to a state claim does not excuse employer's liability under Section 14. *Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989).

The Board rejected employer's contention that it did not know a controversy existed and thus was not liable for a Section 14(e) assessment until it had notice of a claim under the Act, as opposed to knowledge of a state claim. Section 14(e) provides that employer must either pay compensation or controvert employer's entitlement within 14 days of its

knowledge of the injury, not its knowledge that a claim has been filed under the Act. *Spear v. Gen. Dynamics Corp.*, 25 BRBS 132 (1991).

Where carrier did not controvert liability within 14 days of knowledge of claimant's injury and did not pay compensation voluntarily, the Board held that claimant was entitled to a Section 14(e) assessment from decedent's date of death until the informal conference, rejecting employer's argument that its credit for payments under the state act rendered Section 14(e) inapplicable. The Board stated that claimant's entitlement under the Act, including the Section 14(e) amount, is first determined and then carrier receives a Section 3(e) credit for its state payment against that amount. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

In this case, claimant received a 1988 audiogram which revealed a hearing loss. She continued to work and be exposed to injurious noise and did not file a notice of injury or claim for compensation until after a 1994 audiogram revealed an increased hearing loss. In reversing the administrative law judge's award of a Section 14(e) penalty on the 31.88 percent impairment shown in 1988, the Board held that, on the facts of this case, employer was not liable for the penalty because the full extent of claimant's injury was not known until 1994. Specifically, employer must have knowledge of the full extent of the injury or aggravation for which compensation is to be paid before Section 14(e) applies. In 1988, employer had no knowledge of the loss ultimately claimed; therefore, no controversy arose at that time, and it cannot be held liable for failing to pay benefits or filing a notice of controversion. As employer timely controverted the claim filed in 1994, it was not liable for a Section 14(e) penalty. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

In these two consolidated hearing loss cases, the administrative law judges denied claimants' requests for Section 14(e) assessments based on their overbroad interpretation of *Mowl*, 32 BRBS 51. The Board vacated, holding that *Mowl* does not stand for the proposition that in a hearing loss case in which claimant continues to work for employer and to be exposed to noise after undergoing an audiogram, employer cannot be found to have knowledge for purposes of Section 14(e) until the claim is filed. Such a holding would be contrary to the plain language of Section 14(b) and (d) that employer must pay compensation or controvert upon knowledge or notice of an *injury*. Here, unlike *Mowl*, claimants sought Section 14(e) assessments based on the hearing loss injuries demonstrated on the audiograms conducted at employer's facility that formed the basis for the claims, not on prior audiograms. The Board remanded for the administrative law judges to determine whether employer had the requisite Section 14(e) knowledge when it conducted the in-house audiograms that revealed the full extent of the hearing loss for which compensation was claimed and paid. *McGarey v. Elec. Boat Corp.*, 47 BRBS 29 (2013). The Board held that the validity of employer's notice of controversion must be determined with reference only to the contents of the notice itself. The Board rejected the Director's contention that the administrative law judge should assess its validity with reference to employer's other actions and filings, as the Fourth Circuit requires for motions for

modification (*Pettus, Greathouse, Borda*). Rather, as with a claim for compensation (*Craig, Alario*), the sufficiency of employer's notice of controversion is determined by the document alone, *i.e.*, whether it complies with Section 14(d)'s requirement that the notice state the grounds upon which the right to compensation is controverted. As employer's notice in this case stated the reasons, the Board held that the notice of controversion was valid. The Board further held that the notice was timely filed as it was filed within 14 days after claimant first obtained a permanent impairment rating. Thus, the Board held that employer was not liable for a Section 14(e) assessment. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 47 (2004).

(3) Excuse

Employer may escape liability for the Section 14(e) assessment where it does not pay within 14 days after it becomes due or file a notice of controversion if "such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment."

In order for the deputy commissioner/district director to excuse non-payment, it must be due to factors beyond the employer's control. In *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (en banc) (Brown, J., concurring), *aff'd in pert. part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990), the Board and court rejected a blanket excuse granted by the deputy commissioner to employer. In May 1987, the deputy commissioner had sent employer a letter stating that the large volume of hearing loss claims filed against Ingalls Shipbuilding was without precedent and as a result, "effective immediately, Ingalls is excused from filing notices, responses, controversions, and making payments in regard to hearing loss claims which have been filed, or will be filed, until 28 days following service on Ingalls of a claim from this office." The Board held that this "excuse" was invalid because it did not conform to the standard for granting an excuse under Section 14(e), which is whether circumstances beyond *employer's* control prevent timely payment or filing, whereas the excuse here was based on the administrative difficulties at the *deputy commissioner's* office. There was no evidence that employer was unable to process the large number of cases. The Board further rejected any suggestion that any difficulties experienced by the deputy commissioner's office in serving claims prevented employer from either timely controverting the claim or making timely installments of payments, since the time for filing a controversion does not commence with the filing of the claim but rather notice or knowledge of the injury. The Board also rejected the argument that employer detrimentally relied on the excuse; since claimant notified employer of his hearing loss on December 9, 1986, employer's duty to pay or controvert the claim began months before the excuse was granted in May 1987. Affirming the Board, the Fifth Circuit agreed that delays in the deputy commissioner's office did not interfere with employer's ability to file a controversion or make payments because these actions are not triggered by proceedings in that office and that employer's

claim of detrimental reliance was without merit. *Accord Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992).

Period of Assessment

In a series of cases, the Board initially held that, if employer failed to file a timely notice of controversion, its liability under Section 14(e) applied to all compensation which was eventually found due regardless of whether a late notice was filed. *See, e.g., Buella v. Toledo Lakefront Dock Co.*, 3 BRBS 362 (1976). Thus, the Section 14(e) amount was added to all future payments.

Following this approach, the Board rejected employer's argument that it should not be liable for the payment of a Section 14(e) assessment and interest for any period after 20 days following the close of the hearing where the administrative law judge failed to issue a Decision and Order within 20 days after the close of the hearing as required by the regulation, 20 C.F.R. §702.348. The Fourth Circuit affirmed the Board's decision, stating that employer failed to timely controvert the claim and administrative delay may not adversely affect the statutory rights of a claimant. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979), *aff'g in pert. part Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978). Under current law, this holding has little effect, as liability would terminate prior to a hearing. *See, e.g., Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992).

A majority of the Board overruled the holding that Section 14(e) liability continues in definitely in *Oho v. Castle & Cooke Terminals, Ltd*., 9 BRBS 989 (1979) (Miller, dissenting), concluding that employer's liability under Section 14(e) ceases once a notice of controversion is filed.

In *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979), the Ninth Circuit interpreted the Board's decision in *Oho* to mean that employer's liability ceased once a proper notice was filed or "the Department knew of the facts a proper notice would have revealed." In *Nat'l Steel & Shipbuilding Co. v. U.S. Dep't of Labor, OWCP [Holston]*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979), *aff'g in part & rev'g in part Holston v. Nat'l Steel & Shipbuilding Co*., 5 BRBS 794 (1977), the Ninth Circuit, again citing *Oho*, concluded that "for purposes of the test established in *Bonner*, the date 'the Department knew of the facts a proper notice would have revealed' is the date of the informal conference." *See also Spencer v. Baker Agric. Co.*, 16 BRBS 205 (1984).
In *Daniele v. Bromfield Corp.*, 11 BRBS 801 (1980) (Miller, concurring and dissenting), the Board majority agreed with the Ninth Circuit's interpretation of *Oho* and followed the rule set forth in *Holston*. Accordingly, the Board subsequently held that employer's liability under Section 14(e) ceased on the date a notice of controversion was filed or the date of the informal conference, whichever came first. *Harris v. Lambert's Point Docks,*

Inc., 15 BRBS 33 (1982), *aff'd*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Anderson v. Todd Shipyards*, 13 BRBS 593 (1981); *Reynolds v. Marine Stevedoring Corp.*, 12 BRBS 281 (1980), *aff'd*, 644 F.2d 881 (4th Cir. 1981) (table).

In *Rose v. George A. Fuller Co.*, 15 BRBS 195 (1982) (Ramsey, concurring), where the administrative law judge assessed Section 14(e) additional compensation against all benefits to which claimant was entitled, the Board remanded for the administrative law judge to redetermine the proper period of assessment. On remand, the administrative law judge was instructed to consider all evidence which was relevant to the issue, including any evidence employer wished to present.

The proper period of assessment thus continues until the date of the filing of a notice of controversion, the date of the informal conference, *see generally Ivory v. John W. McGrath Corp.*, 13 BRBS 78 (1981)**;** *DeNoble v. Mar. Transp. Mgmt. Inc.*, 12 BRBS 29 (1980); *Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1980), or the date the Department of Labor received notice of the facts a proper notice of controversion would have revealed. *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75 (1985); *Spencer*, 16 BRBS at 209.

In *DeRobertis v. Oceanic Container Service Inc.*, 14 BRBS 284 (1981), claimant was injured and sustained a period of temporary total disability. Employer did not pay benefits under the Act voluntarily or file a notice of controversion, and thus the Board affirmed the assessment on the difference between the benefits paid under a state act and those due under the Act for this period. Claimant then returned to work, and there was no controversy at that time over the permanent partial disability due. The Board held that liability for an additional assessment could not commence until a controversy arose, *i.e.*, after employer had knowledge of the permanency and/or extent of impairment. As the administrative law judge awarded a Section 14(e) assessment on the entire scheduled award, the Board vacated this decision and remanded the case for findings as to the date a controversy arose and whether employer timely filed a notice of controversion. The Board also stated that if controversion was not timely filed, employer's liability would cease as of the date of filing or informal conference, whichever came first.

Once a controversy arises and claimant asserts entitlement to additional compensation, if employer fails to timely pay or controvert, the assessment attaches to the total amount claimed, *i.e.*, all past due amounts plus future amounts accruing until the date a notice is filed or conference occurs. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

The Board noted that under Section 14(b) the first payment of compensation is due within 14 days after employer has knowledge of the injury; and the notice of controversion is also due at this time under Section 14(d). Under Section 14(e), if the notice of controversion is not timely filed, employer's liability for the additional assessment attaches when

compensation is not paid within 14 days after it becomes due. Therefore, where employer fails to file a timely notice of controversion, it has 28 days from the date of knowledge within which to pay compensation without incurring liability under Section 14(e). *DeRobertis*, 14 BRBS at 289, n.7; *Frisco*, 14 BRBS at 801, n.3.

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A Section 14(e) assessment is properly imposed on only those compensation installments which were due prior to the employer's filing of a notice of controversion. Interest is imposed on only overdue compensation payable to claimant, rather than on an amount including both overdue compensation and a Section 14(e) assessment. The Board reasoned that the purpose of awarding interest would not be furthered by imposing interest on Section 14(e) assessments and distinguished *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1978), in which the Board allowed interest on unpaid Section 14(f) amounts. *Cox v. Army Times Publ'g Co.*, 19 BRBS 195 (1987).

In accordance with circuit case precedent addressing Section 14(e) and Section 14(f) and Board law addressing Section 14(f), the Board held there is no basis for treating Section 14(e) payments differently from Section 14(f) payments because they contain substantially similar language and their purposes are similar. Acknowledging that those payments have punitive characteristics, but distinguishing them from penalties because they are linked to a claimant's benefits and paid to the claimant, the Board held that payments under Section 14(e) are "additional compensation." Interest is awardable on past-due compensation; therefore, the Board held that claimant is entitled to post-judgment interest on past-due Section 14(e) payments. Accordingly, the Board overruled its decision to the contrary in *Cox v. Army Times Publ'g Co.*, 19 BRBS 195 (1987). *Robirds v. ICTSI Oregon, Inc.*, 52 BRBS 79 (2019) (en banc) (Boggs, J., concurring), *vacated*, 839 F. App'x 201 (9th Cir. 2021).

Claimant is entitled to a Section 14(e) assessment on all unpaid or untimely paid benefits until the time that a notice of controversion is filed. The Board held that employer's notice of suspension was equivalent to a notice of controversion. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

A Section 14(e) assessment terminates on the date of employer's filing of the notice of controversion. *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

Under Section 14(e), where claimant was awarded back benefits for an occupational disease which caused impairment before it became manifest and where employer failed to either pay compensation within 14 days of notice of the injury or timely controvert the claim, the Board held that claimant was entitled to a 10 percent assessment on the entire award of back benefits. *Kocienda v. Gen. Dynamics Corp.*, 21 BRBS 320 (1988).

Employer is liable for a Section 14(e) penalty on all compensation due and unpaid from the date of injury until the informal conference is held. The Board rejected employer's argument that the penalty should only apply to unpaid compensation that accrued after claimant notified employer that she contested employer's average weekly wage computation as of the date of injury. As of the date claimant notified employer, August 13, 1986, a dispute existed between the parties and employer then had 28 days to pay all of the additional compensation claimed or 14 days in which to controvert the claim, neither of which employer did. As employer did not pay the additional compensation demanded when it became due on August 13, 1986, and did not controvert the claim, the assessment applied to all additional compensation eventually found due from the time of injury until the date of the informal conference. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

On reconsideration, the Board affirmed its holding that employer was liable for a Section 14(e) penalty on all benefits due and unpaid from the date of injury, rather than the date claimant notified employer that she disputed its calculation of her average weekly wage. Although the dispute did not arise until over 2 years after the date of injury, the amount claimant initially contested extended back to the date of injury. The Board rejected employer's argument that *Bonner*, 600 F.2d 1228, supported its contention, finding *Bonner* distinguishable because the controversy in that case arose when the employer reduced its voluntary compensation payments from total to partial. The Ninth Circuit held that the Section 14(e) penalty applied only to the amount due as of the date the controversy arose. While claimant also obtained an average weekly wage adjustment going back to the date of injury, that issue was not raised in *Bonner* until the formal hearing. Thus, there was no controversy regarding average weekly wage until that time. In contrast, in *Browder* the controversy arose when claimant notified employer that she disputed the compensation rate employer used in paying benefits from the date of injury. Once claimant informed employer of the controversy, employer had 28 days to either pay claimant the disputed additional compensation, commencing as of the date of her injury, or to file a notice of controversion to avoid the imposition of a Section 14(e) penalty. *Browder v. Dillingham Ship Repair*, 25 BRBS 88, *aff'g on recon.* 24 BRBS 216 (1991).

Where employer fails to file a notice of controversion, employer's liability under Section 14(e) terminates when DOL knows of the facts that a proper notice of controversion would have revealed. In this case, where no informal conference took place, the Board found that DOL had the requisite knowledge when the case was referred to the OALJ for a formal hearing. Although claimant had filed his LS-18 pre-hearing form prior to the referral date, the Board stated that it was employer's burden to bring any dispute to the attention of DOL. Although employer did not file its pre-hearing statement until subsequent to the referral date, the Board held that this was immaterial because DOL's action in referring the case for a formal hearing indicated that the Department had knowledge that the claim was being disputed at that time. *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992).

If employer does not timely pay benefits or controvert the claim after receipt of claimant's notice of injury, a Section 14(e) penalty applies to all benefits "due and unpaid" including benefits that accrued in the period between the time of injury and the date employer received notice. In this Section 8(c)(13) case, benefits were due from the date of injury, which in this case was the date of the first audiogram, and as the entire award ran out before employer paid or controverted, the Section 14(e) penalty applied to the entire award. *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993).

The Ninth Circuit vacated the administrative law judge's denial of a Section 14(e) penalty and remanded the case for him to determine the date on which the notice of controversion requirement was triggered as the administrative law judge failed to identify a specific date. The court concluded that the assessment period ended on December 31, 1990, when it sent a letter which the administrative law judge found satisfied the purpose of the controversion requirement. *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998).

Section 14(f)

In General

Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due. Specifically, it states,

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order standing payments has been issued by the Board or court.

33 U.S.C. §914(f). *Hines v. Gen. Dynamics Corp.*, 1 BRBS 3 (1974). The application of the Section 14(f) assessment is mandatory where employer has failed to timely pay, *Lawson v. Atl. & Gulf Stevedores*, 9 BRBS 855 (1979), and thus it may not be waived by equitable considerations. *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 36 BRBS 63(CRT) (9th Cir. 2002); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985).

In *Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT), the court also addressed employer's argument that payment was timely based on the date the check was available and its belief that claimant would pick up the check at its office. The court rejected this argument, holding that additional compensation under Section 14(f) cannot be waived by an implied agreement. The court relied on Section 15 of the Act, which precludes waiver of compensation, and stated that implying an agreement from a previous course of dealings would be tantamount to holding that a claimant can waive the penalty by his prior actions; the court declined to so hold. Moreover, an express agreement with a third party, even the claimant's spouse, is insufficient, as under Section 14(a), compensation must be paid directly to claimant and it is thus not unreasonable to require the employer or its insurer to deal *directly* with the claimant. *Compare D.G. [Graham] v. Cascade Gen., Inc.*, 42 BRBS 77 (2008) (Board held claimant could agree in a Section 8(i) settlement to waive Section 14(f) if he failed to provide a valid street address. Note that Section 8(i) is the sole exception to Section 15).

The Section 14(f) assessment applies not only to decisions awarding benefits, *see McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1978), but also to settlement agreements which have been approved. *Patterson v. Tidelands Marine Service*, 15 BRBS 65 (1981), *rev'd on other grounds*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983); *Seward v. Marine Maint. of Texas, Inc.*, 13 BRBS 500 (1981). *See Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT). A settlement agreement which discharges employer from any future liability does not relieve employer of liability for an additional assessment under Section 14(f) if it

fails to pay the settlement amount on time nor does claimant's executed "satisfaction of award" bar the Section 14(f) assessment. *Patterson*, 15 BRBS 65. Thus, as with any other award, employer has 10 days from the date the order approving settlement is filed by the deputy commissioner/district director to pay benefits.

As with Section 14(e), the 20 percent amount has been referred to as a "penalty." In *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007), the Ninth Circuit discussed this occasional reference, holding it was not significant and that the amount is "compensation" such that counsel may be awarded an attorney's fee for work obtaining it. The court stated its agreement with the Fourth Circuit's similar conclusion in *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004), which was based on the construction of the statutory language. *Cf. Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998) (Section 14(f) payments are properly characterized as "penalties" and are thus distinct from compensation; attorney's fee award thus denied).

As equitable considerations are not applicable, the courts have stated that the relevant factors for imposition of the Section 14(f) assessment are (1) date payment was due; (2) whether 10 days elapsed; and (3) calculation of the 20 percent assessment. *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983), *rev'g* 15 BRBS 65 (1981).

Payment is made when it is received by the claimant, not when it is mailed. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *Seward v. Marine Maint. of Texas, Inc.*, 13 BRBS 500 (1981); *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1978). Employer is liable for a Section 14(f) assessment even if it sent a payment timely but to an incorrect address, even if the address was supplied by claimant. *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989). *See Durham v. Embassy Dairy*, 19 BRBS 105 (1986) (carrier's copy of decision sent to incorrect address).

Where the payment of compensation under an award is made by check, the relation back doctrine applies. If the check is honored and paid by the payee bank, the time of payment for the purposes of Section 14(f) relates back to the time the check was delivered to the obligee. *Seward*, 13 BRBS 500; *McKamie*, 7 BRBS 315.

A Section 14(f) assessment must be predicated on a valid underlying award. Thus, where the underlying award of benefits is vacated, the Board has held that employer is not liable under Section 14(f) on those amounts. *See Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009); *M.R. [Rusich] v. Elec. Boat Co.*, 43 BRBS 35 (2009); *Jennings v. Sea-Land Service, Inc.*, 23 BRBS 12 (1989), *vacated on recon.*, 23 BRBS 312 (1990) (award reinstated on reconsideration); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

The Special Fund may be held liable for the Section 14(f) assessment. *Lawson*, 9 BRBS at 859. The Board, however, has held that under certain circumstances it would be unjust to order the Special Fund to pay the assessment. In *Davenport v. Apex Decorating Co., Inc*., 13 BRBS 1029 (1981), the original Decision and Order ordered employer to pay compensation, and the Director had no knowledge of the Special Fund's obligation to pay until the administrative law judge issued an order granting employer's petition for reconsideration. Accordingly, the Board reversed the Section 14(f) assessment against the Special Fund in the interests of equity and justice.

Based on the holdings that the Section 14(f) assessment is "compensation," the Ninth and Fourth Circuits have held that employer may therefore be liable for an attorney's fee award under Section 28 for claimant's counsel's work in obtaining the additional amount. *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT). In *Burgo*, 122 F.3d 140, 31 BRBS 97(CRT), the Second Circuit characterized a Section 14(f) payment as a penalty and held that employer could not be held liable for work in obtaining this amount.

The Board has held that attorney's fee awards are not compensation and thus are not subject to a Section 14(f) assessment or enforceable under Section 18, which applies to default in the payment of compensation due. *Wells v. Int'l Great Lakes Shipping Co.*, 14 BRBS 868 (1982). Thus, attorney's fee awards are not enforceable during the pendency of an appeal but may only be enforced under Section 21(d) after all appeals are exhausted. *Id. See also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982).

In *McKamie*, 7 BRBS 315, the Board allowed interest on unpaid Section 14(f) amounts.

Digests

The Board held that the deputy commissioner acted irrationally in assessing a Section 14(f) amount against Hanover Insurance Company for failure to pay the administrative law judge's award within 10 days since Hanover was not even a party before the administrative law judge and was not found liable until the deputy commissioner's subsequent Order. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board addressed claimant's argument that he was entitled to a Section 14(f) assessment where the deputy commissioner refused to enter a default order. Section 14(f) requires payment within 10 days of the filing of a decision unless a stay of payment has been issued, *see* 20 C.F.R. §702.350, or the order making the award of compensation is non-final. In this case, the deputy commissioner erred in finding that the mailing of carrier's copy of an administrative law judge's Decision and Order to an incorrect address absolved employer from a Section 14(f) assessment. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

In a case of first impression, the Board held that claimant is not entitled to a Section 14(f) assessment on medical benefits that were not timely paid, reasoning that such benefits are not "compensation" as the insurer normally pays the cost directly to the provider. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

The Board distinguished *Caudill* and held pursuant to *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992) (holding Section 18 enforcement available for medical benefits paid by claimant), that if, on remand, the district director found that employer untimely reimbursed claimant for a medical bill he had paid, employer was liable under Section 14(f) for a twenty percent assessment. This holding was limited to medical expenses paid by claimant which employer must reimburse. In *Caudill*, 22 BRBS 10, where the Board held that Section 14(f) was not applicable to the medical benefits, there was no indication that the medical benefits were payable to the claimant. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

The Board held that interest is "compensation" for purposes of a Section 14(f) assessment, reasoning that including it would ensure that all benefits intended to make claimant "whole" would be promptly paid by employer. Thus, if employer does not pay claimant interest under the terms of an award within 10 days after it becomes due, employer is liable for a Section 14(f) assessment on this amount. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting), *aff'd and modified on other grounds on recon. en banc*, 28 BRBS 271 (1994), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

In affirming the Board's assessment of a 20 percent penalty upon employer's late payment of interest, the Ninth Circuit adopted the Director's view that interest is a component of compensation necessary in order to make claimants whole. *Sproull v. Director, OWCP*, 86 F.3d 895, 900, 30 BRBS 49, 52(CRT) (9th Cir. 1996).

Prior to the issuance of the Ninth Circuit's opinion affirming *Sproull*, 25 BRBS 100, the Board overruled its decision in that case and adopted Judge Brown's dissent, holding that as interest is not "compensation" provided under the Act, employer's failure to timely pay it cannot serve as a basis for imposing liability under Section 14(f). The Board stated that the holding that interest is not "compensation" is consistent with the plain language of Section 2(12), and with other cases construing the term in different sections of the statute, *e.g.*, *Castronova*, 20 BRBS 139 (interest is not compensation under Section 14(j)); *Caudill*, 22 BRBS 10 (medical benefits are not compensation under Section 14(f)). *Nelson v. Stevedoring Services of Am.*, 29 BRBS 99 (1995) (en banc). *But see Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997) (affirming Board's *Sproull* decision on this point).

The Board reversed the district director's award of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), as *Holliday* was overruled by the Fifth Circuit in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc) and as the D.C. Circuit, in whose jurisdiction this case arose, stated in *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986), that it would accept *Holliday* until it was overruled by the Fifth Circuit. Consequently, the Board disavowed the holding in *Holliday* and *Brandt* in Section 10(f) cases in the D.C. Circuit and followed *Phillips*, and it held that the Section 14(f) assessment was not due on these amounts. *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998). *But see Snowden v. Director, OWCP*, 253 F.3d 725, 35 BRBS 81(CRT) (D.C. Cir. 2001), *cert. denied*, 535 U.S. 1090 (2002) (*infra*, holding that the Board lacked jurisdiction to address the Section 10(f) issue).

The administrative law judge's award approving a settlement was served on claimant at an incorrect address and employer mailed the check to this erroneous address, causing claimant to receive his compensation after the 10-day period under Section 14(f) expired. In enforcement proceedings, the district court held that the claimant is "paid" when the check is received, not when it is mailed. Noting the harsh result, the district court ruled that Section 14(f) contains no equitable exceptions for late payment, and because more than 10 days had elapsed between the compensation order and the payment to claimant, the Section 14(f) assessment automatically attached. The court further ruled that the district director did not fail to follow the procedural requirements of Section 18(a). *Zea v. W. State, Inc.*, 61 F. Supp. 2d 1144 (D.Ore. 1999).

The Eleventh Circuit addressed the scope of the district court's authority to review supplemental orders, disagreeing with its construing its authority to review the supplemental order merely to ensure that it complied with the requirements of Section 18(a). The Eleventh Circuit stated that while the court lacked authority to consider the validity of the underlying compensation order, in this case employer's challenge to the supplemental order went to its imposition, and Section 18(a) gives the district court a general grant of authority to determine whether that order is lawful. Thus, the court addressed and rejected employer's arguments regarding calculation of the 10-day period and remanded the case to the district court for further action regarding its constitutional arguments. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998).

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 amount 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) provides that the district court's inquiry is solely whether the supplemental order of default is in accordance with law. The court of appeals reversed the district court's decision which equitably estopped claimant from receiving the Section 14(f) assessment awarded by the district director 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).

In a case where employer paid the 20 percent penalty, such that the Board had jurisdiction over the appeal, the Board held that the parties may negotiate claimant's entitlement to or waiver of a Section 14(f) assessment in a Section 8(i) settlement, as the assessment is additional compensation and claimants may waive their rights to compensation only through a Section 8(i) settlement. In this case, claimant and employer entered into a Section 8(i) settlement which provided for claimant's waiver of the Section 14(f) assessment in the event he did not provide a "valid street address for purposes of delivery of the settlement proceeds." Claimant supplied his correct street address but the USPS refused delivery because claimant did not have a mailbox at that address. Consequently, delivery of the proceeds was late. Because the district director did not address employer's argument that claimant violated the settlement clause, the Board vacated the Section 14(f) assessment and remanded the case to the OALJ for fact-finding. *D.G. [Graham] v. Cascade Gen., Inc.*, 42 BRBS 77 (2008).

The Fifth Circuit affirmed a Section 14(f) assessment where LIGA did not pay claimant benefits under the approved settlement agreement until more than 10 days after the compensation order was filed and a supplemental default order awarding the assessment was enforced by the district court. The court held that the "filing" of a compensation order under Section 21(a) occurs, and thus the 10-day period for payment commences, once the district director formally dates the order and files it in his office. The court held that neither mailing the order nor the parties' receipt of the order is part of the "filing" process. The Fifth Circuit declined to address LIGA's contention that it is exempt from a Section 14(f) penalty by state law, as LIGA failed to preserve the issue for appeal by raising it before the district court during claimant's enforcement proceedings. Nonetheless, the court suggested that LIGA's argument would be rejected, noting that the Ninth Circuit in *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT), stated that a Section 14(f) assessment is not a penalty, but is part of a claimant's "compensation." Moreover, the court noted that although the contention was not pursued on appeal, LIGA's "covered claim" contention likely would fail as it did before the district court. *Carillo v. Louisiana Ins. Guar. Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009)

A Section 14(f) assessment must be predicated on a valid underlying award. In its prior decision, the Board reversed the administrative law judge's finding that employer was liable for a Section 14(e) assessment. Thus, the Board held that employer is not liable for

additional compensation under Section 14(f) for untimely paying the Section 14(e) assessment. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

Procedure and Board Jurisdiction

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 and the payment of the amounts required by it 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). Thus, unless a stay is granted, in order to avoid the 20 percent assessment under Section 14(f), employer 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.

A Section 14(f) assessment is imposed where employer fails to pay and thus defaults in the payment of benefits due under an award. Section 18(a) of the Act provides that where employer defaults in the payment of compensation due under an award for more than 30 days, claimant may within one year seek an order declaring the amount of the default from the deputy commissioner/district director, and such an order may then be enforced in the appropriate U.S. District Court. Thus, once claimant asserts default, the deputy commissioner/district director must investigate the request. If he finds that employer is in default, a supplemental order declaring the amount of the default is entered. Where employer fails to pay the benefits awarded within 10 days of the filing of the Order, the amount in default includes the 20 percent assessment.

Consistent with Section 18(a), a request for a default order and Section 14(f) assessment must be directed to the deputy commissioner/district director. *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986). *See Miller v. Cen. Dispatch, Inc.*, 16 BRBS 63 (1984) (Board held request for Section 14(f) assessment was inappropriately raised for the first time on appeal); *Lobue v. Army & Air Force Exch. Serv.*, 15 BRBS 407 (1983); *Simpson v. Seatrain Terminal of California*, 15 BRBS 187 (1982) (claimant's request for a Section 14(f) assessment on unpaid Section 10(f) adjustments remanded to deputy commissioner); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981) (Board would not consider claimant's contentions that checks were for an improper amount and paid late as claimant must pursue that with the deputy commissioner).

The Board initially held that supplemental orders declaring default and assessing a Section 14(f) amount were subject to review by the administrative law judge and/or Board. Thus, if a factual dispute arose, the Board held that the case should be referred to the

administrative law judge for findings, after which the case could be remanded for entry of an order. *See Patterson*, 15 BRBS at 85; 20 C.F.R. §702.372. If, however, only legal issues regarding the application and interpretation of the Act were raised, the Board held that a direct appeal from the deputy commissioner to the Board was appropriate. *Id.*; *Lawson*, 9 BRBS at 855.

However, the Board's holding with regard to review of Supplemental Orders was reversed by the Fifth Circuit. *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983), *rev'g* 15 BRBS 65 (1981). While the same initial procedures described by the Board involving a request for a default order and Section 14(f) assessment from the district director followed by an investigation and entry of an order, if appropriate, apply, the court held that review of the order was governed by the enforcement procedures of Section 18(a). Consistent with that section, the court held that the Board lacks jurisdiction to review such orders, as orders declaring default are subject to review by a district court in enforcement proceedings. *Accord Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Schmit v. ITT Fed. Elec. Int'l*, 986 F.2d 1103, 26 BRBS 166(CRT) (7th Cir. 1993); *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135(CRT) (9th Cir. 1985); *Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT). *See* Section 18 of the desk book.

In *Patterson*, the Fifth Circuit stated that under Section 18(a), a deputy commissioner's supplemental default order is "final" when issued and review of the order is available only in an enforcement proceeding in the district court, with review of the court's ruling on enforcement available as in any other civil suit. The court reasoned that the "section provides a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards, a theme central to the spirit, intent, and purposes of the LHWCA." *Patterson*, 719 F.2d at 129, 16 BRBS at 12(CRT). With regard to Section 14(f), the court noted that it is "self-executing," as "the 20 percent additional compensation automatically becomes due immediately upon the expiration of the ten-day period following the filing of the compensation order with the deputy commissioner." *Id.* at n.2.

Agreeing with this holding in *Providence Washington*, the Ninth Circuit affirmed a Board decision dismissing an appeal pursuant to *Patterson*. The court rejected the argument that supplemental orders declaring default are reviewable under Section 21 and thus, only after Board review may the claimant take a supplementary order to the district court for enforcement under Section 21(d). The court agreed that such orders are properly treated as orders entered under Section 18 with review available in district court. The court found it immaterial that the Section 14(f) assessment was contained in the supplemental order declaring default, agreeing with the Fifth Circuit that the assessment is self-executing and does not require an exercise of discretion by the deputy commissioner. *Providence Washington*, 765 F.2d 1381, 17 BRBS 135(CRT).

In enforcement proceedings, the district court's role is to determine whether the supplemental order is in accordance with law; the Act states that when such an order is filed with the court, the court shall "enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with the law." 33 U.S.C. §918(a). The 20 percent assessment is mandatory where the employer fails to pay within the 10-day period, and the district court may not excuse this failure based on equitable considerations. *Hanson*, 307 F.3d 1139, 36 BRBS 63(CRT) (reversing finding claimant was estopped from pursuing Section 14(f) amount due to his providing an incorrect address). In *Pleasant-El*, 148 F.3d 1300, 32 BRBS 141(CRT), the Eleventh Circuit stated that the district court construed this as a narrow grant of authority to review the supplemental order merely to ensure that it complied with the requirements of Section 18(a). The court rejected this approach, stating that while the court lacks authority to consider the validity of the underlying compensation order, *citing Schmit*, 986 F.2d 1103, 26 BRBS 166(CRT); *Abbott v. Louisiana Ins. Guar. Ass'n*, 889 F.2d 626, 23 BRBS 3(CRT) (5th Cir. 1989), in this case employer's challenge to the supplemental order went to its imposition and enforcement and Section 18(a) gives the district court a general grant of authority to determine whether that order is lawful. Thus, the court addressed and rejected employer's arguments regarding calculation of the 10-day period and remanded the case to the district court for further action on its constitutional arguments. *See Schmit*, 986 F.2d 1103, 26 BRBS 166(CRT) (rejecting constitutional challenge to Section 18 proceedings). Accordingly, where the Board lacks jurisdiction to consider employer's arguments challenging a supplemental order and imposition of a Section 14(f) amount, employer can raise those defenses which go to whether the order complies with law in district court. *See Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000) (Board noted that equitable defenses previously rejected by court).

In some circumstances, the Board retains jurisdiction over Section 14(f) determinations. Where no default order is outstanding, the enforcement proceedings of Section 18 cannot apply. *See Sea-Land Service, 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); *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.

Moreover, where an award does not specify the amount of compensation due, it may not be final and enforceable. *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). In *Hanson*, 34 BRBS 136, the Board rejected the argument that the holding in *Providence Washington* regarding the lack of jurisdiction under Section 21 to review a supplemental order conflicts with Section 702.372 of the regulations, which 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. 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); *Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981); *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. 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.

The amount due under Section 14(f) cannot be assessed until the correct amount of compensation due is determined. *See Lawson v. Atl. & Gulf Grain Stevedores Co.*, 12 BRBS 767 (1980) (in separate decision, Board had remanded for findings regarding claimant's compensation). Thus, the 10-day period may not begin to run where calculations are necessary until they have been made, *Keen*, 35 F.3d 226, 28 BRBS 110(CRT), or where further proceedings are required because a decision does not permit the calculation of compensation due without additional findings. *See Stetzer*, 547 F.3d 459, 42 BRBS 55(CRT); *Severin*, 910 F.2d 286, 24 BRBS 21(CRT)

Where Section 18 does not apply for one of the reasons above, the procedures initially set out by the Board in *Patterson*, 15 BRBS at 85, apply. If a dispute as to the facts arises, the matter must be referred to the Office of Administrative Law Judges. *See* 20 C.F.R. §702.372. If, however, only legal issues regarding the application and interpretation of the Act are raised, a direct appeal may be filed with the Board. *Id.*; *Lawson*, 9 BRBS at 855.

Once an award of compensation has been entered, employer remains obligated to comply with the terms of the award until a further order directs otherwise or until the claim is formally closed. *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979). In *Shoemaker*, employer paid compensation for total disability under an award but suspended payments on the recommendation of a claims examiner following an informal conference in modification proceedings under Section 22. The administrative law judge held that claimant was no longer totally disabled but awarded permanent partial disability benefits and additional compensation under Section 14(f). The Board affirmed both awards,

rejecting employer's reliance on the claims examiner's recommendation. The Board stated that where an employer pays compensation under the terms of an award, but suspends payments pursuant to Section 22 prior to the issuance of a new compensation order, it does so at the risk of incurring liability for an additional assessment under Section 14(f). *See also Jameson v. Marine Terminals*, 10 BRBS 194 (1979) (vacating Section 14(f) assessment and remanding where record was unclear as to whether employer terminated compensation due under award).

Thus, where an award has been entered, and employer thereafter unilaterally terminates the compensation awarded without obtaining a new order under Section 22, it will be liable for a Section 14(f) assessment if claimant successfully defends against modification. Moreover, claimant is entitled to seek enforcement under Section 18 despite the pendency of appeals or modification proceedings. Whether employer is liable for a Section 14(f) assessment after a unilateral termination generally turns on whether it successfully obtains modification of the award. In *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988), the Board affirmed the administrative law judge's finding that the claim was barred under Section 33(g) and reversed the award of disability benefits and Section 14(f) assessment on those benefits through the date a new order denying benefits was entered, holding that as the right to benefits terminated on the date of an unapproved third party settlement, no further payments were due. In *Shoemaker* the Board also noted that when employer terminated payments, claimant's remedy was to immediately seek a default order under Section 18(a). However, Section 18(a) allows claimant to request a default order within one year, and claimant waited 15 months to institute proceedings. The Board 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." *Id.*

Where compensation is wrongly terminated, employer is liable for an additional 20 percent payment. *See Honaker v. Mar Com Inc.*, 44 BRBS 5 (2010) (as Section 33(g) did not bar benefits, employer erred in terminating compensation and Section 14(f) assessment due); *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986) (after unilaterally suspending compensation, employer obtained modification from permanent total disability to partial; Board held employer liable for a Section 14(f) assessment but only on the partial disability benefits awarded during the period when employer suspended compensation).

Digests

Procedure in General

Where claimant asserted on appeal that she was entitled to a Section 14(f) assessment due to employer's failure to pay the interest awarded by the administrative law judge, the Board held that it lacked jurisdiction to address this issue as it had not yet been considered by the deputy commissioner. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148

(1989); *Accord Von Lindenberg v. I.T.O. Corp. of Baltimore*, 19 BRBS 233 (1987) (rejecting claimant's argument on appeal that administrative law judge erred in denying 20 percent assessment on the basis that the issue had not yet been resolved by the deputy commissioner).

In an unpublished opinion, the United States Court of Appeals for the D.C. Circuit agreed with the Board that it retains jurisdiction where employer pays all compensation due and thus no amount is in default. The court reversed the Board's decision that the timely filing of a motion for reconsideration of an administrative law judge's decision stays the amount due. A timely motion for reconsideration does not postpone the date on which an award "becomes due" for purposes of a Section 14(f) assessment. For purposes of Section 14(f), an award "becomes due" when it is "effective" within the meaning of Section 21(a) of the Act--*i.e.*, when it is filed in the deputy commissioner's office. *Rucker v. Lawrence Mangum & Sons, Inc.*, 830 F.2d 1188 (D.C. Cir. 1987) (table), *aff'g and rev'g* 18 BRBS 74 (1986).

As employer paid the amount assessed under Section 14(f), the Board denied Director's motion to dismiss and held it retained jurisdiction as the case involved only a question of law regarding the propriety of a Section 14(f) penalty and did not require Section 18 enforcement. The Board, however, rejected employer's argument that it was not liable for the Section 14(f) amount, holding that it would not continue to follow the rationale of *Rucker*, 18 BRBS 74. Thus, a timely motion for reconsideration does not toll the 10-day period for paying benefits under Section 14(f). *McCrady v. Stevedoring Services of Am.*, 23 BRBS 106 (1989).

The Board held it had jurisdiction over this appeal as deputy commissioner denied Section 14(f) compensation. Section 18 does not apply where no default order is issued. *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

The Board held that it had jurisdiction to address claimant's argument that employer was liable for a Section 14(f) assessment where no default order had been issued based on a finding that payment was timely. 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 assessing Section 14(f) penalties, and which do not require enforcement of default orders. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986).

The Board held that it had jurisdiction over the Section 14(f) issue as employer had paid the compensation and the penalty, and thus there was no basis for proceedings under Section 18. Since the Board reversed the award of benefits, it also reversed the award under Section 14(f). *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 12 (1989), *vacated on recon.*, 23 BRBS 312 (1990).

On reconsideration, the Board held that claimant was entitled to the compensation awarded by the administrative law judge. Since employer did not pay benefits within 10 days of the initial decision, and the filing of a timely motion for reconsideration does not toll the 10-day period for payment of compensation, the Board held that claimant was entitled to the Section 14(f) assessment. *Jennings v. Sea-Land Serv., Inc.*, 23 BRBS 312 (1990), *vacating on recon.* 23 BRBS 12 (1989).

The Board noted it would not address a claimant's arguments that the administrative law judge erred in reducing his temporary total disability benefits and that he was entitled to a Section 14(f) assessment as they were raised only in his response brief and not in a cross-appeal. *Castronova v. Gen. Dynamics Corp.*, 20 BRBS 139 (1987).

The Third Circuit rejected the Director's contention that the Board was without jurisdiction to review the imposition of a Section 14(f) penalty where employer had paid the penalty. The Director's logic would require employer to deliberately withhold payment in order to force claimant to seek enforcement in district court under Section 18, which runs counter to the philosophy of the Act. Once the award has been paid, review is unavailable under Section 18, and the propriety of the assessment is properly before the Board under Section 21(c). *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

In an appeal taken from the district director's Supplementary Compensation Order, the majority held that it had jurisdiction to decide the appeal. As employer paid the compensation and Section 14(f) amount due, the Order did not require enforcement under Section 18(a). Moreover, as the challenge to the district director's order involved only a question of law regarding the propriety of the Section 14(f) assessment, the majority held that direct appeal to the Board was appropriate. *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting).

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 involved whether employer was liable for the Section 14(f) assessment where 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 D.C. Circuit held that the Board did not have jurisdiction to address a supplementary compensation order declaring payments in default as it was issued pursuant to Section 18(a). In this case, the OWCP issued a supplementary compensation order finding employer/carrier in violation for failure to make payments of benefits pursuant to the *Brandt/Holliday* holdings regarding Section 10(f), and it awarded claimant a Section 14(f) assessment on the shortfall. The Board had reasoned that as employer raised the issue of whether claimant's benefits were properly subject to cost-of-living adjustments under Section 10(f) pursuant to *Brandt/Holliday*, and because this issue had not been specifically addressed in the prior compensation award, the propriety of the Section 10(f) payments were not the subject of a compensation order and were properly before it for the first time; following *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), the Board held that prospective benefits are not subject to Section 10(f) adjustments. The court vacated the Board's order, holding that employer did not timely challenge the Section 10(f) issue, and that the Board lacked 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 Board stated it had jurisdiction to decide the Section 14(f) issues raised on appeal where claimant was not seeking enforcement of an award, but a determination of the extent of employer's liability under the administrative law judge's prior awards; moreover, claimant stated that employer had paid the Section 14(f) assessment. *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

Computation of Benefits; Finality and Enforceability

The Fifth Circuit held that where the compensation order of the administrative law judge 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 reasoned that an order is not final if it does not "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 underlying order here did not meet that standard, the court held that the district court properly declined to enforce a default order issued pursuant to Section 18(a) requiring employer to pay a Section 14(f) assessment. *Severin v. Exxon Corp.*, 910 F.2d 286, 289, 24 BRBS 21(CRT) (5th Cir. 1990).

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. That 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 Second Circuit adopted the Fifth Circuit's test as articulated in *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), for determining the finality and enforceability of an administrative law judge's order under Section 14(f). The Second Circuit held that an order is not final and enforceable if it does not 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. The court held that the administrative law judge properly determined that the original award was not final and enforceable under Section 14(f) because it did not specify a compensation rate, only that compensation was to be based on wages of a "comparable employee." A dispute remained regarding whether payments made to the comparable employee should have been included in the benefits calculation. Consequently, the prior order was not enforceable and the administrative law judge properly used the broad power under Section 22 to modify the previous award based on her findings regarding the disputed payments to the "comparable employee." *Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008).

The Board rejected claimant's contention that employer was required to pay compensation within 10 days after the administrative law judge issued her decisions. The administrative law judge ordered the district director to calculate the amount of compensation due. Pursuant to *Keen*, 35 F.3d 226, 28 BRBS 110(CRT), the earliest date from which compensation was due pursuant to the administrative law judge's decisions was 10 days

after the district director filed a letter reflecting the calculations necessary for employer to determine the extent of its compensation liability. The Board remanded for the district director to determine whether employer made timely payments of the amounts previously calculated. In her decisions, moreover, the administrative law judge did not specify the amount of employer's credit for past compensation payments, nor did the parties stipulate to the amount of any benefits previously paid. Claimant challenged the district director's calculation of the amount of benefits due, asserting that employer had not adequately proven under Section 14(k) the amount of its back payments. The Board held that, while employer is liable for an assessment on the amount previously calculated by the district director, proceedings before an administrative law judge, pursuant to *Hanson*, 34 BRBS 136, and *Bray*, 664 F.2d 1045, 14 BRBS 341, are necessary to address the factual matters raised with regard to the amount of compensation due. Pursuant to *Severin,*, 910 F.2d 286, 24 BRBS 21(CRT), employer cannot be held in default for any additional compensation found due on remand until this dispute is resolved. *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

Suspension after an Award

The Board outlined the procedures regarding Section 14(f). Here, employer unilaterally suspended payments when claimant voluntarily returned to the work force prior to the issuance of a new compensation Order pursuant to Section 22. In so doing, employer risked incurring liability for an additional assessment under Section 14(f). However, since employer succeeded in getting claimant's initial total disability award reduced to partial, the Board held that it would be incongruous to require employer to pay a penalty on total disability benefits. Rather, employer would be responsible for a Section 14(f) penalty on all partial disability benefits due and not paid. *Richardson v. Gen. Dynamics Corp.*, 19 BRBS 48 (1986).

The Board vacated the Section 14(f) penalty assessed against employer when it unilaterally terminated compensation pursuant to Section 33(g) after claimant entered into a third party settlement without employer's consent. Fifteen months later, claimant wrote to the deputy commissioner and requested the resumption of benefits; this request was denied. The administrative law judge found the claim barred by Section 33(g), but held claimant entitled to the benefits and a Section 14(f) assessment for the period prior to the issuance of a formal order denying benefits. The Board held that under Section 33(g), claimant's rights to benefits terminated on the date of the settlement. It thus vacated the award of permanent partial disability benefits and consequently the award under Section 14(f). The Board stated, however, that if, in a given case, it was determined that Section 33(g) is inapplicable, an employer's unilateral termination of compensation may entitle claimant to an assessment under Section 14(f) if claimant timely seeks a default order under Section 18(a). *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

As the Board vacated the decision that employer erroneously suspended claimant's compensation payments to recoup a credit, the Board also vacated the Section 14(f) assessment imposed by the administrative law judge. The Board further noted that a claim for a Section 14(f) assessment must be made in the first instance to the district director. *M.R. [Rusich] v. Elec. Boat Co.*, 43 BRBS 35 (2009).

Where claimant's third-party claims were dismissed and the Section 33(g) forfeiture provision was inapplicable, the Board rejected employer's assertion that the administrative law judge erred in failing to modify claimant's 2003 award of benefits. The Board held that the administrative law judge correctly found that employer did not file a motion for modification and, in any event, as the forfeiture provision does not apply, there is no basis for modifying the prior decision. Accordingly, as employer's unilaterally termination of claimant's benefits subjected it to a Section 14(f) assessment, the award of the assessment was affirmed. *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010).

The 10-Day Period and FRCP

The 10-day period referred to in Section 14(f) begins to run when an administrative law judge's decision is filed in the office of the deputy commissioner/district director. *Carillo v. Louisiana Ins. Gua. Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009); *Johnson v. Diamond M. Co.*, 14 BRBS 694 (1982); *Seward v. Marine Maint. of Texas, Inc.*, 13 BRBS 500 (1981); *McKamie v. Transworld Drilling Co*., 7 BRBS 315 (1978). In the case of a Board decision, the 10-day period begins to run on the date the Board's decision is filed as part of the record by the Clerk of the Board. *Caldwell v. Oceanic Container Serv., Inc.*, 15 BRBS 456 (1983).

The Board initially held that where a timely motion for reconsideration is filed, the administrative law judge's decision is not final and payment is not due until the administrative law judge acts on the motion. *Rucker*, 18 BRBS at 74. This decision, however, was reversed by the D.C. Circuit in an unpublished opinion. The court stated that a timely motion for reconsideration does not postpone the date on which an award "becomes due" for purposes of assessing a Section 14(f) penalty. For purposes of Section 14(f), an award "becomes due" when it is "effective" within the meaning of Section 21(a) of the Act--*i.e.,* when it is filed in the deputy commissioner's office. *Rucker v. Lawrence Mangum & Sons, Inc.*, 830 F.2d 1188 (D.C. Cir. 1987) (table). The Board subsequently followed this decision and held that a timely motion for reconsideration will not toll the 10-day period for paying benefits under Section 14(f). *McCrady v. Stevedoring Services of Am*., 23 BRBS 106 (1989).

Although Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due, the Board initially held that under Rule 6(e) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 6(e), where the notice of filing of the compensation order is given by mail, employer shall be given three additional days in which to make payment without incurring liability for additional compensation under Section 14(f). *See Patterson*, 15 BRBS 65; *Johnson*, 14 BRBS 694. The Fifth Circuit, however, held that Rule 6(e) of the Federal Rules of Civil Procedure does not apply to Section 14(f) because Rule 6(e) grants three additional days to a party "required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him," whereas Section 14(f) requires action within ten days of filing. *Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT). The Board subsequently followed *Lauzon* and held that Rule 6(e) does not apply. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986). *Accord Sea-Land Services, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

On the other hand, the Fifth Circuit held that Rule 6(a) applies to exclude Saturdays, Sundays and holidays in calculating the 10-day period. *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991). This holding has been rejected by the Board and

the other Courts of Appeals to address the issue. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998); *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998); *Reid v. Universal Mar. Serv. Corp.*, 41 F.3d 200, 28 BRBS 118(CRT) (4th Cir. 1994); *Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995).

NOTE: Rule 6(a) was amended in 2009 to state: "When the period is stated in days or a longer unit of time . . . count every day, including intermediate Saturdays, Sundays, and legal holidays." Thus, if the Fifth Circuit continues to apply the FRCP, the result likely will bring the "counting" method into agreement with the other circuits' decisions.

Digests

The Fifth Circuit held that when determining whether compensation was timely paid, the district court properly excluded intermediate Saturdays and Sundays under FRCP 6(a). The FRCP apply because a Section 14(f) assessment is a supplementary default order within the meaning of Section 18(a). *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991).

The Fourth Circuit disagreed with *Quave* and held that compensation payments must be made within 10 calendar days, not business days, in order to avoid a Section 14(f) penalty. The court held that the FRCP do not govern the computation of the 10-day period as Section 14(f) is not a "proceeding for enforcement or review" under Section 18 or 21. *Reid v. Universal Mar. Serv. Corp.*, 41 F.3d 200, 28 BRBS 118(CRT) (4th Cir. 1994).

The Board adopted the reasoning of the Fourth Circuit in *Reid*, 41 F.3d 200, 28 BRBS 118(CRT), and held that FRCP 6(a) is not applicable to time computations under Section 14(f), since Section 14(f) is a substantive, not a procedural, provision. The Board held that the 10-day requirement contained in Section 14(f) means 10 calendar days, including Saturdays, Sundays and holidays. Thus, the Board reversed the administrative law judge's determination that employer is not liable for a Section 14(f) penalty, as employer's payment of benefits was made 12 days after the issuance of the administrative law judge's order approving the parties' settlement, and therefore, was untimely. *Irwin v. Navy Resale Exch.*, 29 BRBS 77 (1995).

Following its decision in *Irwin*, 29 BRBS 77, the Board rejected employer's contention that Rule 6(a) of the Federal Rules of Civil Procedure applies to Section 14(f), and held that the 10-day time limit under Section 14(f) means 10 calendar days. Thus, the Board affirmed the district director's finding that employer's payment of compensation to claimant on July 8, 1994, 11 days after it became due, was untimely under Section 14(f). *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (en banc) (Brown and McGranery, JJ., concurring and dissenting).

The Second Circuit held that the unambiguous meaning of the 10-day requirement contained in Section 14(f) means 10 calendar days, including Saturdays, Sundays and

holidays. The court further held that Rule 6(a) and Rule 81(a)(6) of the FRCP do not apply, as Rule 81(a)(6) applies to enforcement proceedings under Sections 18 and 21, and the calculation of the payment deadline involves the terms of Section 14(f); this calculation thus cannot be characterized as part of the enforcement proceedings. Thus, the court affirmed the lower court's award of a Section 14(f) penalty where the claimant received payment from employer 13 days after it became due. *Burgo v. Gen. Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT) (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998).

The Eleventh Circuit held that employer is required to pay a compensation award to claimant within 10 calendar days, not 10 business days, to avoid a late penalty under Section 14(f). The court noted that its decision was consistent with decisions of the First and Fourth Circuits and the Board. *Pleasant-El v. Oil Recovery Co., Inc.*, 148 F.3d 1300, 32 BRBS 141(CRT) (11th Cir. 1998).

The Board reversed the administrative law judge's determination that FRCP 6(e) provided employer with an extra three days in which to make compensation payments without incurring Section 14(f) liability. The Fifth Circuit, where this case arose, has held that Rule 6(e) -- which adds three days to the period within which a party must respond to a document, when the document is served on him by mail--is inapplicable to Section 14(f), because Rule 6(e) refers to the date on which a document is *served*, while Section 14(f) refers to the date on which a document is *filed*. The Board accordingly held Rule 6(e) inapplicable to the determination of whether employer was required to pay a Section 14(f) penalty. *Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986).

The Board vacated the deputy commissioner's Compensation Order denying assessment of additional compensation under Section 14(f) and remanded the case for entry of a default order where claimant received his compensation check 15 days after it became due. The Board rejected employer's contentions that the late payment should be excused because employer made a good faith attempt to pay claimant in a timely manner, but mistakenly sent the check to the wrong address, that payment should be considered to have been made on the date the check was placed in the mail instead of the date claimant received it, and that employer should be given three extra days to make payment pursuant to FRCP 6(e). *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989).

Where the administrative law judge's decision awarding benefits was filed by the district director on January 15, 1991, and employer did not issue a check to claimant until January 30, 1991, the Board affirmed the administrative law judge's finding that employer was liable for a Section 14(f) assessment. The Board rejected employer's contention that FRCP 6(e) applies; this rule requires action within 10 days of service and adds three days to the prescribed period when service is accomplished by mail. Section 14(f), however, requires payment of benefits within 10 days of filing. Therefore, in accordance with *Lauzon*, 782 F.2d 1217, 18 BRBS 60(CRT), the Board held that Rule 6(e) does not apply, thereby reaffirming *Matthews*, 22 BRBS 440, and *Lynn*, 20 BRBS 72. The Board noted the

common-law rule that when payment is sent by mail, the date of payment is the day it is received by the payee, and the Board determined that employer's issuance of a check on January 30, 1991, was not timely payment. Even assuming, *arguendo*, that FRCP 6(a) would apply to 14(f) (noting the Director's contention that it does not), the Board held that payment must have been made by January 30, 1991, and there was no evidence that claimant received payment by that date. Therefore, the Board rejected employer's arguments and affirmed the administrative law judge's finding that it is liable under Section 14(f). *Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), *aff'd*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994).

The Third Circuit held that FRCP 6(e) does not apply to Section 14(f) inasmuch as Section 14(f) requires payment within 10 days of "filing," not "service" as contemplated by Rule 6(e). Moreover, the court rejected the contention that compensation is "paid" when the check is mailed rather than when it is received. *Sea-Land Services, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994).

Section 14(g) – (i)

Section 14(g) provides that within 16 days of the final payment of compensation, the employer shall send a notice to the deputy commissioner on a form prescribed by the Secretary fully detailing the compensation payments.

Section 14(h) provides that the deputy commissioner may in cases in which payments are being made without an award, and shall in cases where claimant's right to compensation has been controverted or compensation has been suspended, upon receipt of notice from any party, make such investigations, cause such medical examinations to be made or hold such hearing, and take such further actions as necessary to protect the rights of the parties. In *Employers Liability Assurance Corp. v. Donovan*, 279 F.2d 76 (5th Cir.), *cert. denied*, 364 U.S. 884 (1960), the Fifth Circuit discussed the difference between Section 14(h) and Section 19(c). Section 14(h) applies when no claim has been filed, and it confers discretionary, not mandatory, powers on the deputy commissioner. *See also Atl. & Gulf Stevedores, Inc. v. Donovan*, 279 F.2d 79, *denying reh'g in* 274 F.2d 794 (5th Cir. 1960).

In *Calicutt v. Sheppard Air Force Base Billeting Fund*, 16 BRBS 111 (1984), the Board held that the deputy commissioner did not violate Section 14(h) where he investigated the claim but declined to order the claimant to undergo rehabilitation evaluation. For another case involving Section 14(h), *see Ocean Accident & Guar. Corp. v. Lawson*, 135 F. 2d 865 (5th Cir 1943).

Section 14(i) provides that whenever the deputy commissioner deems it advisable, he may require employer to make a deposit with the U.S. Treasury to ensure the prompt payment of compensation and payments from these funds upon any awards shall by made as ordered by the deputy commissioner.

Commutation of Benefits (Repealed 1984)

Under the Act as amended in 1972, Section 14(j) provided that, if a deputy commissioner determined it was in the interest of justice, the deputy commissioner, with the approval of the Secretary, could approve a lump sum commutation of future compensation payments pursuant to a formula set out in the section. 33 U.S.C. §914(j) (1982) (repealed 1984). This provision was repealed by Section 13(b) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1649.

The amendment repealing Section 14(j) was effective 90 days after enactment and applied to cases pending on that date. *Smith v. Director, OWCP*, 17 BRBS 89 (1985). Accordingly, the Board vacated a deputy commissioner's order commuting claimant's benefits to a lump sum, even though the deputy commissioner's action was valid when ordered, as the case was pending at the Board when the section was repealed. *Id*.; *Thompson v. Todd Pac. Shipyards Corp*., 17 BRBS 246 (1985).

For cases discussing the pre-1984 provision, *see Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981)**;** *Kritsonis v. Seattle Crescent Container*, 17 BRBS 3 (1984); *Ashton v. Director, OWCP*, 11 BRBS 495 (1979).

Credit—Section 14(j)

Section 14(k) of the 1972 Act was changed to Section 14(j) as a result of the 1984 Amendments repeal of the prior 14(j) regarding commutation of benefits.

Section 14(j) allows employer a credit for any advance payments of compensation against any unpaid installments of compensation subsequently found due.

The Act contains other credit provisions in addition to Section 14(j). Section 33(f) allows employer a credit for amounts recovered in a third party suit; this provision is discussed in Section 33 of the desk book. Prior to the 1984 Amendments, Sections 14(j) and 33(f) were the only provisions specifically allowing credits or offsets. Nonetheless, employer was held entitled to a credit for payments made under a state compensation act in order to avoid double recovery. *See, e.g. Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *Ferch v. Todd Shipyards Corp.*, 8 BRBS 316 (1978); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). *Cf. United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977) (no credit as there was no double recovery where employer was wholly liable for claimant's disability and claimant's receipt of benefits from another employer under state act settlement was a "mere fortuity"). The Amendments added Section 3(e), which provides a credit for payments under any other workers' compensation law. That section is discussed in Section 3 of the desk book. In addition, where a claimant awarded benefits for a scheduled disability sustains a second, aggravating injury to the same body part, employer may credit the amount paid for the prior injury against its liability for the second injury. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Cases addressing this "credit doctrine" are discussed in Section 8.

Section 14(j) aims at reimbursing employer for the entire amount of its advance payments where these payments were too generous, for however long this takes, out of unpaid compensation found to be due. *See Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245 (1979). In *Tibbetts*, the Board rejected claimant's argument that since employer overpaid benefits for the 86.4 weeks it paid based on the schedule, employer should only be permitted a credit for this number of weeks against its liability for a Section 8(c)(21) award rather than a credit for the entire amount overpaid.

Thus, under Section 14(j), employer's excess voluntary payments of temporary total disability would be credited against an award of permanent partial compensation. *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710 (1978). In an early case, where employer paid claimant an amount equal to his salary and in excess of that payable for the disability during his temporary total disability, the Second Circuit held that employer was entitled to credit the excess payments against its liability for a subsequent period of permanent partial disability, notwithstanding that the payments were not designated as "advance payments of compensation" or that employer did not know claimant would

sustain a permanent partial disability at the time it made the payments. *McCabe Inspection Serv., Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1957). *See also Universal Mar. Serv. Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000) (holding that benefits may be retroactively terminated pursuant to Section 22 at any point after the date of injury, the court held that employer was entitled to credit an overpayment created by a Section 22 proceeding which terminated benefits for temporary total disability due to back and other injuries at an earlier date than benefits were paid by employer against its liability for a scheduled hearing loss award arising from the same accident).

Similarly, where employer makes voluntary payments of compensation under the schedule and it is later determined that the injury supports an award under Section 8(c)(21), employer is entitled to a credit for its voluntary payments. *Scott v. Transworld Airlines*, 5 BRBS 141 (1976). Employer's credit is based on the total dollar amount paid, not the number of weeks paid. *Hubert v. Bath Iron Works Corp.*, 11 BRBS 143 (1979) (note that this rule is also consistent with the result under the "credit doctrine," discussed in Section 8 of the desk book).

The Board has held that Section 14(j) contemplates a credit for prior compensation payments made by the same employer. *Melson v. United Brands Co*., 6 BRBS 503 (1977), *aff'd*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979). In *Wade v. Gulf Stevedore Corp.*, 12 BRBS 475 (1980), claimant sustained a 1975 injury while working for Dixie Stevedores and a 1976 injury while working for Gulf Stevedore Corporation. The same carrier insured both employers. On the claim against Dixie, the administrative law judge awarded claimant compensation but in a lesser amount than the voluntary payments made by Dixie. In the second claim, the administrative law judge awarded claimant compensation against Gulf but deducted the amount Dixie overpaid on the original claim from the amount due from Gulf on the second claim, even though Dixie was not a party to the second claim. The Board held that the administrative law judge erred in giving Gulf a credit for Dixie's overpayment. The Board rejected Gulf's argument that it did not matter that different employers were involved because the overpayment really was being credited to the carrier, who insured both employers. The carrier puts itself in the place of employer and its rights are derivative of employer's. Because Gulf had no right to offset its liability by an overpayment made by Dixie, its carrier had no right to an offset.

In *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984), claimant was injured in 1974 and was due $4,283.30 for a scheduled permanent partial disability. Employer sent claimant a check, and when claimant averred he never received it, employer sent a second check, cancelling the first one. However, claimant had already cashed both checks, resulting in a double payment of benefits by employer. Claimant was subsequently injured in 1980, at which time employer took a credit for the overpayment on the 1974 injury against compensation due for the 1980 injury. The administrative law judge approved the credit. The Board held that the issue was moot, as the credit had already been

taken by employer and the parties had agreed that claimant was not entitled to the erroneous payment. The Board thus declined to disturb the administrative law judge's ruling.

The Board in *Klubnikin,* therefore, did not address the construction of Section 14(j) and whether it allows a credit for an overpayment for one injury against a second unrelated injury. The Board addressed this issue in *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), holding that employer is not entitled to reduce its liability for compensation due for a subsequent work-related injury by crediting an overpayment of compensation made for a prior, unrelated work injury.

Thus, employer is entitled to a credit for benefits it pays as a result of the same accident, *Spitalieri,* 226 F.3d 167, 34 BRBS 85(CRT). However, there is no credit where two employers or accidents are involved.

Where employer continues claimant's regular salary during claimant's period of disability, employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978); *McIntosh v. Parkhill-Goodloe Co., Inc.*, 4 BRBS 3 (1976), *aff'd mem*., 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S.1033 (1978); *Luker v. Ingalls Shipbuilding,* 3 BRBS 321 (1976). The same rule applies where employer continues claimant's salary under a formal salary continuance plan. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Breen v. Olympic Steamship Co.*, 10 BRBS 334 (1979); *Jones v. The Chesapeake & Potomac Tel. Co.*, 11 BRBS 7 (1979), *aff'd sub nom. Chesapeake & Potomac Tel. Co. v. Director, OWCP*, 615 F.2d 1368 (D.C. Cir. 1980) (table).

Employer also is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered compensation for the purposes of Section 14(j). *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). Employer is not entitled to a credit for payments erroneously made by its non-occupational sickness and accident carrier since employer is not entitled to receive credit for money it never paid. *Jacomino v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 680 (1979); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). Nor may employer receive credit under Section 14(j) for wages received by claimant from another employer. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Carter v. Gen. Elevator Co.*, 14 BRBS 90 (1981).

The Board has held that employer is not entitled to a credit for payments under a pension plan where an employer was also paying compensation benefits. *Adkins v. Safeway Stores*, 6 BRBS 513 (1977). The D.C. Circuit stated that pension benefits were "payable over and above compensation awards under the statute." *Massey v. D.C. Transit Sys. Inc*., 388 F.2d 584, 585 (D.C. Cir. 1967). Similarly, employer was not entitled to a Section 14(j) credit for advance "supplemental payments" which were characterized as fringe benefits. *Brandt*

v. Avondale Shipyards, Inc., 8 BRBS 698 (1978). In *Brandt,* the Board held that the administrative law judge properly credited evidence that the supplemental payments were intended to be in addition to and above workmen's compensation.

Finally, the Board has stated that where an employer transfers an employee from a position in which he incurred disability to different work at a lower pay scale but continues to pay him the higher wage of his original position, employer may be entitled to credit the difference in pay against its liability for compensation. *White v. Bath Iron Works Corp.*, 7 BRBS 86 (1977), *aff'd*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). Employer, however, must establish that it intended the extra pay to be compensation, and it did not do so in *White*.

Digests

Credit for "Compensation" & Payments in General

The Board determined that interest is not "compensation" within the meaning of Section 2(12) of the Act. Accordingly, given that Section 14(j) allows an employer to credit its overpayments of compensation against only "compensation" later found to be due, the Board held that the administrative law judge properly declined to allow employer to reduce its liability for awarded interest by the amount it had previously overpaid in compensation. The Board additionally noted that granting employer a credit for its overpayments in this case would not further the underlying purpose of Section 14(j)--to encourage an employer to tender payments of benefits during the period of its employee's "greatest need"--since employer did not make the voluntary payments at issue until after an informal conference had been held. *Castronova v. Gen. Dynamics Corp.*, 20 BRBS 139 (1987).

The Board held that the administrative law judge erred in failing to allow employer a credit for compensation paid pursuant to the deputy commissioner's recommendation. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

The Board held that advance payments of compensation may not be credited against awarded medical expenses. An employer is limited to a credit against unpaid installments of compensation due under Section 14(j) and since medical expenses are not paid in installments and do not equate to compensation under Section 2(12), an employer may not reduce its liability for medical benefits by the amount of its voluntary disability payments. *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

The Fifth Circuit held that where employer overpays compensation to claimant it may not deduct the amount of overpayment from an award of attorney's fees to claimant's counsel. Payments to claimant's counsel are not "compensation" under the Act. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

In a case of first impression, the Board held that employer is not entitled to reduce its liability for compensation due for a subsequent work-related injury by crediting an overpayment of compensation made for a prior, unrelated work injury. *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993).

The Board reversed the administrative law judge's holding that the carrier's excess cost-of-living adjustments paid on an existing Longshore award in error based on a state workers' compensation statute were not "advance payments of compensation" pursuant to Section 14(j). The Board allowed employer to credit the excess payments, mistakenly made to claimant's federal longshore award, against subsequent payments due until the overpayment was recouped. Although the administrative law judge found that Section 14(j) is not applicable to excess payments made after an award is in effect, the Board looked to the plain language of Section 14(j) and held that it did not require that an overpayment can be recouped only if it is voluntarily made prior to the entry of an award. *Flynn v. John T. Clark & Sons*, 30 BRBS 73 (1996). *Cf. Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002) (in context of holding employer was not entitled to offset excess disability payments against its liability for death benefits, court stated that as the disability payments were made pursuant to an order they were not "advance" payments); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) (a settlement is not an "advance payment").

The Board held that benefits may not be retroactively terminated pursuant to Section 22 when no further benefits are due, as this would contravene the plain language of the statute and the rules of statutory construction. The Board thus held that there was no overpayment for employer to credit, as claimant's temporary total disability award for injuries to his back, head, leg, and for a psychological impairment was completely terminated and such termination was not retroactive. The fact that claimant became entitled to a permanent partial disability award for a hearing loss arising out of the same accident upon the termination of the total disability award did not entitle employer to a credit either pursuant to Section 22 as the total award cannot be retroactively terminated or pursuant to Section 14(j) as there were no advance payments of compensation made. *Spitalieri v. Universal Mar. Services*, 33 BRBS 164 (1999) (en banc) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 33 BRBS 6 (1999), *rev'd*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

The Second Circuit held that benefits may be retroactively terminated pursuant to Section 22 at any point after the date of injury. On modification, claimant's temporary total disability award from injuries to his back, head, leg, and a psychological impairment was terminated on February 21, 1996. The employer had paid compensation for temporary total disability through January 20, 1998, resulting in an overpayment of approximately $54,000. The court reversed the Board's holding that employer was not entitled to credit this overpayment against its liability for a scheduled hearing loss award arising from the same accident. Contrary to the Board's holding, the court reasoned that a termination of

benefits is a "decrease" in benefits as that term is used in Section 22, and thus is permitted to "affect compensation previously paid" in the form of a credit for benefits due for a different disability. *Universal Mar. Serv. Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001).

Section 14(j) permits an employer who has paid advance payments of compensation to be reimbursed out of unpaid installments of compensation. As the record contained evidence that employer paid claimant a post-injury salary, which may or may not have been intended as advance payments of compensation, the Board remanded the case to the administrative law judge for further consideration of this issue. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Board rejected claimant's assertion that the administrative law judge erred by not including money paid by employer to claimant as part of an aborted settlement agreement as compensation forfeited by claimant under Section 8(j). Specifically, the Board held that the administrative law judge properly determined that once the approval of the settlement was vacated, claimant's entitlement to that money, as disability compensation, was subject to adjudication and was properly viewed as an advance payment of compensation within the meaning of Section 14(j) of the Act and not, as claimant argued, compensation already paid pursuant to Section 702.286(c). *Floyd v. Penn Terminals, Inc.*, 37 BRBS 141 (2003).

The Board affirmed the administrative law judge's finding that employer is entitled to a credit for temporary total disability benefits it paid following claimant's 1997 surgery, prior to an award on modification, against the additional permanent total disability benefits he awarded on modification, pursuant to Section 14(j). The Board remanded the case, however, because the administrative law judge did not calculate the dollar amount of employer's credit. *LaRosa v. King & Co.*, 40 BRBS 29 (2006).

In this case, Claimant was awarded permanent total disability benefits for the combined disabling effects of his left shoulder and right knee injuries. Employer sought a credit for permanent partial disability payments it had paid for Claimant's left shoulder injury. The ALJ summarily dismissed Employer's credit claim, stating the left shoulder injury was not a sequela of the right knee injury. However, the Board remanded the case for further explanation, as Employer was seeking a credit against a subsequent award of permanent total disability benefits for a cumulative trauma injury to which the left shoulder contributed. *Garcia v. Nat'l Steel & Shipbuilding Co.*, 57 BRBS 33 (2023).

Holiday and Vacation Payments

The Board held, based on the facts of this case and the union contract in effect which provided for the payment of holiday pay "in lieu of compensation," that the administrative law judge erred in finding payments under the holiday pay provision constituted a "fringe benefit." Rather, the Board held that employer was entitled to credit its liability for compensation under the Act for its payment of "holiday pay" under the union contract. The Board held that, based on the facts of this case, claimant incurred no wage loss on the days he received holiday pay and therefore employer was not required to pay him compensation under the Act on those days. *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990).

The Board held that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the contract. The Board, however, affirmed the administrative law judge's denial of a credit for vacation pay paid during the period of temporary total disability and vice versa inasmuch as claimant qualified for and earned his vacation in the prior year. Vacation pay is dissimilar from holiday pay as it is not paid out for a specific day, but is earned over the course of a year based on various factors. *Sproull v. Stevedoring Services of Am.*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and modified in pert. part on recon. en banc*, 28 BRBS 271 (1994), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996).

The Board reversed its prior determination and held that employer was not entitled to a credit for disability compensation paid to claimant on days claimant also received holiday pay. The Board distinguished the case from *Andrews* in that there was no provision in the contract that holiday pay was to be "in lieu of compensation." Moreover, had claimant not been injured he could have worked and received both his salary and holiday pay. *Sproull v. Stevedoring Services of Am.*, 28 BRBS 271 (1994) (en banc), *aff'g in part and modifying in pert. on recon. en banc* 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in pert. part sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996).

The Ninth Circuit rejected employer's contention that its liability to claimant should be offset by vacation and holiday pay it paid to claimant while he was receiving temporary total disability benefits. The court noted that under the terms of the collective bargaining agreement, claimant would have received both wages and holiday pay if he could have worked on the holidays, and that vacation pay was not based on an employee's actually taking a vacation. *Sproull v. Director, OWCP*, 86 F.3d 895, 899, 30 BRBS 49, 51(CRT) (9th Cir. 1996), *aff'g in pert. part Sproull v. Stevedoring Services of Am.*, 28 BRBS 272 (1991) (en banc), *modifying in pert. part* 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds).

The Board reversed the administrative law judge's finding that employer was entitled to a credit under Section 14(j) for vacation and holiday payments it made to decedent while he was disabled after his injury. Since the union contract in the instant case did not specifically provide that vacation and holiday payments were intended to be in lieu of compensation, they were not intended as advance payments of compensation; rather, they were likened to wages paid under an employer-sponsored salary continuance plan. Thus, these payments were not subject to a credit under Section 14(j). *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996).

The Board reversed the administrative law judge's finding that employer was to be credited for vacation, holiday and container royalty payments claimant received after his injury against its liability for compensation. There was no evidence that these payments were intended to be in lieu of compensation as in *Andrews*, which is the only basis under the Act for awarding employer a credit under Section 14(j). Claimant earned the right to these payments even if he was disabled, and his entitlement to them stemmed from the collective bargaining agreement. *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem*., 96 F.3d 1438 (4th Cir. 1996) (table).

Post-injury receipt of holiday pay during a period of temporary total disability does not represent the capacity to earn wages, and thus does not demonstrate a post-injury wage-earning capacity. Therefore, employer was not entitled to an offset for the worker's receipt of holiday pay against its liability for temporary total disability benefits. *Eagle Marine Services v. Director, OWCP (Wolfskill)*, 115 F.3d 735, 31 BRBS 49(CRT) (9th Cir. 1997).

In accordance with *Eagle Marine* and *Branch*, the Board affirmed the administrative law judge's conclusion that claimant's vacation, holiday, and container royalty payments, received during the period of his temporary total disability, did not constitute wages within the meaning of Section 2(13) and had no impact on claimant's post-injury wage-earning capacity. Employer therefore was not entitled to a credit for claimant's receipt of these payments. *Wright v. Universal Mar. Serv. Corp.*, 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998).

The Eleventh Circuit held that employer was not entitled to a credit for post-injury container royalty and holiday/vacation payments made to claimant under a union contract as employer presented no evidence that such were intended as advance payments "in lieu of compensation" as required under Section 14(j); indeed, the court concluded that the fact that such payments were made regardless of whether an employee was disabled belied a finding that they were intended as advance payments of compensation. *SEACO v. Richardson*, 136 F.3d 1290, 32 BRBS 56(CRT) (11th Cir. 1998).

Survivor's Claims

The Board held that the language of Section 44(c)(1) of the Act required the employer to make the $5,000 payment to the Special Fund required by that section, irrespective of the fact that the employer had already paid survivor's 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).

Section 14(j) allows the Board to order that an employer who has made an overpayment but is no longer liable for any future payments to be reimbursed from future payments by a third party--in this case, the Special Fund. *Phillips v. Marine Concrete Structures, Inc*., 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).

Where claimant-widow received increased compensation payments on behalf of her son for the period her son attended a non-accredited high school after he reached the age of eighteen, the Board ruled that any overpayments employer made to claimant on behalf of her son could be credited against its future compensation liability to claimant, pursuant to Section 14(j). Contrary to claimant's contention, the Board held that Section 9(b) provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children, and thus, this case does not contain two separate death claims. *Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999).

In denying claimants' motion for reconsideration, the Board elaborated on its statement, made in a footnote, that employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez. On reconsideration, the Board distinguished its decision in *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), as that case involved allocating credits between "persons entitled to compensation" for purposes of the credit provision at Section 33(f). This case concerns the overpayment of death benefits which is governed by Section 14(j), *see Hawkins*, 33 BRBS 198. As the Act provides for one "death benefit" to be distributed to appropriate survivors, an overpayment to one survivor may be credited against liability to another survivor. *Valdez v. Crosby & Overton*, 34 BRBS 185, *aff'g on recon.* 34 BRBS 69 (2000).

The Board affirmed the administrative law judge's finding that claimant is not entitled to any additional death benefits under Section 9(c) of the Act, because employer has a credit, pursuant to Section 14(j), for its voluntary payments in excess of any additional amount of death benefits to which claimant might be entitled. *Welch v. Fugro Geosciences, Inc.*, 44 BRBS 89 (2010).

The Board held that employer may not offset excess disability payments against its liability for death payments under Section 14(j), as under this section disability benefits cannot be viewed as advance payments on the subsequent death claim. It has consistently been held

that a worker's claim for disability benefits and a survivor's claim for death benefits involve two separate and distinct rights. The Board found support for this holding in case law interpreting Section 3(e) and Section 33(f), two of the Act's other credit provisions, as well as the other subsections of Section 14. The Board distinguished *Hawkins*, 33 BRBS 198, where the Board affirmed the administrative law judge's decision to allow employer a credit for an overpayment of the death benefits for a decedent's child against its obligation to the widow, on the ground that the Act provides for only one death benefit; the instant case involves two separate claims: an *inter vivos* disability claim and a death benefits claim. Moreover, Section 14(j) does not provide an offset based on equitable principles. *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

The Fifth Circuit affirmed the Board's holding that employer may not offset excess disability payments against its liability to the widow for death payments under Section 14(j). The court held that the plain language of the statute refers to reimbursement for "advance" payments of compensation, and here, as employer paid pursuant to an administrative law judge's order, employer's payment cannot be deemed to be "advance payments of compensation" under Section 14. The court also agreed with the Board that an *inter vivos* disability claim and a death claim are two separate claims, and payments on one cannot be offset against the other. The court further rejected employer's request for offset based on equitable principles. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

In a case arising under the DBA, the Board affirmed the administrative law judge's finding that employer is liable to claimant Lily, decedent's putative wife whom he "married" in California in 1996, and with whom he was living and had two minor children, and not to his "legal" wife Shahira whom he married years earlier in Jordan, despite the alleged reaffirmation of his marriage to her in 2005. As Shahira does not satisfy any of the elements of being a widow under Section 2(16) of the Act and is not entitled to death benefits, employer is not entitled to a credit for benefits it voluntarily paid to Shahira against its liability to Lily and her minor children. *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012).

Credit for Payments by Another Employer

The Fifth Circuit held that a second employer, found responsible for claimant's permanent total disability, was not entitled to a credit for sums paid by an earlier employer in settlement of a claim for permanent partial disability to a non-scheduled body part. The court distinguished the credit doctrine enunciated in *Nash v. Strachan Shipping*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc), which applies to successive scheduled injuries. *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

The Board held that, under Section 14(j), employer is entitled to a credit for advance payments of compensation made by other potentially liable employers in settlement of claimant's occupational disease claim. Under *Cardillo*, the last covered employer to expose claimant to potentially harmful stimuli prior to claimant's awareness of his injury is liable for claimant's entire disability. Where an employer is found to be the responsible employer, it is wholly liable for claimant's disability; liability is not apportioned among successive employers. Thus, where an employer makes voluntarily payments but a later employer is ultimately found responsible, claimant is not entitled to both the voluntary payments and a full overlapping recovery from the responsible employer. With appropriate credits or reimbursement, claimant recovers once for the full extent of his disability from the sole responsible employer. *Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1998), *rev'd sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

Following remand, citing the law of the case doctrine, the Board reaffirmed its previous decision in *Alexander*, 32 BRBS 40, that employer is entitled to a credit for settlement payments claimant received from other longshore employers for the same disability. *Alexander v. Triple A Mach. Shop*, 34 BRBS 34 (2000), *rev'd sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

The Ninth Circuit reversed the Board's holding that the last responsible employer is entitled to a credit for Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court held that the plain language of Section 14(j) authorizes a credit only when the same employer who has made advance payments of compensation seeks the credit against later payments. Moreover, the court held that a settlement is not an "advance payment." *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

Citing *Alexander*, 32 BRBS 40, the Board affirmed the administrative law judge's finding that employer was entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples*, 883 F.2d 422, 22 BRBS 126(CRT), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved

multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004).

The Fifth Circuit reversed the Board's holding that the employer was entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The court deferred to the Director's position that the amounts received from the settling employers were irrelevant to the amount owed by the responsible employer and could not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004).

Payments under Other Laws

The Board held that the Act does not authorize offsetting benefits by the amount of unemployment compensation that claimant may have received during a period of disability, as they are not compensation benefits qualifying under Section 3(e) or advance payments of compensation under Section 14(j). *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986).

The Board held that the net proceeds of a third-party settlement under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51, may provide the basis for a credit against an employer's compensation liability. The Board noted that while the FELA settlement recovery does not fall within the enumerated provisions of the Act which pertain to third-party settlements and advance payments of compensation, such as Section 14(j), a credit from the net amount of the FELA recovery is based on an independent credit doctrine which exists in case law to provide employers with an offset to prevent double recovery. Applying the credit in this case consistently with that obtained pursuant to Sections 3(e) and 33(f) of the Act, the Board also ruled that employer was entitled to a credit only in the net amount of the FELA settlement. *Jenkins v. Norfolk & W. Ry. Co.*, 30 BRBS 109 (1996).

For the reasons stated in *Jenkins*, 30 BRBS 109, the Board affirmed the administrative law judge's grant of an offset for the net amount claimant received in a prior FELA settlement, a figure reached after subtracting claimant's attorney's fee in the FELA action. The Board rejected employer's contention that it was entitled to a credit for payments claimant received from the Railroad Retirement Board. The Board held that these payments are retirement benefits, not workers' compensation benefits, and thus are not subject to a credit under Section 3(e) of the Act. *Wilson v. Norfolk & W. Ry. Co.*, 32 BRBS 57 (1998), *rev'd*, 7 F. App'x 156 (4th Cir. 2001).

Holding that claimant may not pursue a remedy under the Longshore Act after settling a claim under FELA, the Fourth Circuit stated in *dicta* that employer is not entitled to be reimbursed under Section 14(j) for payments made to claimant under a FELA settlement since those payments were not intended to be and in fact were not advance payments of compensation. *Artis v. Norfolk & W. Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000).

The party claiming a credit for the claimant's proceeds from a British tort suit, AG Jersey here, has the burden of proving the allocation of the settlement proceeds to show that it is deserving of a credit for benefits due under the Act. In this case, AG Jersey has not established the applicability of any of the Act's credit doctrines as: it did not show there were payments made under another workers' compensation act or the Jones Act (Section 3(e)); it did not show there was a reduction of benefits due to a modification of a prior award (Section 22); it did not show there was a third-party payment (Section 33(f)); and it did not show there was an injury under the schedule for which prior payments had been made (*Nash*). AG Jersey also did not show that the settlement payment was an advanced payment of compensation (Section 14(j)), as the details of the settlement have not been divulged. The Board also rejected the suggestion that it create another extra-statutory credit provision; double recoveries are not absolutely prohibited under *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). The Board also rejected AG Jersey's argument that allowing double recovery would give non-U.S. citizens greater rights, stating that the rights of U.S. citizens and foreign nationals are not always equal under the Act. Therefore, the Board held that AG Jersey is not

entitled to a credit for payments made to claimant pursuant to the tort settlement. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).

Wages, Short-Term Disability Plans and Such

The Eleventh Circuit held that since employer never notified the deputy commissioner that it had begun payment of compensation, as is required by Section 14(c), it would be inequitable to allow employer to credit the wages it paid claimant during the period for which claimant was entitled to total disability benefits against its liability for the total disability benefits. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *aff'g and rev'g Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., concurring and dissenting).

The Board held that the administrative law judge improperly denied employer a credit for a short-term disability non-occupational payment of $2,600 made before notification of the claim without considering whether they were paid by employer and intended as advance payments of compensation. As it was not clear from the record whether the benefits were paid by the self-insured employer or an independent insurance company, the Board remanded for clarification, re-asserting prior Board law that employer is not entitled to a credit if its non-occupational accident carrier actually made the payments. That carrier, however, could intervene to recover monies erroneously paid. *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).

The Board reversed the administrative law judge's finding that employer was entitled to a credit for income claimant earned from other employers subsequent to March 31, 1995, as the Act contains no provision which entitles employer to a credit for income earned from other employers, and such an award would contravene both Section 8(h) of the Act and the administrative law judge's finding that claimant has a residual wage-earning capacity of $170 per week. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

The Fifth Circuit affirmed the administrative law judge's determinations that the twenty-six weeks of full pay provided to claimant under employer's SDB Plan were intended to be advance payments of compensation but that the subsequent twenty-six weeks of half-pay under the same program were not compensation payments within the scope of Section 14(j). Accordingly, the Fifth Circuit modified the administrative law judge's determination to reflect employer's entitlement to full credit, rather than the 2/3 credit which the administrative law judge found applicable, for the full-wage payments, and affirmed the administrative law judge's finding that the half-wage payments were not to be offset. *Shell Offshore v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

Section 14(j) permits an employer who has paid advance payments of compensation to be reimbursed out of unpaid installments of compensation. As the record contained evidence that employer paid claimant a post-injury salary, which may or may not have been intended as advance payments of compensation, the Board remanded the case to the administrative

law judge for further consideration of this issue. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Board affirmed the administrative law judge's denial of a Section 14(j) credit to employer for the payments claimant received under its Illness and Disability Plan. Substantial evidence supported the administrative law judge's finding that there is no indication in employer's Employee Manual that employer intended the years-of-service-based payments to be advance payments of compensation. The fact that the payments were for a disability does not *per se* establish that these payments were intended as advance payments of compensation under Section 14(j). Moreover, the administrative law judge rationally credited the fact that the payments were based on the employee's years of service rather than on loss in wage-earning capacity as evidence that these payments are not intended as advance payments of compensation. *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009).

Credits between Employer and the Special Fund

Section 14(j) allows the Board to order that an employer who has made an overpayment but is no longer liable for any future payments to be reimbursed from future payments by a third party--in this case, the Special Fund. *Phillips v. Marine Concrete Structures, Inc*., 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).

Since the instant case involved only one award for hearing loss, and employer made voluntary advance payments of compensation to claimant in excess of the amount for which it was subsequently found to be liable due to the operation of Section 8(f), the Board held employer, rather than the Special Fund, entitled to a credit for the voluntary payment. Employer was entitled to reimbursement for its overpayment from the Special Fund. *Krotsis v. Gen. Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

The Second Circuit affirmed the Board's holding that the money paid to claimant by employer pursuant to an unresolved 1979 claim was a voluntary advance payment of compensation. Since the amount paid by employer was greater than the sum for which it was subsequently found to be liable, employer was entitled to a credit for its overpayment pursuant to Section 14(j), and to reimbursement from the Special Fund due to the operation of Section 8(f). *Director, OWCP v. Gen. Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

Where employer made voluntary advance payments of compensation to claimant in excess of the amount for which it was subsequently found liable due to the operation of Section 8(f), employer is entitled to a credit. The administrative law judge erred in awarding employer a credit for its overpayment to be offset against any future hearing loss claims filed by claimant, as employer is entitled to reimbursement from the Special Fund. The offset for the voluntary payments of compensation should be made on a dollar for dollar basis, and not on a percentage basis, in order to insure that claimant is fully compensation for his hearing loss. *Balzer v. Gen. Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990)(Brown, J., dissenting).

Employer voluntarily paid claimants compensation for their first hearing loss claims. Claimants continued working for employer and filed second claims alleging an additional work-related hearing loss. The court held that where claimants did not have a pre-employment hearing loss and the payments previously made by employer were compensation for hearing losses suffered on the job, employer is not entitled to a credit for its initial payments against its liability for the injuries that resulted in claimants' second claims. Although, application of the credit doctrine or Section 14(j) protects employers against double payments to an employee for an overall disability, Section 8(f) does not further protect employer in the case of a disability resulting exclusively from a work-related

injury. Accordingly the credit for previous payments made by employer should be applied first to the liability of the Special Fund. *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993).

Additional cases addressing the allocation of credits between an employer and the Special Fund are discussed in Section 8(f).

Reimbursement from Claimant

The Board rejected employer's argument that it was entitled to reimbursement of its voluntary payments of compensation. Claimant was not entitled to additional compensation, as the administrative law judge found he did not suffer an injury at work, but Section 14(j) allows only for a credit of excess voluntary payments against compensation due. It does not authorize reimbursement. *Cooper v. Ceres Gulf*, 24 BRBS 33 (1990).

None of the three sections of the Longshore and Harbor Workers' Compensation Act which provide for recovery of overpayments, *i.e.*, Sections 14(j), 8(j) and 22, provides for the employer recovering overpayments directly from the employee; such recovery can only be an offset against future compensation under the Act. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992).

Section 14(j) allows employer a credit for its prior payments of compensation against any compensation subsequently found due, but evinces a congressional recognition that there might not be any unpaid installment to recover. Thus, Section 14(j) does not provide an employer with a right of repayment for an alleged overpayment of compensation. *Stevedoring Services of Am., Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92(CRT) (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992). *Cf. Stevedoring Services of Am., Inc. v. Eggert*, 914 P.2d 737 (Wash. 1996) (en banc) (Washington Supreme Court permits state claim for unjust enrichment, conversion, fraud and intentional or negligent misrepresentation, finding Longshore Act does not preempt such claims for fraudulently obtained benefits).

Employer's argument that it should be reimbursed for sums paid to claimant pursuant to the administrative law judge's Decision and Order was rejected as there is no basis for reimbursement under the Act. *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1992).

The Act does not provide a federal remedy for employers to recoup overpayments of compensation. The legislative history of Section 14(j) confirms that Congress intended to preclude methods of recoupment other than offsets against future benefits. *Lennon v. Waterfront Transp.*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

In three separate sections, the Act provides that the employer may recover past payments from an employee, but only by offsetting those payments against future compensation payments still due. *See* 33 U.S.C. §§908(j), 914(j), 922. Citing *Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT), the Fifth Circuit noted that there is no separate cause of action to enforce a reimbursement order against an employee when no future compensation payments are due; this is true even if the employee has engaged in fraud to obtain the medical benefits, *see* 33 U.S.C. §931(a). Although the holding in *Cooper* relates only to the employer's right to recover past payments from an employee, the court stated that

similar provisions in the Act and legislative history compel a conclusion that employer is foreclosed from bringing an action for reimbursement against medical care providers even if the medical provider engaged in fraud so as to disqualify him from participating in the system, *see* 33 U.S.C. §907(c)(1)(C), although these factors were not present in the case before the court. *Petroleum Helicopters, Inc. v. Nancy Garrett, L.P.T.*, P.C., 23 F.3d 107, 28 BRBS 40(CRT) (5th Cir. 1994).

Employer provided claimant, a bi-lateral amputee, with a wheelchair-accessible addition to his parents' home where he resided at the time of his work injury. Nine years later, claimant moved for reasons unrelated to the work injury and requested that employer appropriately modify his new home. The administrative law judge ordered employer to provide home modifications, but allowed it to take a credit for the cost of the modifications to claimant's prior home. The Board reversed the administrative law judge's award of a credit for these previously paid medical benefits. There are no statutory or extra-statutory bases to allow a credit. The administrative law judge found no evidence that claimant moved in order to impose on employer liability for the additional expense or based on a personal preference to live elsewhere. Rather, he found claimant had to move for reasons largely beyond his control. *Teer v. Huntington Ingalls, Inc*., 53 BRBS 5 (2019).

Section 14(k)

Section 14(k) (pre-1984 Section 14(l)) provides that a claimant must give receipts for payment of compensation to the employer paying benefits and employer must produce them when required by the deputy commissioner.

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The Board rejected claimant's contention that employer was required to pay compensation within 10 days after the administrative law judge issued her decisions. The administrative law judge ordered the district director to calculate the amount of compensation due. Pursuant to *Keen*, 35 F.3d 226, 28 BRBS 110(CRT), the earliest date from which compensation was due pursuant to the administrative law judge's decisions was 10 days after the district director filed a letter reflecting the calculations necessary for employer to determine the extent of its compensation liability. The Board remanded for the district director to determine whether employer made timely payments of the amounts previously calculated. In her decisions, moreover, the administrative law judge did not specify the amount of employer's credit for past compensation payments, nor did the parties stipulate to the amount of any benefits previously paid. Claimant challenged the district director's calculation of the amount of benefits due, asserting that employer had not adequately proven under Section 14(k) the amount of its back payments. The Board held that, while employer is liable for an assessment on the amount previously calculated by the district director, proceedings before an administrative law judge, pursuant to *Hanson*, 34 BRBS 136, and *Bray*, 664 F.2d 1045, 14 BRBS 341, are necessary to address the factual matters raised with regard to the amount of compensation due. Pursuant to *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), employer cannot be held in default for any additional compensation found due on remand until this dispute is resolved. *Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

Section 14(m) (Repealed 1972)

Section 14(m) placed a $24,000 ceiling on temporary total, temporary partial, and permanent partial disability benefits. Section 14(m) was repealed in 1972.

Several courts of appeals and the Board held that the pre-1972 $24,000 ceiling on temporary total, temporary partial and permanent partial disability was no longer applicable to injuries occurring prior to the 1972 Amendments where the ceiling was not reached until after the effective date of the Amendments. *Argonaut Ins. Co. v. Director, OWCP*, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981)**;** *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 12 BRBS 478 (5th Cir. 1980); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Davis v. United States Dep't of Labor*, 646 F.2d 609 (D.C. Cir. 1980); *Smith v. The Am. Univ.*, 14 BRBS 875 (1982); *Morgan v. Marine Corps Exch.*, 14 BRBS 784 (1982).

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The Board held that the administrative law judge erred in applying Section 14(m), which was repealed in 1972, to either claimant's 1970 siderosis claim or his 1982 asbestosis claim. Following *Morgan*, 14 BRBS 784, the Board held that, since the $24,000 ceiling was not reached prior to the effective date of the 1972 Amendments for either claimant's siderosis or asbestosis claim, Section 14(m) does not apply in either instance and would not bar claimant's right to further compensation. *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon.*, 22 BRBS 430 (1989).

The Board rejected employer's argument that claimant's recovery for permanent total disability should be limited to the Section 14(m) statutory maximum in effect at the time of claimant's 1941 injury, concluding that the administrative law judge properly determined based on *Hastings*, 628 F.2d 85, 14 BRBS 345, and *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), that the 1972 repeal of this provision should be accorded retroactive effect. The Board also agreed with the administrative law judge's determination that *Argonaut Ins.*, 646 F.2d 710, 13 BRBS 297, supports retroactive application of the repeal of Section 14(m), noting that in *Argonaut*, the First Circuit, in which this case arose, specifically rejected employer's argument that the repeal should not be applied retroactively because it would be unfair to impose upon carriers obligations they had not anticipated and would not be able to recoup. *Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989).