BRB No. 92-1238

JAMES BARRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED: _____
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

James R. Campbell, New York, New York, for claimant.

Keith L. Flicker and Richard L. Garelick (Flicker & Associates), New York, New York, for employer.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-903) of Administrative Law Judge Paul H. Teitler awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured during the course of his employment with employer. The parties settled the claim on January 2, 1991, and the Order approving settlement was filed by the district director[1] on January 15, 1991. Decision and Order at 2. The district director certified that he mailed copies of the Order to the parties that same day. *Id.*; Cl. Ex. 1. In fulfillment of the settlement agreement, employer issued a check for $4,090.51 on January 30, 1991. Decision and Order at 2-3; Cl. Ex. 2. Claimant thereafter sought the imposition of a Section 14(f), 33 U.S.C. §914(f), penalty, contending that employer's payment of compensation was not timely made. On March 1, 1991, the district director informed the parties that employer is liable for a 20 percent penalty pursuant to Section 14(f) because payment was made beyond the 10 days allowed by statute. Decision and Order at 3; Cl. Ex. 3. Employer objected to the district director's action and requested a hearing before an administrative law judge.

A hearing was held on December 16, 1991, wherein the parties disputed only whether employer is liable for the Section 14(f) penalty. At the hearing, an employee of employer's carrier testified it did not receive the administrative law judge's Order approving settlement until January 25, 1991. Emp. Ex. 1; Tr. at 11. Employer argued that payment of compensation was timely because Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure (FRCP) apply to Section 14(f). *See* Fed. R. Civ. P. 6(a), (e). The administrative law judge rejected employer's Rule 6(e) argument in accordance with *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60 (CRT) (5th Cir. 1985), finding that Rule 6(e) does not apply to Section 14(f). Decision and Order at 5. Therefore, the administrative law judge determined that employer failed to make timely payment to claimant and is liable for a Section 14(f) penalty.[2] *Id.* Employer appeals the administrative law judge's decision, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.[3]

[1]Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

[2]If employer is liable, the parties agree that the penalty amounts to $818.10. Decision and Order at 2; Tr. at 7.

[3]In an Order dated July 24, 1992, the Board held that it has jurisdiction to decide this appeal because, as employer paid the amount in default, it is asked to review only the propriety of the Section 14(f) penalty and not the supplemental order declaring default. Order at 1. Therefore, we reject claimant's argument that the Board lacks jurisdiction to review this case. *McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989).

Employer contends the administrative law judge erred in awarding claimant additional compensation pursuant to Section 14(f). Employer argues that Rules 6(a) and 6(e) of the FRCP apply to determinations regarding the timeliness of payments under the Act. More specifically, it avers that the Board's decision in *Johnson v. Diamond M. Co.*, 14 BRBS 694 (1982) (Kalaris, J., dissenting), is controlling for the Rule 6(e) issue, and that the Board should follow the reasoning of the United States Court of Appeals for the Fifth Circuit in *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*, ___ U.S. ___, 111 S.Ct. 2012 (1991), for the Rule 6(a) issue. Claimant and the Director respond, contending that Rule 6(e) does not apply to Section 14(f). The Director further argues that Rule 6(a) does not apply to Section 14(f), but even if it does, employer's payment was still late; therefore, employer is liable for the 20 percent penalty. Additionally, the Director contends the administrative law judge erred in not awarding claimant interest on the Section 14(f) penalty.

Employer first argues that Rule 6(e) of the FRCP applies to Section 14(f). Section 14(f) of the Act 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 921 of this title and an order staying payment has been issued by the Board or the court.

33 U.S.C. §914(f) (emphasis added). Rule 6(e) provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the *service* of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Fed. R. Civ. P. 6(e) (emphasis added). Because the district director served the parties by mail, employer asserts that three days should be added to the 10-day period prescribed in Section 14(f). In support of its argument, employer relies on the Board's holding in *Johnson*, 14 BRBS 694.

To resolve the inequities of the Section 14(f) time restraint, in *Johnson*, the Board held that where notice of filing is given by mail, three days will be added to the prescribed 10-day period. *Johnson*, 14 BRBS at 697; *see also Patterson v. Tidelands Marine Service*, 15 BRBS 65 (1982), *vacated*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983). However, the Fifth Circuit subsequently decided *Lauzon*, in which the court held that Rule 6(e) is inapplicable in cases involving Section 14(f) as it requires an action to occur within 10 days of *filing* and not 10 days of *service* as contemplated by Rule 6(e).[4] Although employer attempts to distinguish the instant case from

[4]Rule 6(e) computes the timeliness of an action from the date of service on a party while under Section 21(a) of the Act compensation orders become effective when filed in the office of the district

Lauzon by noting that it arises under the jurisdiction of the United States Court of Appeals for the Third Circuit, the Board has followed *Lauzon* in subsequent cases arising both in and out of the Fifth Circuit. *See Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989) (Fourth Circuit); *Lynn v. Comet Construction Co.*, 20 BRBS 72 (1986) (Fifth Circuit). In view of these more recent decisions, *Johnson* is no longer controlling precedent, and employer's argument must fail. Moreover, we note that even were we to apply Rule 6(e) to this case, it alone is not sufficient to render employer's payment of compensation timely, as the addition of three days requires payment to have occurred on January 28, 1991, two days prior to the issuance of the compensation check.[5] Therefore, we reject employer's Rule 6(e) argument for the reasons set forth in *Lauzon, Matthews*, and *Lynn*.[6]

Employer also contends that Rule 6(a) applies to Section 14(f) in accordance with *Quave*, 912 F.2d at 798, 24 BRBS at 43 (CRT). In his analysis, the administrative law judge noted the provisions of Rule 6(a); however, he did not discuss it further or make any findings regarding it. In *Quave*, the Fifth Circuit relied on the plain language of FRCP Rule 81(a)(6), and its reasoning in *Tidelands Marine Service*, 719 F.2d at 126, 16 BRBS at 10 (CRT),[7] and determined that Rule 6(a) applies to time computations under Section 14(f) of the Act. *Quave*, 912 F.2d at 800, 24 BRBS at 45 (CRT); Fed. R. Civ. P. 81(a)(6). Rule 6(a) provides:

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director. *See* 33 U.S.C. §921(a); Fed. R. Civ. P. 6(e).

[5]Although employer argues it is nearly impossible for it to comply with a 10-day time limit, the Board noted there is only one exception for a late payment and that is the granting of a stay of payment. Equitable principles will not excuse late payments. *See Matthews*, 22 BRBS at 442; *Durham v. Embassy Dairy*, 19 BRBS 105 (1986).

[6]This case differs from *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 27 BRBS 31 (CRT) (9th Cir. 1993), a case recently decided by the United States Court of Appeals for the Ninth Circuit. In *Nealon*, a case in which a compensation order was not properly served on claimant, the court held that under Section 19(e) of the Act, 33 U.S.C. §919(e), a compensation order is not deemed filed until the parties have been served. Thus, the 30-day time limit for filing an appeal does not begin to run until service on the parties has been effected. *Nealon*, 996 F.2d at 968, 27 BRBS at 32 (CRT). *Cf. Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79 (CRT) (7th Cir. 1989) (under Section 702.349 of the regulations, 20 C.F.R. §702.349, "filing" does not require proper service on counsel for a party). There has been no allegation of improper service in this case; the district director certified that he filed the decision and served the parties on January 15, 1991.

[7]According to Rule 81(a)(6), the FRCP apply to "proceedings for enforcement or review of compensation orders" under the Act, specifically under Sections 18 and 21, 33 U.S.C. §§918, 921. Fed. R. Civ. P. 81(a)(6). In *Tidelands Marine Service*, the court concluded that an order issued by a district director based on a Section 14(f) assessment is a supplementary order declaring the amount of the default within the meaning of Section 18(a) of the Act, 33 U.S.C. §918(a). *Tidelands Marine Service*, 719 F.2d at 129, 16 BRBS at 12-13 (CRT); *see also Quave*, 912 F.2d at 800 n. 4, 24 BRBS at 45 n. 4 (CRT).

In computing any period of time prescribed or allowed by these rules . . . , the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days. *When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.*

Fed. R. Civ. P. 6(a) (emphasis added). Because the prescribed period in Section 14(f) is less than 11 days, application of Rule 6(a) to the case at hand would result in the exclusion of January 19, 20, 21, 1991 (Saturday, Sunday, holiday) and January 26, 27, 1991 (Saturday, Sunday) from the computation of timeliness. Use of Rule 6(a) in this case would thus extend the period allotted for payment to January 30, 1991, and because employer issued claimant's compensation check on that date, it argues it made a timely payment.

Without deciding whether Rule 6(a) is applicable,[8] we note that the common-law rule, long-recognized by the Board, refutes employer's contention that its payment was timely if Rule 6(a) is applied. The rule states that when payment is sent by mail, the time of payment is the date payment is received by the payee and not the date it was mailed. *Matthews*, 22 BRBS at 442; *McKamie v. Transworld Drilling Co.*, 7 BRBS 315, 319 (1977). Assuming, *arguendo*, we were to apply Rule 6(a) of the FRCP to this case, then in light of the common-law rule of payment, claimant must have received the compensation check by January 30, 1991 in order for payment to be considered timely. As there is no evidence in the record that claimant received payment on that date, and as that date controls the application of Rule 6(a), we reject employer's contention. *See Matthews*, 22 BRBS at 442; 33 U.S.C. §914(f). Consequently, we affirm the administrative law judge's finding that employer is liable for a Section 14(f) penalty.

In his response brief, the Director raises the issue of claimant's entitlement to interest on the overdue penalty payment. Although interest is not specifically addressed in the Act, the Board and the courts have accepted the Director's opinion that interest on past-due compensation serves the purpose of the Act and permits a claimant to be compensated fully. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors, Inc.*, 22 BRBS 453 (1989). Moreover, the Board has noted previously that the award of interest is mandatory, and that the issue of whether a claimant is entitled to interest can be raised at any time. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *on recon.*, 17 BRBS 20 (1985). In addition, the Board has held that when a payment of additional compensation pursuant to Section 14(f) is overdue, a claimant is entitled to interest thereon.

[8]The Director does not believe *Quave* was properly decided. Because Congress did not alter the language of Section 14(f) with the enactment of the 1984 Amendments to the Act, despite proposals to do so, he argues that a 1985 amendment to Rule 6(a) should not be applied beyond the limited scope of Rules 1 and 81(a)(6) of the FRCP, as to do so would effectively amend Section 14(f) in a manner rejected by Congress in 1984. *See* Dir's Brief at 5-10.

McKamie, 7 BRBS at 320. Therefore, we modify the award to reflect claimant's entitlement to interest on the late penalty payment, to be calculated by the district director. *Id.*

Accordingly, the Decision and Order of the administrative law judge holding employer liable for a Section 14(f) penalty is affirmed. The decision is modified to reflect claimant's entitlement to interest on the late penalty payment.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge