BRB No. 92-2321

ROBERT F. IRWIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY RESALE EXCHANGE	)	DATE ISSUED:
	)	
and	)	
	)	
GATES, McDONALD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Diane L. Middleton (Law Offices of Diane L. Middleton), San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (89-LHC-400, 91-LHC-533) of Administrative Law Judge Thomas Schneider rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a work-related injury during the course of his employment with employer. The parties entered into a Section 8(i), 33 U.S.C. §908(i), settlement agreement on August 10, 1990, and the Decision and Order of Administrative Law Judge Ellin O'Shea approving that settlement was filed in the office of the district director on January 25, 1991. The settlement check was mailed by employer on February 2, 1991, and received by claimant on February 6, 1991, 12 days after the January 25, 1991, date of filing. There were two Saturdays and two Sundays between the date the check was mailed, January 25, 1991, and the date it was received, February 6, 1991. Claimant thereafter sought imposition of a penalty under Section 14(f) of the Act, 33 U.S.C. §914(f), contending that employer's payment of compensation was not timely made.

A hearing was held on December 9, 1991, wherein the parties disputed only whether employer is liable for a Section 14(f) penalty. The administrative law judge rejected claimant's contention that Section 18.4(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.4(a), was applicable to the instant case; rather, the administrative law judge found that when computing the 10-day time period under Section 14(f), Rule 6(a) of the Federal Rules of Civil Procedure (FRCP) applies. *See* Fed. R. Civ. P. 6(a). The administrative law judge thereafter determined that employer's payment was timely made pursuant to that rule; thus, the administrative law judge denied claimant's request for the imposition of a Section 14(f) penalty.

On appeal, claimant challenges the administrative law judge's determination that employer's payment was timely, contending that the administrative law judge erred in finding that Rule 6(a) applies when computing the 10-day time limit under Section 14(f). Employer responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in support of claimant's position, arguing that Rule 6(a) is not applicable under Section 14(f).

The only issue presented by this appeal is whether the administrative law judge properly determined that employer timely paid claimant compensation pursuant 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). Compensation payable under an order becomes due on the day the order is filed with the district director. 33 U.S.C. §921(a); *see also* 33 U.S.C. §919. It is well-established 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. *See Barry v. Sea-Land Service, Inc.*, 27 BRBS 260 (1993), *aff'd*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994); *Matthews v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 440 (1989). In the instant case, it is uncontroverted that the compensation awarded in the order approving the parties' settlement became due on January 25, 1991, the day Judge O'Shea's Order approving that settlement was filed with the district director. Thus, the issue presented by this appeal is whether claimant's receipt of employer's check on February 6, 1991, 12 days later, was timely payment under Section 14(f).

Claimant contends that the administrative law judge erred in failing to apply Section 18.4(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges when computing the 10-day time limit under Section 14(f). Section 18.4(a) provides:

> In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day. *When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.*

29 C.F.R. §18.4(a)(emphasis added). Since the time limit under Section 14(f) is greater than 7 days, claimant argues, the two Saturdays and two Sundays between January 25, 1991, and February 6, 1991, should not have been excluded, thereby making employer's payment untimely under Section 14(f).

In his decision, however, the administrative law judge found that the applicable rule to be utilized in calculating the Section 14(f) 10-day time limit is Rule 6(a) of the FRCP, which he found to be applicable to the Act pursuant to FRCP 81(a)(6).[1] Rule 81(a)(6) provides that the FRCP apply to "proceedings for enforcement or review of compensation orders under the [LHWCA] U.S.C., Title 33, §§918, 921 . . ." Fed. R. Civ. P. 81(a)(6). Rule 6(a) provides:

> In computing any period of time prescribed or allowed by these rules . . ., or by any applicable statute, the day of the act, event or default from which the designated

[1]The administrative law judge erroneously referred to this Rule as Rule 81(e).

> 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). Since the prescribed period in Section 14(f) is less than 11 days, the administrative law judge excluded the intermediate Saturdays and Sundays, thus extending the period allotted for payment by 4 days, and found that employer's payment on February 6, 1991, was timely under Section 14(f).

The United States Court of Appeals for the Ninth Circuit, wherein appellate jurisdiction of this case lies, has yet to rule on the issue of whether Rule 6(a) applies to the time computation under Section 14(f). Two other circuit courts of appeals have addressed this issue, with differing results. 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*, 500 U.S. 916 (1991), the United States Court of Appeals for the Fifth Circuit relied on the plain language of Rule 81(a)(6), and that court's prior reasoning in *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT)(5th Cir. 1983), to determine that Rule 6(a) applies to time computations under Section 14(f) of the Act. In *Quave*, the Fifth Circuit acknowledged that Section 14 of the LHWCA is not mentioned in Rule 81(a)(6) of the FRCP. However, based on its holding in *Patterson* that an order containing a Section 14(f) assessment is a "supplementary order declaring the amount of the default" within the meaning of Section 18 of the LHWCA, the court held that Section 14 fell within FRCP 81(a)(6).[2] *Quave*, 912 F.2d at 800, 24 BRBS at 45 (CRT). The court thus determined that Rule 6(a), through Rule 81(a)(6), governs the computation of the time period contained in Section 14(f) of the LHWCA.

In contrast, the United States Court of Appeals for the Fourth Circuit rejected a similar argument in *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 28 BRBS 118 (CRT)(4th Cir. 1994). The court began its analysis with the plain language of Section 14(f), and the view that "ten days" means what it says. The court noted that a basis for adding the word "business" or similar language must be presented to extend the time period. In this context, the court addressed employer's argument that Rule 6(a) of the FRCP applies to calculate the time period of Section 14(f) because a Section 14(f) assessment is enforced through Section 18(a), and FRCP 81(a)(6) references Section 18. In addressing this issue, the Fourth Circuit first detailed the "circuitous statutory course" required to reach this result, citing the decision in *Quave*. Disagreeing with this result, the court noted that Rule 81(a)(6) does not even mention Section 14(f) of the Act, but expressly states that the FRCP apply to "`*proceedings for enforcement or review* . . . under the [LHWCA] §§918, 921.'"

[2]Section 18(a) of the Act, 33 U.S.C. §918(a), sets forth the procedure to be followed in cases where an employer defaults in the payment of compensation due under any award of compensation; specifically, following the issuance of a supplementary order by the district director declaring the amount of the default, claimant must seek enforcement of the supplementary order in district court.

Reid, 41 F.3d at 202, 28 BRBS at 121 (CRT)(emphasis in original). The court determined that "periods for payments under §914(f) are simply not `proceedings for enforcement or review'" since Section 21(e) of the LHWCA, 33 U.S.C. §921(e), provides that such "proceedings" under the LHWCA are exclusively contained in Sections 18 and 21, 33 U.S.C. §§918, 921. *Id*. The court thereafter determined that Section 14(f) is substantive, not procedural, in nature, with the penalty requiring a proceeding under Sections 18 or 21 in order "to be given effect." *Id*. The court concluded, "[w]hen examining a §914(f) penalty enforced through a §918(a) order, the Federal Rules apply to the §918 enforcement procedure, but they do not apply to the underlying substantive penalty being enforced." *Id*. Having thus rejected the employer's proposed link between Rule 6(a) of the FRCP and Section 14(f) of the Act, the Fourth Circuit found itself "left with the original proposition that `ten days' means, after all, ten days." *Id.* Thus, the court concluded that the 10-day period set forth in Section 14(f) was to be interpreted as ten calendar days.[3]

We find the reasoning of the Fourth Circuit in *Reid* compelling and thus hold that Rule 6(a) of the FRCP is not applicable to time computations under Section 14(f). Specifically, Rule 81(a)(6) of the FRCP does not reference Section 14(f), and that section does not involve a "proceeding for enforcement or review" under the LHWCA. Rather, "proceedings" are exclusively contained in Sections 18 and 21 of the LHWCA, *see* 33 U.S.C. §921(e), and those sections are explicitly set forth in Rule 81(a)(6). The Fourth Circuit's determination that Section 14(f) is a substantive, not a procedural, provision is consistent with the fact that the section imposes an additional liability upon employer if its provisions are not met. Once a determination is made under the Act that a Section 14(f) penalty is due, a Section 18 proceeding is necessary only for it to be collected. Based on the reasoning in *Reid*, we hold that Rule 6(a) does not apply to a determination as to employer's liability for the penalty contained in Section 14(f). As the *Reid* court declared, the 10-day requirement contained in Section 14(f) "means what it says -- that ten days is ten, twenty-four hour periods, as a day is commonly understood. `Congress may well be supposed to have used language in accordance with the common understanding.' *Union P.R. Co. v. Hall*, 91 U.S. 343 (1875)." *Id.*, 41 F.3d at 201, 28 BRBS at 120 (CRT). Although the Director supports our ten calendar day interpretation, as she did in the Fourth Circuit, her interpretation is not entitled to the "substantial deference" she claims because the statutory language is unambiguous. *Id.*, 41 F.3d at 202, 28 BRBS at 120 (CRT); *see* Director's Brief at 1. Therefore, based upon the undisputed facts of this case, we reverse the administrative law judge's finding that employer is not liable for a Section 14(f) penalty, as its payment on February 6, 1991, was not timely made.[4]

[3]In thus rejecting employer's interpretation of Section 14(f), the court, after noting that Congress in 1981 had considered and rejected an amendment to Section 14(f) which would have extended the time period from ten to fifteen days, stated that employer's attempt to achieve judicial results where legislative efforts have been unavailing is nothing more than a prescription for augmenting the influence of the courts at the expense of a healthy climate of democracy. *See Reid*, 41 F.3d at 202, 28 BRBS at 121 (CRT).

[4]Based on our ruling herein, claimant's argument that he is entitled to receive a Section 14(f) penalty pursuant to Rule 18.4(a) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.4(a), is moot.

Accordingly, the Decision and Order Denying Claim of the administrative law judge is reversed, and the case is remanded to the administrative law judge for further proceedings necessary for the entry of a supplementary order entitling claimant to a Section 14(f) penalty, consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge