

BRB No. 93-1011

FLORENCE FLYNN)
)
 Claimant-Respondent)
)
 v.)
)
 JOHN T. CLARK & SONS) DATE ISSUED:
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 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Joan Huddy Rosenzweig, Administrative Law Judge,
United States Department of Labor.

Nathan Greenberg, Boston, Massachusetts, for claimant.

Richard N. Curtin (Parker, Coulter, Daley & White), Boston, Massachusetts, for
employer/carrier.

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

PER CURIAM:

Employer/carrier appeals the Decision and Order (92-LHC-660) of Administrative Law Judge Joan Huddy Rosenzweig rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant and her two minor children were awarded death benefits pursuant to the Act on February 6, 1968, for the death of claimant's husband who suffered a fatal heart attack while working for employer on March 29, 1967. The carrier paid these death benefits until November 8, 1990, when it realized that it had been erroneously making cost-of-living adjustments pursuant to a newly enacted Massachusetts workers' compensation statute to claimant's federal longshore benefits.

The amount it overpaid claimant was allegedly \$5,099.42. The carrier intended to recoup this overpayment by suspending the payment of benefits to claimant for a total of 445 weeks, or approximately eight and one-half years, and upon recoupment to reinstate the benefits. Claimant requested that the case be referred to the Office of Administrative Law Judges to have her past due benefits paid, her benefits reinstated, and to have the collection of the carrier's overpayment waived.

The administrative law judge concluded that the carrier was not entitled to a credit against future benefits owed to claimant for overpayments it mistakenly made after an award was issued. The administrative law judge rejected employer's contentions that the overpayments were advance payments of compensation for which it would be entitled to a credit under Section 14(j) of the Act, 33 U.S.C. §914(j), or that the overpayments were made pursuant to a state workers' compensation statute for which it would be entitled to a credit under Section 3(e) of the Act, 33 U.S.C. §903(e). The administrative law judge distinguished this case from cases where an employer is entitled to recoup overpayments of compensation prior to the issuance of an award.

On appeal, employer challenges the administrative law judge's conclusion that it is not entitled to a credit for amounts it erroneously paid to claimant. Employer argues that either Section 14(j) or Section 3(e) of the Act allows it to recoup these overpayments. Claimant responds in support of the administrative law judge's decision.

As employer accurately asserts in its brief, this case involves an issue of first impression on the facts presented. In reviewing cases of first impression involving a statute, the Board must first look to the plain language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993). The relevant statutory provision is Section 14(j) which provides, "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j).

The issue in the instant case is whether the cost-of-living adjustments the carrier erroneously made to an existing longshore award under the provisions of a state workers' compensation statute are "advance payments of compensation" pursuant to Section 14(j) for which the carrier is entitled to recoupment. The administrative law judge's finding that Section 14(j) is not applicable to excess payments made after an award is in effect is based on cases where the excess payments were indeed made in advance of an award. *See, e.g., Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990); *McCabe Inspection Service, Inc. v. Willard*, 240 F.2d 942 (2d Cir. 1957); *Lawson v. Standard Dredging Co.*, 134 F.2d 771 (5th Cir. 1943); *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245 (1979). These cases, however, do not compel the conclusion that excess payments made after an award is in effect are not subject to recoupment under Section 14(j).¹

¹These cases provide guidance on the issue of whether an employer is entitled to recoup its overpayments, but can be distinguished from the instant case. The court in *Krotsis*, 900 F.2d at 506, 23 BRBS at 40 (CRT), and *McCabe*, 240 F.2d at 942, allowed employer to receive a reimbursement for overpayments made prior to an award. It did not, however, require that the overpayments be made prior to an award. In *Lawson*, 134 F.2d at 771, the court of appeals affirmed the district court's

The administrative law judge also discussed *Phillips v. Marine Concrete Structures, Inc.*, 877 F.2d 1231, 22 BRBS 83 (CRT) (5th Cir. 1989), *aff'g* 21 BRBS 233 (1988), *rev'd on other grounds*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*). In *Phillips*, the Board modified the claimant's award in a way such that employer had overpaid claimant \$3,200 pursuant to Section 10(f), 33 U.S.C. §910(f), during periods of temporary total disability and the Board ordered the Special Fund, by virtue of employer's entitlement to relief pursuant to 33 U.S.C. §908(f), to repay employer for that amount by withholding small increments from future benefits to the claimant until the time that employer was fully repaid. The United States Court of Appeals for the Fifth Circuit affirmed the Board's decision.² The court first looked to the language of Section 14(j) and stated that

There is little question that, if the employer/carrier were still making payments to Phillips, it would be entitled to reimbursement under the statute by withholding the relevant amount from future payments.

Phillips, 877 F.2d at 1234, 22 BRBS at 86 (CRT). The court agreed with the Board that employer was entitled to reimbursement from the Special Fund, holding that "there is no requirement that the reimbursement come from installments still owed by the party that made the overpayment." *Id.* Moreover, and more pertinent to the case at bar, the court addressed congressional intent and stated

The purpose of section 14(j) is apparent: If an employer has paid out, and the claimant has received, LHWCA benefits to which it is later found that the claimant is not entitled, the employer should be able to recover those funds. This is a corollary to one of the LHWCA's main purposes, which is to ensure the prompt payment of benefits

Id., 877 F.2d at 1234, 22 BRBS at 86 (CRT). The administrative law judge in the instant case attempted to distinguish *Phillips* by stating that the cost-of-living adjustments which resulted in an overpayment in that case were solely due to the reversal of the administrative law judge's findings on appeal, while here it is solely due to the carrier's error of mistakenly assuming that claimant was

determination that payments made under the Florida state workers' compensation statute pursuant to an invalid employment contract were advance payments of compensation within Section 14(j), entitling employer to a credit for these payments.

²The panel decision affirmed the Board's reversal of an award of Section 10(f) adjustments during the period claimant was temporarily totally disabled, which resulted in claimant's receiving the overpayment of \$3,200. The panel's decisions also affirmed an award of Section 10(f) adjustments to claimant's permanent total disability benefits that included adjustments occurring during previous periods of temporary total disability pursuant to *Holliday v. Todd Shipyards Corp.*, 645 F.2d 415, 13 BRBS 741 (5th Cir. 1981). That portion of the panel decision was subsequently overruled by the Fifth Circuit sitting *en banc*. 895 F.2d at 1033, 23 BRBS at 36 (CRT). The panel's analysis of Section 14(j) for the initial overpayment is not affected by the *en banc* decision.

entitled to cost-of-living adjustments pursuant to an inapplicable state statute. Although the circumstances that resulted in the overpayment are different in the two cases, these cases are similar in that they both involve overpayments of cost-of-living adjustments made after an award under the Act was in effect, and the court's decision provides guidance regarding the scope of Section 14(j). *See* Decision and Order at 3-5.

As there is no case precedent on the facts presented in this case, we too look to the plain language of Section 14(j), *E.P. Paup Co.*, 999 F.2d at 1341, 27 BRBS at 41 (CRT), and we hold that the plain language of Section 14(j) does not require that a mistaken overpayment can be recouped only if it is voluntarily made prior to the entry of an award. Rather, the literal language of Section 14(j) merely requires that the payments of compensation be "advance payments." Within the context of Section 14 as a whole, the logical implication of this phrase is that in order for Section 14(j) to apply, a payment is considered to be in "advance" if it is made prior to the date it is "due" under Section 14(b).³ Because the carrier's cost-of-living payments in this case, although mistakenly made, were made before its payments of compensation were due, the payments are "advance payments of compensation" and employer is entitled to recoupment pursuant to Section 14(j) against subsequent payments due to claimant. Moreover, this interpretation satisfies the purpose

³Section 14(b) states

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

33 U.S.C. §914(b).

of Section 14(j) of the Act, as stated by the Fifth Circuit in *Phillips*, 877 F.2d at 1234, 22 BRBS at 86 (CRT).⁴

We, therefore, hold that an employer who is paying benefits pursuant to an award under the Act may credit excess payments it erroneously made under the provisions of a state workers' compensation statute pursuant to Section 14(j).⁵ Consequently, we reverse the administrative law judge's holding that the carrier's mistaken cost-of-living adjustments were not "advance payments of compensation" pursuant to Section 14(j) and hold that employer is entitled to credit these payments against subsequent payments due until the overpayment is recouped.⁶

⁴The administrative law judge in this case also found in favor of claimant based on equitable grounds, stating that "as between the innocent Claimant and the negligent Carrier, the balance of the equities must tip in favor of claimant." Decision and Order at 5. Contrary to the administrative law judge's equity finding in favor of claimant, however, claimant was not harmed by the carrier's action as she received compensation sooner than she should have under the terms of the award and she does not have to repay the amount of the overpayment. *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir.), cert. denied, 112 S.Ct. 3056 (1992); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992). Carrier is limited to suspending benefits until the overpayment is recovered.

⁵Granting the carrier a credit in this case also furthers the purpose of preventing double recoveries. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); see also *Blanchette v. OWCP*, 998 F.2d 109, 116, 27 BRBS 58, 71 (CRT)(2d Cir. 1993)("Whether by application of the credit doctrine or the rule of §914(j), employers are protected against double payments to an employee for an overall disability.").

⁶Since we base our decision on the plain language of Section 14(j), we need not address employer's challenge to the administrative law judge's findings pursuant to Section 3(e). Decision and Order at 5 n. 8.

Accordingly, the administrative law judge's Decision and Order denying employer a credit for its overpayment pursuant to Section 14(j) is reversed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge