TOPIC 14 PAYMENT OF COMPENSATION

14.1 PAYMENT OF COMPENSATION

Section 14(a) of the LHWCA provides:

> **(a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.**

33 U.S.C. § 914(a).

Section 14(a) does not require the employer to pay compensation pending a hearing on a controverted claim, therefore serving 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, 158 (CRT) (**W.D. Wash.** 1984), rev'd on other grounds, 771 F.2d 1335, 18 BRBS 1 (CRT) (**9th Cir.** 1985), cert. denied, 475 **U.S.** 1019 (1986).

Since this section requires that compensation be paid "directly to the person entitled thereto," the **Ninth Circuit** has found that it is error to direct an employer or carrier to reimburse a state directly for benefits previously paid under that state's workers' compensation law. E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 1351, 27 BRBS 41, 51 (CRT) (**9th Cir.** 1993). Instead, the employer or carrier must pay the claimant an amount equal to the state's payments and the claimant then must pay that amount to the state. Id. at 1351, 27 BRBS at 51-52.

Section 14(b) of the LHWCA provides:

> **(b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 12, 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).

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, 1137 (1981). Medical benefits are generally not considered to be compensation. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10, 16 (1988).

Section 14(c) of the LHWCA provides:

> **(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.**

33 U.S.C. § 914(c). The employer cannot convert post-disability wages to disability payments without giving the claimant prior notification. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 723, 21 BRBS 51, 59 (CRT) (**11th Cir.** 1988).

14.2 CONTROVERSION

14.2.1 Notice of Controversion

Section 14(d) sets out the procedure which the employer should follow in order to timely controvert the right to compensation. It provides:

> **(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a 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 upon which the right to compensation is controverted.**

33 U.S.C. § 914(d). In order to controvert the right to compensation, the employer 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 Agric. Co., 16 BRBS 205, 209 (1984).

The employer must file on or within the 14th day after it has knowledge of the **injury**, not knowledge of the **claim**. See Jaros v. National Steel Shipbuilding Co., 21 BRBS 26, 32 (1988) (date of injury, not date of claimant's termination, is relevant issue); Spencer, 16 BRBS at 209; Wall v. Huey Wall, Inc., 16 BRBS 340, 343 (1984); Miller v. Prolerized New England Co., 14 BRBS 811, 821 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (**1st Cir.** 1982); Davenport v. Apex Decorating Co., 13 BRBS 1029, 1041 (1981), overruled in part by Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142 (1985) (notice was not timely where it was filed in close proximity to time of filing of claim, but more than six years after injury).

A mistaken belief that a state, rather than the federal, act applies does not excuse the employer's requirement to file a notice of controversion. Burke v. San Leandro Boat Works, 14 BRBS 198, 203 (1981); Davenport, 13 BRBS at 1041 n.14. The employer must also file a notice of controversion where it terminates payments because the claimant files a Jones Act claim. Ramos v. Universal Dredging Corp., 15 BRBS 140, 145-46 (1982).

The **notice of controversion** must be given in accordance with the form prescribed by the Secretary and **must include** the following:

(1) A statement that the right to compensation is controverted:

(2) the name of the claimant;

(3) the name of the employer;

(4) the date of the alleged injury or death; and

(5) and the grounds for controversion.

See 33 U.S.C. § 914(d); Ingalls Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 1095, 23 BRBS 61, 67 (CRT) (**5th Cir.** 1990), rev'd on other grounds sub nom. Bath Iron Works Corp. v. Director, OWCP, 506 **U.S.** 153, 26 BRBS 151 (CRT) (1993) (must **specify** grounds for controversion).

The fact that the claimant and his attorney are aware of the employer's position does not affect the duty to file a notice of controversion as the Department of Labor must be notified. Rowe v. Western Pac. Dredging, 12 BRBS 427, 434 (1980), overruled in part by Vlasic v. American President Lines, 20 BRBS 188 (1987).

The Board has held that the **title of the document is not determinative** of whether the employer has complied with Section 14(d) and that if a document contains all of the information required by that section, it may be considered equivalent to a notice of controversion. Snowden v. Ingalls Shipbuilding, Inc., 25 BRBS 245, 249 (1991), aff'd on recon. en banc, 25 BRBS 346 (1992) (employer's first report of injury form inadequate because it does not explicitly state that right to compensation is controverted or provide specific reasons for controversion); White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 79 (1984), rev'g Garner v. Olin Corp., 11 BRBS 502 (1979) (notice of suspension of payments which includes all information required by Section 14(d) is functional equivalent of a notice of controversion); Spencer, 16 BRBS at 209 (employer's pre-hearing statement, which included all relevant information, constituted a notice of controversion).

The filing of an answer to a state compensation claim does not constitute a filing of a notice of controversion and does not excuse the employer's liability under the LHWCA. Moore v. Paycor, Inc., 11 BRBS 483, 492 (1979).

Where the employer does not make voluntary payments or file a notice of controversion as required by Section 14(d), the employer is liable for a 10 percent penalty assessment. See Section 14(e); White, 17 BRBS at 78. The employer's liability for the Section 14(e) penalty terminates with its filing of a notice of controversion. Scott v. Tug Mate, Inc., 22 BRBS 164, 169 (1989).

14.2.2 Failure to Controvert

Section 14(e) of the LHWCA provides:

> **(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such**

> **installment, unless notice is filed under subdivision (d) of this section, or unless 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.**

33 U.S.C. § 914(e). The Board has held that in order to escape Section 14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. Frisco v. Perini Corp., Marine Div., 14 BRBS 798, 800 (1981).

The purpose of Section 14(e) is to encourage the prompt payment of benefits, to ensure that claimants receive the full amount due, and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the Department of Labor's attention. Fairley v. Ingalls Shipbuilding, 22 BRBS 184, 192 (1989), aff'd in pert. part, Ingalls Shipbuilding v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT) (**5th Cir.** 1990); Grant v. Portland Stevedoring Co., 16 BRBS 267, 269 (1984), on recon., 17 BRBS 20 (1985).

This provision serves to notify the claimant and the Department of Labor that the employer disputes liability and will not pay without adversarial proceedings. Primc v. Todd Shipyards Corp., 12 BRBS 190, 196 (1980). A Section 14(e) assessment will therefore not be made where the employer timely controverts the claim, but the case ultimately results in an unfavorable disposition to the employer. Id.

The 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, 209 (1979).

All employers must timely controvert: the filing of a notice of controversion by one employer does not excuse another employer from filing its own such notice. Edwards v. Willamette Western Corp., 13 BRBS 800, 806 (1981). The Board has also held, however, that an employer's timely controversion precludes the Special Fund from becoming liable for any additional assessment of compensation under Section 14(e). Bingham v. General Dynamics Corp., 20 BRBS 198, 203 (1988); Brady v. Bethlehem Steel Corp., 13 BRBS 1044, 1048 (1981).

The Section 14(e) penalty applies only to "any installment of **compensation** not paid within 14 days." See 33 U.S.C. § 902(12) (emphasis added). The **penalty does not apply to accrued unpaid medical benefits**. Scott v. Tug Mate, Inc., 22 BRBS 164, 169 (1989). **Medical expenses and expert witness fees are also not subject to the assessment**. Collington v. Ira S. Bushey & Sons, 13 BRBS 768, 774 (1981).

The Board has held that the assessment of additional compensation under Section 14(e) is mandatory and may therefore be raised at any time. Scott, 22 BRBS at 168; McKee v. D.E. Foster Co., 14 BRBS 513, 517 (1981); Edwards, 13 BRBS at 806; Johnson v. C & P Tel., 13 BRBS 492,

497 (1981); McNeil v. Prolerized New England Co., 11 BRBS 576, 578 (1979), aff'd sub nom. Prolerized New England Co. v. Benefits Review Bd., 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, 448 (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, 959 (1978); Reed v. Sun Shipbuilding & Dry Dock Co., 4 BRBS 130, 134 (1976).

The Board has raised the issue *sua sponte*. See Boudreaux v. J. Ray McDermott & Co., 13 BRBS 992.1 (1981), rev'd on other grounds, 679 F.2d 452, 14 BRBS 940 (**5th Cir.** 1982); McNeil, 11 BRBS 576. The Board has also addressed the issue where it was raised by the Director on behalf of the claimant for the first time on appeal, Cooper v. Cooper Associates, 7 BRBS 853 (1978), aff'd in pert. part sub nom. Director, OWCP v. Cooper Associates, 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**, although stating that the Board has the discretion to raise the issue on its own motion, has taken issue with the Board's characterization of the Section 14(e) penalty as "mandatory," insofar as this term implies that notice need not be given to the employer prior to the assessment of the penalty: "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. v. Benefits Review Bd., 637 F.2d at 39. The court held, however, that lack of notice was not a problem in this case because the employer vigorously defended the administrative law judge's ruling on Section 14(e). Id. See Burke, 14 BRBS at 203.

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, 247 (**4th Cir.**), cert. denied, 439 **U.S.** 979 (1978). The Board has also held that an excuse from making payments or filing controversions must be "based on a showing that employer was prevented from making payments or filing notices because of circumstances beyond its control." Gulley v. Ingalls Shipbuilding, Inc., 22 BRBS 262, 266 (1989), 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 has declined to address an employer's contention that the judge erroneously awarded a Section 14(e) assessment where that employer failed to brief the issue in its appeal. Bonner v. Ryan-Walsh Stevedoring Co., 15 BRBS 321, 325 (1983).

The employer's **good faith is not relevant** to Section 14(e). Director, OWCP v. Cooper Assocs., Inc., 607 F.2d 1385, 1389, 10 BRBS 1058, 1063 (**D.C. Cir.** 1979); Browder v. Dillingham Ship Repair, 24 BRBS 216, 220, on recon., 25 BRBS 88 (1991). Cf. Universal Terminal & Stevedoring Corp. v. Parker, 587 F.2d 608, 612, 9 BRBS 326, 330 (**3d Cir.** 1978) (Section 14(e) penalty not due until controversy arises where employer who voluntarily pays compensation

suspends payments upon claimant's return to work and the parties decide in good faith to wait to determine the nature of the disability). The employer's **bad faith is also irrelevant**, as long as its controversion is timely. Denton v. Northrop Corp., 21 BRBS 37, 47-48 (1988) (Board affirmed ALJ's denial of Section 14(e) penalty against employer, despite employer's failure to act in good faith by delaying payments for over 4 years).

A belief that the LHWCA does not apply does not excuse the employer's responsibility to file a notice of controversion. Curtis v. Service Mach. Group, 20 BRBS 501, 518 (ALJ) (1987). Similarly, the employer's answer to the claimant's state claim does not constitute a controversion under the LHWCA. Maddon v. Western Asbestos Co., 23 BRBS 55, 60 (1989).

It is not necessary that the claimant show that prejudice resulted from the employer's late filing of the notice of controversion. Miller v. Prolerized New England Co., 14 BRBS 811, 822 n.15 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (**1st Cir.** 1982). Furthermore, a claimant may not waive his right to additional compensation under Section 14(e). Director, OWCP v. Cooper Assocs., 607 F.2d at 1389, 10 BRBS at 1062; McNeil, 11 BRBS at 578; Harris v. Marine Terminals Corp., 8 BRBS 712, 714 (1978).

No formal hearing is required prior to the assessment of additional compensation under Section 14(e), but the employer must be given the "opportunity to be heard" by submitting relevant evidence. Witthuhn v. Todd Shipyards Corp., 3 BRBS 146 (1976), aff'd, 596 F.2d 899, 10 BRBS 517 (**9th Cir.** 1979). See Prolerized New England Co., 637 F.2d at 30, 12 BRBS at 808.

Where there is 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 the hearing, the judge may not infer that there had been no filing of the notice of controversion. Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778, 783-84 (1981); Cooper v. John T. Clark & Son, Inc., 11 BRBS 453, 461 (1979), aff'd, 687 F.2d 39, 15 BRBS 5 (CRT) (**4th Cir.** 1982). See Rose v. George A. Fuller Co., 15 BRBS 195, 196-97 (1982).

The ALJ is responsible for 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 judge must ask the parties to submit all relevant evidence before making the appropriate findings. Tezeno, 13 BRBS at 784; see also Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980).

Where the issue of the Section 14(e) assessment has been raised on appeal and the record does not contain sufficient evidence to determine the amount to be assessed, the Board must remand the case to the ALJ to make the necessary determinations. DeRobertis v. Oceanic Container Serv., 14 BRBS 284, 289 (1981); Collington v. Ira S. Bushey & Sons, 13 BRBS 768, 772 (1981); Anderson v. Todd Shipyards, 13 BRBS 593, 597 (1981); De Noble v. Maritime Transp. Management, 12 BRBS 29, 32 (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, 524-25 (1977), overruled in part by Armor v. Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986). Section 14(e) also applies to payments falling under the schedule. Lonergan v. Ira S. Bushey & Sons, Inc., 11 BRBS 345, 347 (1979).

Although payments made under a state act do not excuse the failure to file a notice of controversion, where the employer makes payments and the claimant ultimately is awarded compensation in a greater amount under the LHWCA, the employer's liability under Section 14(e) is based solely on the difference. Spear v. General Dynamics Corp., 25 BRBS 132, 136-37 (1991); Dygert v. Manufacturer's Packaging Co., 10 BRBS 1036, 1046-47 (1979); Barton v. Kaiser Steel Corp., 2 BRBS 210, 212 (1975), overruled in part by Oho v. Castle & Cooke Terminals, 9 BRBS 989 (1979).

Where the employer pays some compensation voluntarily, fails to controvert the remainder, and the claimant ultimately is awarded compensation in an amount greater than that which the employer voluntarily paid, the employer's liability under Section 14(e) is based solely on the difference. National 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, 296 (1978).

14.3 ESTABLISHING LIABILITY

The **employer is liable** for the additional assessment under Section 14(e) **unless**:

(1) it pays compensation voluntarily;

(2) it timely controverts liability; or

(3) the deputy commissioner excuses the failure to pay compensation voluntarily upon a showing by the employer that, because of conditions beyond its control, it could not make timely payments.

14.3.1 Employer Knowledge

The employer's **knowledge of the claimant's injury triggers a duty to pay or controvert**. Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37, 39 (1991), aff'd sub nom. Ingalls Shipbuilding v. Director, OWCP, 976 F.2d 934, 26 BRBS 107 (CRT) (**5th Cir.** 1992). Section 14 requires that a controversion be filed within 14 days of the employer's awareness of the injury. 33 U.S.C. § 914(d); Maddon v. Western Asbestos Co., 23 BRBS 55, 59 (1989). The employer's knowledge of the claim is irrelevant. Benn, 25 BRBS at 39; Miller v. Prolerized New England Co., 14 BRBS 811, 821 (1981), aff'd, 691 F.2d 45, 15 BRBS 23 (CRT) (**1st Cir.** 1982); Pilkington v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 119, 126 (1981); O'Leary v. Southeast Stevedore Co., 3 BRBS 419, 420 (1976).

The Board recognized an **exception** to this rule in a case where the claimant developed asbestosis and continued to work: the employer had no reason to pay compensation or controvert until it was aware that a claim was being filed. Paul v. General Dynamics Corp., 13 BRBS 1073, 1076-77 (1981).

The determination of whether the employer has knowledge of the claimant's injury for the purposes of Section 14 is governed by the same criteria that apply under Section 12(d)(1). Pilkington, 14 BRBS at 126 (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 condition was work-related); Chiarella v. Bethlehem Steel Corp., 13 BRBS 91, 94 (1981) (employer had knowledge of 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 received injury at work and on day of injury, claimant informed foreman, who then gave him lighter work); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 475-76 (1978). An employer has knowledge if it knows of the injury and of such facts so that a reasonable man would consider that compensation liability was possible and that further investigation should be made. Pardee v. Army & Air Force Exch., 13 BRBS 1130, 1137 (1981); Willis v. Washington Metro. Area Transit Auth., 12 BRBS 18, 24 (1980).

Under current interpretations of Section 12(d)(1), the employer must know of the injury **and** that it is work-related. See Section 12(d)(1); Sun Shipbuilding & Dry Dock Co. v. Walker, 590 F.2d 73, 76, 9 BRBS 399, 403 (**3d Cir.** 1978) (employer had no knowledge where claimant received benefits under employer's accident and health insurance policy and claimant's doctor provided weekly certification that injury was not job-related). Contra Director, OWCP v. Cooper Assocs., 607 F.2d 1385, 1390, 10 BRBS 1058, 1064 (**D.C. Cir.** 1979) (employer needs knowledge of the injury and not knowledge that the injury was work-related).

It is the duty of the trier of fact to determine when the employer had knowledge. Maddon v. Western Asbestos Co., 23 BRBS 55, 60 (1989) (Board instructed ALJ, on remand, to determine employer's exact dates of awareness of claimant's injury and death, so that Section 14(e) penalty may be imposed); Davenport v. Apex Decorating Co., 13 BRBS 1029, 1041 (1981), overruled in part by Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142 (1985); Pilkington, 9 BRBS at 476. See Pardee, 13 BRBS at 1137 (where ALJ made no finding as to whether employer had knowledge, his Section 14(e) finding had to be vacated). An employer does not have knowledge of an injury for purposes of Section 14(e) until it knows of the full extent of the injury on which the claim is based. See Mowl v. Ingalls Shipyard, Inc., 32 BRBS 51 (1998).

The Board has held that the employer's knowledge under Section 14(b) is imputed to the carrier. Cooper v. Cooper Assocs., 7 BRBS 853, 866 (1978), aff'd in part, rev'd in part sub nom. Director, OWCP v. Cooper Assocs., 607 F.2d 1385, 10 BRBS 1058 (**D.C. Cir.** 1979). The **District of Columbia Circuit** affirmed on other grounds, noting that it would seriously consider making an exception to Section 35 where the interests of the employer and its carrier differed. Id. at 1389, 10 BRBS at 1063.

14.3.2 Period of Assessment

Where the employer fails to file a notice of controversion, its liability under Section 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed." National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1295 (**9th Cir.** 1979); Hearndon v. Ingalls Shipbuilding, Inc., 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).

A notice of controversion or informal conference will provide the Department of Labor with the requisite knowledge: liability for the Section 14(e) penalty ceases on the date of the filing of the notice of controversion or on the date of the informal conference, whichever comes first. National Steel & Shipbuilding Co. v. U.S. Dep't of Labor, 606 F.2d 875, 880, 11 BRBS 68, 71 (**9th Cir.** 1979), aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co., 5 BRBS 794 (1977) ("[F]or 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."); Browder v. Dillingham Ship Repair, 24 BRBS 216, 220, on recon., 25 BRBS 88 (1991) (employer liable for Section 14(e) penalty, applicable from time of injury until date of informal conference).

See Spear v. General Dynamics Corp., 25 BRBS 132, 136-37 (1991) (penalty assessed on difference between what employer paid under state act and what was due under the LHWCA from commencement of state payments until filing of notice of controversion under the LHWCA); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 347 (1988); Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987) (assessment due only on compensation installments due prior to date employer filed notice of controversion); Harris v. Lambert's Point Docks, 15 BRBS 33, 36 (1982), aff'd, 718 F.2d 644, 16 BRBS 1 (CRT) (**4th Cir.** 1983); Oho v. Castle & Cooke Terminals, 9 BRBS 989, 992 (1979); Sarafian v. Bethlehem Hingham Hospital, 21 BRBS 73, 90 (ALJ) (1988).

The period of assessment commences 14 days after the controversy arose. Harrison, 21 BRBS at 347; Ivory v. John W. McGrath Corp., 13 BRBS 78, 80 (1981); Cummins v. Todd Shipyards Corp., 12 BRBS 283, 289-90 (1980); De Noble v. Maritime Transp. Management, 12 BRBS 29, 32 (1980). In DeRobertis v. Oceanic Container Service, 14 BRBS 284 (1981), the Board noted that under Section 14(b) the first payment of compensation is **due** within 14 days after the employer has knowledge of the injury, but that under Section 14(e) if the notice of controversion is not timely filed, the 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)**. Id. at 289 n.7; Frisco v. Perini Corp., Marine Div., 14 BRBS 798, 801 n.3 (1981).

The penalty attaches to all payments which are "due and unpaid" at the time liability ceases. Pullin v. Ingalls Shipbuilding, 27 BRBS 45, 46 (1993). See also Rose v. George A. Fuller Co., 15 BRBS 195, 196 (1982) (where ALJ assessed 14(e) penalty against **all** benefits to which claimant was entitled, Board remanded for ALJ to redetermine proper period of assessment). The size of the installment that is due is irrelevant. Kocienda v. General Dynamics Corp., 21 BRBS 320, 322 (1988) (claimant entitled to penalty on entire hearing loss award because entire award due at time of employer's controversion).

14.3.3 Voluntary Payments

A notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is voluntarily paid. Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980). The employer should pay the compensation it considers due and controvert the remainder. Alston v. United Brands Co., 5 BRBS 600, 607 (1977).

If the employer fails to controvert the disputed portion, a Section 14(e) penalty may be assessed against that amount. Browder v. Dillingham Ship Repair, 25 BRBS 88, 90-91 (1991); Morgan v. Nacirema Operating Co., 20 BRBS 252, 262-63 (ALJ) (1987) (where employer paid part of compensation due claimant, did not pay or controvert remainder, and claimant's award based on amount greater than what employer paid, claimant was entitled to Section 14(e) assessment).

Generally, where an employer pays compensation voluntarily within 14 days after it becomes due but subsequently suspends the payments, it will be liable for additional compensation under Section 14(e) unless it files a notice of controversion within 14 days after a controversy arises between the parties. See Ramos v. Universal Dredging Corp., 15 BRBS 140, 145 (1982).

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), however, the employer voluntarily paid compensation until the claimant returned to work, at which time it filed a Section 14(g) notice of termination of payments. Eight months later, the claimant filed a claim for permanent partial disability. The Board held that the claimant was entitled automatically to a Section 14(e) penalty because the employer did not file a notice of controversion within 14 days of suspending compensation, regardless of the fact that a dispute did not exist at the time of suspension of payments.

The **Third Circuit** reversed, holding that the Board's decision runs afoul of the LHWCA's policy of encouraging the payment of compensation without litigation. Id. at 610-11, 9 BRBS at 328-29. 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, the parties reach agreement without the need for formal adjudication. Id. at 611, 9 BRBS at 329. See also Ivory v. John W. McGrath Corp., 13 BRBS 78, 80 (1981).

The Board has adopted the **Third Circuit's** reasoning. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). The Board requires, however, that the employer file a notice of controversion within 14 days after a controversy between the parties arises, in order to avoid liability under Section 14(e). Id. at 662. The Board therefore remanded Devillier to the judge for a finding as to when the controversy between the parties arose. Id. at 663. See Garner v. Olin Corp., 11 BRBS 502, 505 (1979), overruled in part by White v. Rock Creek Ginger Ale Co., 17 BRBS 75 (1985). See also Lozupone v. Stephano Lozupone & Sons, 12 BRBS 148, 159-60 (1979); De Noble v. Maritime Transp. Management, 12 BRBS 29, 32 (1980); Pernell v. Capitol Hill Masonry, 11 BRBS 532, 538-39 (1979); Caraballo v. Northeast Marine Terminal Co., 11 BRBS 514, 516-17 (1979); Keeney v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 224, 230 (1979).

The Board has rejected the argument that there is no controversy until a claim is filed. Spencer v. Baker Agric. Co., 16 BRBS 205, 208-09 (1984). An **exception** to this holding was recognized in Paul v. General Dynamics Corp., 13 BRBS 1073 (1981), where the claimant developed asbestosis from asbestos exposure at work but continued to work until the time of the hearing. The Board held that because the claimant was working, the employer had no reason to file a notice of controversion until a controversy arose which, under the facts of the case, did not occur until the employer was aware that a notice of claim was being filed. Id. at 1077. See also Devillier, 10 BRBS at 662; Gilmore v. Alabama Dry Dock & Shipbuilding Co., 9 BRBS 861, 864-65 (1979).

The Board has also held that it was not error to assess a penalty where the claimant returned to work and was fired, as the employer should have been aware of a controversy when the claimant

was dismissed. Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74, 76 (1986), vac'd, No. 86-1199 (**D.C. Cir.** 1987).

In scheduled injury cases, where the 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 until 14 days after the employer first gains knowledge of the permanency of the claimant's condition and/or the extent of his impairment. DeRobertis v. Oceanic Container Serv., 14 BRBS 284, 289 (1981); Sankey v. Sun Shipbuilding & Dry Dock Co., 14 BRBS 272, 274 (1981); Collington v. Ira S. Bushey & Sons, 13 BRBS 768, 773 (1981). See also McKee v. D.E. Foster Co., 14 BRBS 513, 518 (1981); Welding v. Bath Iron Works Corp., 13 BRBS 812, 824-25 (1981).

Where the employer unilaterally suspends its voluntary payment of benefits, a controversy arises between the parties on the date of the employer's unilateral suspension. Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339, 347 (1988); Garner v. Olin Corp., 11 BRBS 502, 506 (1979), overruled in part by White v. Rock Creek Ginger Ale Co., 17 BRBS 75 (1985). See also Olson v. Healy Tibbits Constr. Co., 22 BRBS 221, 224-25 (1989) (claimant's Section 14(e) request denied where record failed to indicate date upon which employer ceased making voluntary payments of compensation); Tezeno v. Consolidated Aluminum Corp., 13 BRBS 778, 783 (1981); Daniele v. Bromfield Corp., 11 BRBS 801, 806-07 (1980).

A controversy also exists where the employer reduces voluntary payments. National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1294-95 (**9th Cir.** 1979), remanding in pert. part 5 BRBS 290 (1977); Harrison, 21 BRBS at 347. Additionally, where the employer terminated voluntary payments when the claimant filed for benefits under the Jones Act, it should have filed a notice of controversion. Ramos v. Universal Dredging Corp., 15 BRBS 140, 145-46 (1982).

Where the employer fails to increase the claimant's compensation as provided for in Section 6(b)(1), a controversy exists and the employer is liable for an assessment of additional compensation pursuant to Section 14(e). West v. Washington Metro. Area Transit Auth., 21 BRBS 125, 128 (1988) (employer liable for Section 14(e) assessment based on difference between amount of temporary total disability compensation it has voluntarily paid and amount for which it is liable under Section 6(b)(1)). The claimant need not protest the employer's failure to increase compensation in order to be entitled to the additional assessment. Dews v. Intercounty Assocs., 14 BRBS 1031, 1035 (1982).

A claimant's request for additional compensation based on a higher average weekly wage followed by the employer's refusal to pay constitutes a controversy for purposes of Section 14, and the 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). Browder, 25 BRBS at 90-91; Anderson v. Todd Shipyards, 13 BRBS 593, 597 (1981).

14.4 COMPENSATION PAID UNDER AWARD

Section 14(f) of the LHWCA provides:

> **(f) 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 staying payments has been issued by the Board or court.**

33 U.S.C. § 914(f). The purpose of this Section is to "ensure that all benefits intended to make claimant 'whole' will be promptly paid by employer." Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 112-13 (1991).

The application of the **Section 14(f) assessment is mandatory** and leaves the deputy commissioner without any discretion as to whether to assess it. Matthews v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 440, 442 (1989) (Section 14(f) penalty not excused where employer made good faith attempt to pay claimant in timely manner but sent check to wrong address); Lawson v. Atlantic & Gulf Stevedores, 9 BRBS 855, 860 (1979). The assessment may not be waived by implied agreement. Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1221, 18 BRBS 60, 65 (CRT) (**5th Cir.** 1985).

An award "becomes due" under Section 14(f) when it is filed in the deputy commissioner's office. McCrady v. Stevedoring Servs. of America, 23 BRBS 106, 110 (1989); Lynn v. Comet Constr. Co., 20 BRBS 72, 73 (1986); Durham v. Embassy Dairy, 19 BRBS 105, 109 (1986) (LHWCA only requires that compensation order be filed with deputy commissioner and copies sent to last known address of claimant and employer--time not extended because order mailed to incorrect address); Johnson v. Diamond M. Co., 14 BRBS 694, 696 (1982); Seward v. Marine Maintenance of Texas, Inc., 13 BRBS 500, 502 (1981); McKamie v. Transworld Drilling Co., 7 BRBS 315, 319 (1977).

In Quave v. Progress Marine, 24 BRBS 43 (CRT) (**5th Cir.** 1990), the **Fifth Circuit** held that the district court's determination that Federal Rule of Civil Procedure 6(a) governs the timeliness of the employer's payment to the claimant was proper. Therefore, there was not a Section 14(f) penalty where the claimant received payment more than 10 days after it was due since the payment was timely if weekends were excluded.

In Pleasant-El v. Oil Recovery Company, Inc., 148 F.3d 1300 (**11th Cir.** 1998), the **Eleventh Circuit** held that the plain meaning of Section 14(f) is that a compensation award must be paid within 10 calendar days after it becomes due. Thus, the **Eleventh Circuit** joins with the **First** and

Fourth Circuits as well as the Board, leaving only the **Fifth Circuit** on record as holding that the 10 day period should be 10 business days.

The **Ninth Circuit** has held that under Section 19(e) of the LHWCA and pertinent regulations, service on the parties must be effected before a compensation order is deemed "filed." Nealon v. California Stevedoring & Ballast Co., 996 F.2d 966, 27 BRBS 31 (CRT) (**9th Cir.** 1993). Citing Jeffboat, Inc. v. Mann, 875 F.2d 660 (**7th Cir.** 1989), and Insurance Co. of North America v. Gee, 702 F.2d 411 (**2d Cir.** 1983), the **Ninth Circuit** noted that the law of the circuits is uniform. "There is no case that even suggests that the Longshore Act does not require service on the claimant and the employer as part of 'filing.' ... Jeffboat and Gee assume that such service is required." Nealon, 996 F.2d at 971, 27 BRBS at 36 (CRT).

[ED. NOTE:** Although the **Ninth Circuit** in Nealon was specifically addressing service as per Section 19(e), it is highly unlikely that the court would draw a distinction between service for purposes of Section 14 and Section 19(e).**]

In the case of a Benefits Review Board decision, the 10-day period begins to run on the date the Board's decision is filed as part of the record with the Clerk of the Board. Caldwell v. Oceanic Container Serv., 15 BRBS 456, 458 (1983). A timely motion for reconsideration of an administrative law judge's order will **not** toll the 10-day period for paying benefits contained in Section 14(f). Jennings v. Sea-Land Serv., 23 BRBS 312, 315 (1990), on recon., vac'g 23 BRBS 12; McCrady, 23 BRBS at 110.

The **Fifth Circuit** holds that Rule 6(e) does not apply to a determination of timeliness under Section 14(f) because Section 14(f) requires action within 10 days of **filing**, not within 10 days of **service**. Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1220, 18 BRBS 60, 63 (CRT) (**5th Cir.** 1985); Lynn v. Comet Constr. Co., 20 BRBS 72, 74 (1986). But see Quave v. Progress Marine, 912 F.2d 798, 800, 24 BRBS 43, 45 (CRT), on reh'g, 918 F.2d 33, 24 BRBS 55 (CRT) (**5th Cir.** 1990), cert. denied, 500 **U.S.** 916 (1991) (FRCP 6(a) governs timeliness of employer's payment to claimant: no Section 14(f) penalty where claimant received payment more than 10 days after it was due, since payment was timely if weekends were excluded).

Furthermore, **neither equitable considerations nor agreement by the claimant as to method of delivery of payment are relevant**.

The only relevant factors are:

(1) the date payment was due;

(2) whether 10 days elapsed; and

(3) calculation of the 20 percent penalty.

Lauzon, 782 F.2d at 1222, 18 BRBS at 66; Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1385, 17 BRBS 135, 137 (CRT) (**9th Cir.** 1985).

The Board has acknowledged that it has followed Lauzon, both within and outside the **Fifth Circuit**. Barry v. Sea-Land Services, Inc., 27 BRBS 260, 263 (1993); see Matthews v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 440 (CRT) (**4th Cir.** 1989); Lynn, 20 BRBS 72 (CRT) (**5th Cir.** 1986). The Board now holds that where notice of filing is given by mail, three days will not be added to the prescribed 10-day period. Barry, 27 BRBS 260. Johnson, 14 BRBS 694 (1982) is no longer controlling precedent.

[ED. NOTE:** In Barry, the Board specifically noted that without deciding whether Rule 6(a) is applicable, that the **common-law rule on the time of payment**, long-recognized by the Board, would be controlling. The common-law 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. Barry, 27 BRBS at 264; Matthews, 22 BRBS at 442; McKamie v. Transworld Drilling Co., 7 BRBS 315, 319 (1977).**]

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 at 502; McKamie, 7 BRBS at 319.

Once an award of compensation has been entered, the employer remains obligated to comply with the terms of that award until a further order alters that obligation or until the claim is formally closed. Richardson v. General Dynamics Corp., 19 BRBS 48, 50 (1986). Hence, where an employer pays compensation under the terms of an award but suspends payments on the recommendation of a claims examiner prior to the issuance of a new compensation order pursuant to Section 22, it does so at the risk of incurring liability for an additional assessment under Section 14(f). Id. See Shoemaker v. Schiavone & Sons, Inc., 20 BRBS 214, 218 (1988) (vacated penalty where claimant waited 15 months to institute proceedings or obtain compensation and imposition of Section 14(f) penalty would require employer to pay for claimant's delay).

Section 14(f) requests must first be directed to and considered by the deputy commissioner (district director). Sinclair v. United Food & Commercial Workers, 23 BRBS 148, 157 (1989); Lindenberg v. I.T.O. Corp. of Baltimore, 19 BRBS 233, 234 (1987). Where a Section 14(f) request is not first made with the deputy commissioner, no relief can be granted. See id.; Quintana v. Crescent Wharf & Warehouse Co., 18 BRBS 254, 258 (1986). See Miller v. Central Dispatch, 16 BRBS 64 (1984) (Board held Section 14(f) request inappropriately raised for first time on appeal); Lobue v. Army & Air Force Exch. Serv., 15 BRBS 407, 410 (1983); Miranda v Excavation Constr., 13 BRBS 882, 887-88 (1981).

Once a request for a Section 14(e) penalty is made, the deputy commissioner must investigate that request. If he finds that the employer has defaulted by not paying benefits within 10 days, he enters a Supplemental Order declaring default. The Board lacks jurisdiction to review such orders,

as **default orders must be reviewed by a district court in enforcement proceedings under Section 18**. Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT) (**5th Cir.** 1983), rev'g 15 BRBS 65 (1981). See Severin v. Exxon Corp., 910 F.2d 286, 289, 24 BRBS 21, 23 (CRT) (**5th Cir.** 1990); Lauzon, 782 F.2d at 1219 n.2, 18 BRBS at 61 n.2 (CRT); Providence Wash. Ins. Co., 765 F.2d at 1386, 17 BRBS at 138 (CRT).

The Board retains jurisdiction over cases which involve only a question of law regarding the propriety of a Section 14(f) penalty and do not require a Section 18 enforcement of that penalty. McCrady v. Stevedoring Servs. of America, 23 BRBS 106, 108 (1989); Jennings v. Sea-Land Serv., 23 BRBS 12, 18 (1989), vac'd on other grounds, 23 BRBS 312 (1990). Where no default order is outstanding, the enforcement proceedings of Section 18 cannot apply. See Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74, 77-78 (1986), vac'd, No. 86-1199 (**D.C. Cir.** 1987) (employer paid all compensation due, including the Section 14(f) assessment).

If Section 18 does not apply and a **dispute as to the facts** arises, the matter must be referred to the Office of Administrative Law Judges. Patterson, 15 BRBS at 68. If **only legal issues** regarding the application and interpretation of the LHWCA are raised, a direct appeal may be filed with the Benefits Review Board. See id.; Lawson, 9 BRBS at 858.

The Special Fund may be held liable for a Section 14(f) assessment. Lawson, 9 BRBS at 859. The Board has held, however, that, under certain circumstances, it would be unjust to order the Special Fund to pay the penalty. In Davenport v. Apex Decorating Co., 13 BRBS 1029 (1981), the original Decision and Order ordered the employer to pay compensation. The Director had no knowledge of the Special Fund's obligation to pay until the administrative law judge issued an order granting the employer's petition for reconsideration. The Board held that it was unfair for the administrative law judge to find the Special Fund liable for the additional Section 14(f) assessment. Id. at 1041.

The Section 14(f) assessment applies not only to awards made by administrative law judges and deputy commissioners, see McKamie, 7 BRBS 315, but also to approved settlement agreements. Patterson, 15 BRBS at 67; Seward v. Marine Maintenance of Texas, Inc., 13 BRBS 500, 502 (1981). A settlement agreement which discharges the employer from any future liability does not relieve it of liability for an additional assessment under Section 14(f) nor does the claimant's executed "satisfaction of award" bar the assessment. Patterson, 15 BRBS at 69.

The amount due under Section 14(f) cannot be determined until the correct amount of compensation ultimately due is determined. Severin, 910 F.2d at 289, 24 BRBS at 23 (CRT); Lawson v. Atlantic & Grain Stevedores Co., 12 BRBS 767, 769 (1980). See also Simpson v. Seatrain Terminal, 15 BRBS 187, 192 (1982).

An assessment may not be made against the late payment of attorney's fees because attorney's fees are not compensation. Wells v. Int'l Great Lakes Shipping Co., 14 BRBS 868, 871 (1982). A Section 14(f) assessment may not be made against medical benefits that were timely paid because

such benefits are generally not considered to be compensation. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10, 16 (1988). Overdue interest payments, however, are "compensation" for purposes of Section 14(f). Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 112-13 (1991).

14.5 EMPLOYER CREDIT FOR PRIOR PAYMENTS

Section 14(k) of the 1972 LHWCA was changed to Section 14(j) by the 1984 Amendments. Pub. L. No. 98-426, 98 Stat. 1639, 1649, § 13(b). Section 14(j) of the LHWCA provides:

> **(j) 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 purpose of Section 14(j) is to reimburse an employer for the amount of its **advance** payments, where these payments were too generous, for however long it takes, out of **unpaid** compensation found to be due. Stevedoring Servs. of America v. Eggert, 953 F.2d 552, 556, 25 BRBS 92, 97 (CRT) (**9th Cir.**), cert. denied, 505 **U.S.** 1230 (1992); Tibbetts v. Bath Iron Works Corp., 10 BRBS 245, 249 (1979); Nichols v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 710, 712 (1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). **Section 14(j) does not, however, establish a right of repayment or recoupment for an alleged overpayment of compensation.** Ceres Gulf v. Cooper, 957 F.2d 1199, 1208, 25 BRBS 125, 132 (CRT) (**5th Cir.** 1992); Eggert, 953 F.2d at 557, 25 BRBS at 97 (CRT); Vitola v. Navy Resale & Servs. Support Office, 26 BRBS 88, 97 (1992).

Section 14(j) allows the employer a **credit for its prior payments** of compensation against any compensation subsequently found due. Balzer v. General Dynamics Corp., 22 BRBS 447, 451 (1989), on recon., aff'd, 23 BRBS 241 (1990); Mason v. Baltimore Stevedoring Co., 22 BRBS 413, 415 (1989); Mijangos v. Avondale Shipyards, 19 BRBS 15, 21 (1986), rev'd on other grounds, 948 F.2d 941, 25 BRBS 78 (CRT) (**5th Cir.** 1991). If the employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 14(j). Mijangos, 19 BRBS at 21.

Where the 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), the employer is entitled to a credit for its voluntary payments. Scott v. Transworld Airlines, 5 BRBS 141, 145 (1976). The 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, 147 (1979), overruled in part by Potomac Elec. Power Co. v. Director, OWCP, 449 **U.S.** 268, 14 BRBS 363 (1980).

Where a claimant filed claims against four potentially responsible employers, and subsequently settled with three of the potentially responsible employers pursuant to Section 8(i), the remaining employer was warranted to a credit pursuant to Section 14(j). See Alexander v. Triple A Machine Shop, 32 BRBS 40 (1998).

The employer is also entitled to a credit for payments made under a state compensation act. Garcia v. National Steel & Shipbuilding Co., 21 BRBS 314, 317 (1988); Ferch v. Todd Shipyards Corp., 8 BRBS 316, 319 (1978); Adams v. Parr Richmond Terminal Co., 2 BRBS 303, 305 (1975). See also Lustig v. Todd Shipyards Corp., 20 BRBS 207, 212 (1988), aff'd in part, rev'd in part, Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (**9th Cir.** 1989) (employer entitled to credit for proceeds of state workers' compensation settlement but **not** attorney fees or medical liens paid under state workers' compensation act).

When an employer is entitled to credit for overpayment to one child (i.e. child had reached 23rd birthday), employer may apply credit against future compensation owed to another sibling (who is still a minor). Brad Valdez and Joshua Valdez (Children of Manuel Valdez, Jr.) v. Crosby & Overton, 34 BRBS 69 (2001). In Valdez, the Board reasoned that because Section 9(b) allows for payment of one death benefit to a spouse including additional compensation for surviving children, the compensation owed to one sibling was subsequent compensation due under the same award as that paid to the other sibling.

An employer, however, is not entitled to an offset or Section 14(j) credit of any overpayment of benefits it made on behalf of decedent against benefits it owes a decedent's widow. Liuzza v. Cooper/T. Smith Stevedoring Co., 35 BRBS 112 (2001). In Liuzza, the Board looked to the separate nature of disability and death benefits discussed in the LHWCA's other credit provisions for the proposition that overpayments of disability compensation can be offset only against disability compensation due and overpayments of compensation for death can be offset only against death benefits due.

The employer is not entitled to 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, 1137 (1981). Because **medical expenses** are not "compensation," advance payments of compensation may not be credited against awarded medical expenses. Aurelio v. Louisiana Stevedores, 22 BRBS 418, 423 (1989), aff'd mem., No. 90-4135 (**5th Cir.** 1991). **Interest** is also not "compensation" for Section 14(j) purposes. Castronova v. General Dynamics Corp., 20 BRBS 139, 141 (1987). See also Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 112 (1991) (holding that interest is not compensation furthers goal of fully compensating claimant by not allowing employer an offset for its overpayments of disability compensation against interest awarded by ALJ).

An award of **attorney's fees** is also not considered "compensation" under Section 14(j), and therefore any overpayment which the employer made to the claimant should not be deducted from the claimant's attorney's award of attorney's fees. Guidry v. Booker Drilling Co., 901 F.2d 485, 487, 23 BRBS 82, 84 (CRT) (**5th Cir.** 1990).

The employer is not entitled to a credit for payments made by a non-occupational sickness and accident carrier, because the employer is not entitled to receive credit for money it never paid.

Mijangos, 19 BRBS at 21; Jacomino v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 680, 684 (1979); Pilkington v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 473, 480-481 (1978).

An employer is not entitled to reduce its liability for compensation due as a result of a subsequent work-related injury by crediting an overpayment of compensation made as a result of a prior, unrelated work injury. Vinson v. Newport News Shipbuilding & Dry Dock Co., 27 BRBS 220 (1993). In Vinson, the Board noted that this was an issue of first impression and therefore, it looked to the statute for guidance. The Board found that the plain language of Section 14 references a single compensation injury. Vinson at 223. As Section 14 references a single work injury, it would not be logical to interpret Section 14(j) as allowing an overpayment of compensation for one injury to be credited against compensation due on a subsequent, unrelated injury.

Additionally the Board noted that in Vinson, the employer's voluntary payments of compensation to the claimant in 1989 cannot rationally be deemed as "advance" payments of compensation for the claimant's 1990 injury, which had yet to occur.

The employer is, however, entitled to reimbursement for an overpayment where the Special Fund is now making payments. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 512, 23 BRBS 40, 50 (CRT) (**2d Cir.** 1990); Phillips v. Maine Concrete Structures, 877 F.2d 1231, 1234, 22 BRBS 83, 86-87 (CRT) (**5th Cir.** 1989), on reh'g, en banc, 895 F.2d 1033 (**5th Cir.** 1990) (Section 14(j) allows employer/carrier that has made overpayment but is no longer liable for any future payments to be reimbursed from payments made by third party); Balzer v. General Dynamics Corp., 23 BRBS 241, 243 (1990); Krotsis v. General Dynamics Corp., 22 BRBS 128, 131 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT) (**2d Cir.** 1990).

In Flynn v. John T. Clark & Sons, 30 BRBS 73 (1996), the Board held that an employer who is paying benefits pursuant to an award under the LHWCA may credit excess payments it erroneously made under the provisions of a state workers' compensation statute pursuant to Section 14(j). Citing Phillips, the Board held:

> [T]he 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).

In Flynn, the carrier's cost-of-living payments, although mistakenly made, were made before its payments of compensation were due, the payments are "advance payments of compensation" and the employer was entitled to recoupment pursuant to Section 14(j) against subsequent payments due to the claimant.

The Board, first stated in Phillips, and re-stated in Flynn the purpose of Section 14(j):

> 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... .**

Phillips, 877 F.2d at 1234, 22 BRBS at 86 (CRT)(Emphasis added.).

The carrier puts itself in the place of the employer and its credit rights are derivative of the employer's. Wade v. Gulf Stevedore Corp., 12 BRBS 475, 476-77 n.1 (1980). The claimant in Wade 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. In a claim against Dixie, the judge awarded the claimant compensation that was less than the voluntary payments made by Dixie. In a second claim, the judge awarded the claimant compensation against Gulf, but then 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 judge erred in giving Gulf a credit for Dixie's overpayment. It 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. Because Gulf had no right to offset its liability by an overpayment made to Dixie, its carrier had no right to an offset. Id. See also Melson v. United Brands Co., 6 BRBS 503, 512 (1977), aff'd sub nom. United Brands Co. v. Melson, 594 F.2d 1068, 10 BRBS 494 (**5th Cir.** 1979).

Where the employer continues the claimant's regular salary during the claimant's period of disability, the employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 723, 21 BRBS 51, 59 (CRT) (**11th Cir.** 1988); Van Dyke v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 388, 396 (1978); McIntosh v. Parkhill-Goodloe Co., 4 BRBS 3, 11 (1976), aff'd mem., 550 F.2d 1283 (**5th Cir.** 1977), cert. denied, 434 **U.S.** 1033 (1978); Luker v. Ingalls Shipbuilding, Inc., 3 BRBS 321, 326 (1976). But see White v. Bath Iron Works Corp., 7 BRBS 86, 93 (1977), aff'd, 584 F.2d 569, 8 BRBS 818 (**1st Cir.** 1978) (where employer transfers claimant from position in which disability was incurred to different work of lower pay scale but continues to pay him at higher scale of position from which it transferred him, employer may be entitled to credit difference in pay against its liability for compensation if it can establish that it intended the extra pay to be compensation).

This rule (where employer must show that payments were intended as advance payments of compensation) also applies where the employer continues the claimant's salary under a formal salary continuance plan. Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 282, 286 (1984), aff'd, 776 F.2d 1225, 18 BRBS 12 (CRT) (**4th Cir.** 1985); Jones v. Chesapeake & Potomac

Tel. Co., 11 BRBS 7, 8-9 (1979), aff'd sub nom. Chesapeake & Potomac Tel. Co. v. Director, OWCP, 615 F.2d 1368 (**D.C. Cir.** 1980); Breen v. Olympic Steamship Co., 10 BRBS 334, 336 (1979). The employer may not receive credit under Section 14(j) for wages received by the claimant from another employer. See Carter v. General Elevator Co., 14 BRBS 90, 98 n.1 (1981).

In Seaco v. Richardson, 136 F.3d 1290 (**11th Cir.** 1998), the **Eleventh Circuit** denied the employer's request for a credit under Section 8(e). The court found that container royalty payments and holiday/vacation payments do not constitute "advance payments of compensation" under Section 14(j) and do not represent post-injury wage-earning capacity under Section 8(h). The fact that the claimant and other longshoremen are able to "earn" these payments, regardless of whether they are disabled "belies a finding that these payments were intended as advance payments of compensation."

14.6 MISCELLANEOUS PROVISIONS

14.6.1 Final Payment of Compensation

Section 14(g) addresses the employer's obligations after the final payment of compensation to the claimant has been made. This section provides:

> **(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.**

33 U.S.C. § 914(g).

14.6.2 District Director's Role

Sections 14(h) and 14(i) address the role of the District Director (formerly referred to as the "Deputy Commissioner"). Section 14(h) of the LHWCA provides:

> **(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.**

33 U.S.C. § 914(h). See Ocean Accident & Guarantee Corp. v. Lawson, 135 F.2d 865, 866 (**5th Cir.** 1943) (Section 14(h), which authorizes deputy commissioner to make investigation on own initiative, must be construed in connection with Section 13(a), which bars claims not filed within one year after injury); Calicutt v. Sheppard Air Force Base Billeting Fund, 16 BRBS 111, 113 (1984) (deputy commissioner did not violate Section 14(h) where he investigated the claim but declined to order claimant to undergo rehabilitation evaluation).

Section 14(i) vests the deputy commissioner with the authority to require the employer to secure the payment of benefits. This section provides:

> **(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.**

33 U.S.C. § 914(i).

14.6.3 Commutation of Benefits

Under the LHWCA as amended in 1972, Section 14(j) provided that, if the deputy commissioner determined it was in the interest of justice, he, 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) (amended 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 applies to cases pending on that date pursuant to Section 28(b) of the Amendments. Smith v. Director, OWCP, 17 BRBS 89, 91 (1985). Accordingly, the Board vacated the deputy commissioner's order commuting the claimant's benefits to a lump sum, even though the deputy commissioner's action was valid when ordered, where the repeal of Section 14(j) was effective while the case was pending at the Board. See id.; Thompson v. Todd Pac. Shipyards Corp., 17 BRBS 246, 248 (1985).

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

14.6.4 Ceiling on Payments

Section 14(m), which was repealed in 1972, placed a $24,000 ceiling on temporary total, temporary partial, and permanent partial disability payments. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1254, § 5(e).

Several circuits and the Board have held that the pre-Amendment ceiling on payments is 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. See Argonaut Ins. Co. v. Director, OWCP, 646 F.2d 710, 711-12, 13 BRBS 297, 300 (**1st Cir.** 1981); Davis v. U.S. Dep't of Labor, 646 F.2d 609, 612 (**D.C. Cir.** 1980), rev'g 9 BRBS 127 (1978); Hastings v. Earth Satellite Corp., 628 F.2d 85, 94, 14 BRBS 345, 353 (**D.C. Cir.**), cert. denied, 449 **U.S.** 905 (1980); Avondale Shipyards v.

Vinson, 623 F.2d 1117, 1122, 12 BRBS 478, 481 (**5th Cir.** 1980); Simpson v. Bath Iron Works Corp., 22 BRBS 25, 30-31 (1989); O'Berry v. Jacksonville Shipyards, 21 BRBS 355, 360 (1988), overruled in part by Estate of Cowart v. Nicklos Drilling Co., 505 **U.S.** 469 (1992); Smith v. American Univ., 14 BRBS 875, 880 (1982); Morgan v. Marine Corps Exch., 14 BRBS 784, 792 (1982), aff'd sub nom. Marine Corps Exch. v. Director, OWCP, 718 F.2d 1111 (**9th Cir.** 1983), cert. denied, 465 **U.S.** 1012 (1984).