

TOPIC 65 INTEREST

65.1 GENERALLY

Although the LHWCA does not provide for interest to be paid on past due benefits, the courts and the Board have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Watkins), 594 F.2d 986, 987 (4th Cir. 1979); Strachan Shipping Co. v. Wedemeyer, 452 F.2d 1225 (5th Cir. 1971), cert. denied, 406 U.S. 958 (1972); Grant v. Portland Stevedoring Co., 16 BRBS 267, 269 (1984), on recon., 17 BRBS 20, 23 (1985).

In Wilkerson v. Ingalls Shipbuilding, Inc., 125 F.3d 904 (5th Cir. 1997), the Fifth Circuit became the first circuit court to definitively determine the point at which prejudgment interest attaches. The court stated that the interest is based on making the claimant whole. Wilkerson, 125 F.3d at 907, citing Strachan, 452 F.2d at 1229. Thus the interest should be assessed from the expirations of the employer's fourteen days to respond to the claim rather than from the actual date of the injury. 125 F.3d at 908. Congress has mandated in the LHWCA that the benefits accrue to the claimant, either voluntary or a right to benefits upon defeat of a controversy, starting fourteen days after the claim has been filed. Thus to give the claimant prejudgment interest prior to the time at which he was entitled to compensation would undermine the will of Congress. Id. The court noted that this holding creates incentives for both the employer and the employee. The employer has the incentive not to controvert the claims and therefore delay the payment of meritorious claims. Also, it provides the employee with the incentive to file a claim on an accident in a timely manner since waiting will not afford any increase in the prejudgment interest. Id.

Interest is awarded to ensure that employees receive the full amount of compensation due. Grant, 17 BRBS at 23; Morris v. Washington Metro. Area Transit Auth., 12 BRBS 208, 210 (1979).

65.2 AUTHORITY

The courts and the Board have consistently affirmed basic authority to award interest. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 625, 25 BRBS 71 (CRT) (**9th Cir.** 1991); Quave v. Progress Marine, 912 F.2d 798, 801, 24 BRBS 43 (CRT), on reh'g, 918 F.2d 33, 24 BRBS 55 (CRT) (**5th Cir.** 1990), cert. denied, 500 U.S. 619 (1991); Strachan, 452 F.2d at 1225; Estate of Cowart v. Nicklos Drilling Co., 23 BRBS 42, 47 (1989), rev'd in part, 907 F.2d 1552, 24 BRBS 1 (CRT) (**5th Cir.** 1990), aff'd en banc, 927 F.2d 828, 24 BRBS 93 (CRT) (**5th Cir.** 1991), aff'd, 505 U.S. 469 (1992); Vanover v. Foundation Constructors, 22 BRBS 453, 458 (1989).

65.3 EFFECT OF DELAY BY OWCP OR OALJ

Since the purpose of awarding interest is to make the claimant whole and is not intended to penalize the employer, delays in the process of adjudication attributable to the Director, OWCP or to the Office of Administrative Law Judges do not constitute exceptions to the mandatory award of interest. Thus, even where the deputy commissioner caused a three-month delay which resulted in the compensation payment to the claimant being past due, the Board held the employer liable for interest since the employer had use of the money. Garner v. Olin Corp., 11 BRBS 502, 508 (1979). Likewise, interest was due where there was a six-month delay between the hearing and the date of decision awarding the claimant benefits from the date of injury. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556, 560 (1978).

65.4 CLAIMANT REJECTION OF SETTLEMENT OFFER

Interest is due on all overdue amounts regardless of the fact that a claimant has rejected a lower recommendation or settlement and offer. Schreck v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 611, 613 (1978).

65.5 WAIVER OF INTEREST

65.5.1 Waiver Not Permitted in Contested Cases

Interest is mandatory and cannot be waived in contested cases. Byrum v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 833, 837 (1982); MacDonald v. Sun Shipbuilding & Dry Dock Co., 10 BRBS 734, 735 (1978); Chandler v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 293, 296 (1978); Ryan v. McKie Co., 1 BRBS 221, 230 (1974).

65.5.2 Waiver Permitted in § 8(i) Settlements

Waiver of interest is allowable, however, as an item of compromise in a settlement agreement under 33 U.S.C. § 908(i). Hernandez v. Sealand Serv., Inc., 9 BRBS 1076, 1079 (1978); Clefstad v. Perini N. River Assocs., 9 BRBS 217, 224 (1978).

65.6 APPLICABILITY OF AWARDS

65.6.1 Not Payable on Attorney's Fees

An attorney's fee is not compensation, thus interest is not assessed on past due attorney's fee awards. Boland Marine & Mfg. Co. v. Rihner, 41 F.3d 997, 29 BRBS 43 (CRT) (5th Cir. 1995) (Interest is not available on attorney's fee awards.); Fisher v. Todd Shipyards Corp., 21 BRBS 323, 328 (1988); Ping v. Brady-Hamilton Stevedore Co., 21 BRBS 223, 225 (1988); Blake v. Bethlehem Steel Corp., 21 BRBS 49, 55 (1988); Hobbs v. Stan Flowers Co., Inc., 18 BRBS 65, 66 (1986), aff'd sub nom. Hobbs v. Director, OWCP, 820 F.2d 1528 (9th Cir. 1987); Battle v. A.J. Ellis Constr. Co., 16 BRBS 329 (1984); Wells v. International Great Lakes Shipping Co., 14 BRBS 868, 874 (1982). See also, Fairley v. Ingalls Shipbuilding, Inc., 25 BRBS 61 (1991), on remand 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990) (But cf. Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991) (ALJ did not abuse his discretionary authority in awarding counsel an hourly rate greater than that which prevailed at the time that his services were rendered where the case had been pending for over six years since the initial formal hearing). Additionally, in the case of Guidry v. Booker Drilling Co., 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990) the court found that interest was owed on an unpaid attorney fee in an enforcement proceeding. The court found that counsel was entitled to pre-and post-judgment interest noting that interest provides an incentive for attorneys to represent longshoremen because they will receive the full value of the fees to which they are entitled under the LHWCA.

65.6.2 Interest Payable on Medical Expenses

With Ion v. Duluth, Missabe & Iron Range Railway Co., 31 BRBS 76 (1997), the Board adopted the position of the **Ninth Circuit** in Hunt v. Director, OWCP, 999 F.2d 419 (9th Cir. 1993), 27 BRBS 84(CRT) (1993) that interest should be awarded on all past due medical benefits, whether costs were initially borne by the claimant or medical providers. With this new tact, the **Board specifically overruled its decisions in Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988)(Had held, judge erred in awarding interest on the past due medical expenses because there was no evidence in the record indicating that the claimant had in fact made any direct payments to health care providers; and with regard to the interest awarded on the outstanding medical bills owed to the providers, the Board concluded that the equitable principles which mandate the award of interest on unpaid compensation were not applicable because the cash needs of medical professionals, like those of attorneys, cannot be likened to those of an injured employee if payment is not forthcoming.) and Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988)(Had held, that though interest may be awarded on past-due medical benefits, interest cannot be assessed on past-due medical benefits that are owed to providers rather than to the claimant himself.).**

In Hunt, the **Ninth Circuit** held that medical providers (a medical doctor and a physical therapist) were entitled to recover interest and attorney fees where they intervened in a LHWCA proceeding and the judge ruled that the claimant was disabled and that the treatment the medical providers rendered was reasonable and appropriate under the LHWCA.

Noting that the LHWCA provides that a "party in interest" may petition the Secretary for "an award of the reasonable value of medical or surgical treatment" provided to an injured longshore worker, 33 U.S.C. § 907(d)(3), the **Ninth Circuit** reasoned that it could discover no statutory impediment to the view that the "reasonable value" of medical services rendered includes interest on sums that are overdue.

The **Ninth Circuit** went on to state that the remedial purposes of the LHWCA would be undermined if employers were allowed to withhold medical payments--no less than disability payments--interest free. The court also noted that permitting recovery of attorney fees forces employers to bear the cost of a wrongful refusal to pay benefits.

65.6.3 Interest Payable on Funeral Expenses

Interest is due on funeral expenses which are untimely paid since funeral expenses are included in the term "**compensation.**" 33 U.S.C. § 902(12). Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 84 (1989).

65.6.4 Interest Not Payable on Section 14(e) Assessments

Section 14(e) of the LHWCA provides that under certain circumstances, if the employer fails to pay compensation voluntarily or file a controversion within fourteen days after payment becomes due, as provided in Section 14(b), the employer shall be liable for an additional 10 percent added to unpaid installments. The Board has held that interest is not to be imposed on amounts due under Section 14(e), reasoning that the purpose of awarding interest would not be served by imposing interest on such assessments. Section 14(e) is intended to encourage the employer to make timely payments; interest on overdue payments is meant to make claimants whole. Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987). Accord Caudill, 22 BRBS at 15, overruled on other grounds, Ion v. Duluth, Missabe & Iron Range Railway Co., 31 BRBS 76 (1997).

65.6.5 Interest Payable on Section 14(f) Assessments

Section 14(f) of the LHWCA provides that compensation payable under the terms of an award must be paid within 10 days after it is due. Otherwise, an additional 20 percent assessment shall be paid, unless there is a review of the award, as provided in Section 21, and an order staying payments has been issued by the Board or the courts. 33 U.S.C. § 914(f). The Board has held that Section 14(f) assessments are "**compensation.**" Thus, interest is to be assessed on amounts due under Section 14(f). See McKamie v. Transworld Drilling Co., 7 BRBS 315, 320 (1977). Barry v. Sea-Land Services, Inc., 27 BRBS 260, 265 (1993).

[ED. NOTE: The Board has not adequately explained why interest is due on assessments under Sections 14(f), but not on assessments under 14(e). It may be surmised, however, that the difference lies in the fact that Section 14(f) is applicable only when there is a valid decision pending establishing the claimant's entitlement, and Section 14(e) applies to pre-decision entitlement.]

65.6.6 Periods of Temporary Disability/Periods Before Maximum Medical Improvement

In cases involving a period of temporary disability where full benefits have not been paid, interest on unpaid benefits is usually awarded from the date of injury. Loneragan v. Ira S. Bushey & Sons, Inc., 11 BRBS 345, 348 (1979) (scheduled injury). In cases where there are unpaid benefits for a permanent disability, however, interest becomes assessable as of the date maximum medical improvement is reached for the purposes of rating the extent of the permanent disability. Schreck v. Newport News Shipbuilding & Dry Dock Co., 10 BRBS 611, 613-14 (1978); see also Lonergan, 11 BRBS at 348; Whyte v. General Dynamics Corp., 8 BRBS 706, 708 (1978).

Schreck involved a case of disfigurement. The Board held that interest was due, not from the date of injury, but from the date of maximum medical improvement, noting that "if a scar is temporary, it generally would not be adjudged serious or compensable." There was "little room for referring interest on [the] award back to the date of the accident." Thus, interest could not be assessed until the date when a disfigurement had reached the point when neither medical procedures (such as scar reduction surgery) nor the healing effects of time would reduce the extent of the disfigurement. Schreck, 10 BRBS at 614.

65.6.7 Interest and Pre-1984 Injuries

In Smith v. Ingalls Shipbuilding Div., Litton Sys., Inc., 22 BRBS 46 (1989), the Board held that the judge erred by refusing to award the claimant interest on his past-due benefits because the claimant did not have a compensable disability until the effective date of the 1984 Amendments. The Board stated that the purpose of interest is not to punish employers but to make claimants whole, as the employer had use of the money until an award issued. The award was therefore modified to allow interest on all unpaid accrued benefits. Id. at 50. See also Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 84 (1989) (awarding interest on all unpaid accrued disability and death compensation).

65.7 INTEREST AND OVERPAYMENT

In Ceres Gulf v. Cooper, 756 F. Supp. 303, 24 BRBS 56 (CRT) (S.D. Tex. 1990), rev'd, 957 F.2d 1199 (5th Cir. 1992), the district court awarded interest to an employer on overpaid benefits that were made to the claimant prior to the final decision denying benefits. The Board had declined to award interest, indicating there was no jurisdiction to do so since there were no future benefits due claimant from which to recoup interest. Id. at 304. The district court did not take issue with the Board, it merely used its inherent power to charge the interest, suggesting that its decision to do so was based on the likelihood that claimant was a "malingerer." Id. at 305-06.

65.8 COMPUTATION OF INTEREST

65.8.1 Credit for State Compensation Payments

Employers are entitled to a credit for all sums paid under state compensation statutes **before** interest is computed. Thus, an award of interest should be based on the difference between the amount awarded under the LHWCA and the benefits paid pursuant to the state statute. Batista v. Atlantic Container Lines, Ltd., 2 BRBS 193, 195 (1975).

65.8.2 Interest Computed from Date Each Compensation Payment Becomes Due

Interest is computed from the date each compensation payment becomes overdue. Since compensation is due a claimant from the date of disability, interest on payments which are not timely made accrues from the date of disability as well. Canamore v. Todd Shipyards Corp., 13 BRBS 911, 916 (1981). In a schedule award case for permanent partial disability, interest attached when the claimant's condition reached maximum medical improvement. Lonergan, 11 BRBS at 348.

65.8.3 Applicable Rate of Interest

Originally the Board mandated that interest be paid at a rate of six percent. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1978). In Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), the Board replaced the fixed six percent interest rate with the rate employed by the U.S. district courts under **28 U.S.C. § 1961**. Section 1961 provides for an assessment of interest on monetary awards under district court judgments. Prior to 1982, Section 1961 provided that the applicable interest rate was that applied in state courts.

Section 1961 was amended in 1982 to provide for a uniform interest rate based on the 52-week U.S. Treasury Bill yield immediately prior to the date of judgment. 28 U.S.C. § 1961. The Board adopted the Treasury Bill rate in order to fully compensate claimants for the loss of the use of their benefits and to ensure uniformity with federal proceedings. Id.

The Board clarified the method used to calculate the interest rate pursuant to Section 1961 on reconsideration in Grant v. Portland Stevedoring Co., 17 BRBS 20, 22-23 (1985). The Board held that the Treasury Bill rate of the amended statute applies to Decisions and Orders filed after October 1, 1982, the effective date of the amendments, even if a portion of the period of liability is prior to that date. Thus, where interest is awarded, the rate must reflect the rate on the 52-week U.S. Treasury Bill yield immediately prior to the date of judgment. Holliman v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 114, 118 (1987). Pre-amendment Section 1961 applies to all decisions filed before October 1, 1982. See Cox v. Army Times Publishing Co., 19 BRBS 195, 198 (1987).

In Littrell v. Oregon Shipbuilding Co., 17 BRBS 84 (1985), the Board, applying Grant, held that, since the administrative law judge's Decision and Order was filed in the deputy commissioner's

office on May 5, 1983, interest had to be assessed on unpaid compensation based on the 52-week U.S. Treasury Bill yield immediately prior to the date of judgment. Id. at 87. See Holliman, 20 BRBS at 118; Perry v. Carolina Shipping Co., 20 BRBS 90, 93 (1987); Stone v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 1, 7 (1987); Bingham v. General Dynamics Corp., 20 BRBS 198, 205 (1988).

The **date of judgement** is the date that the Decision and Order is filed in the Office of the District Director (formerly, Deputy Commissioner). Grant, 17 BRBS at 23. Cf. Nealon v. California Stevedore & Ballast Co., 996 F.2d 966 (**9th Cir.** 1993), where the **Ninth Circuit** held that a compensation order is deemed filed when the parties receive the order.

65.8.4 Interest Not Compounded

The Board follows "**the general American rule**" regarding the calculation of interest, i.e., "when interest is allowable it is to be computed on a simple rather than a compound basis in the absence of **express authorization** otherwise." Santos v. General Dynamics Corp., 22 BRBS 226, 228 (1989) (emphasis added) (citing Stovall v. Illinois Cent. Gulf R.R. Co., 722 F.2d 190, 192 (**5th Cir.** 1984)). In Santos, the Board noted that while 28 U.S.C. § 1961 allows for post-judgment compound interest, it does not expressly provide for compound pre-judgment interest. Id.

65.9**LIABILITY OF THE SPECIAL FUND FOR INTEREST**

Interest is chargeable against the Special Fund where the Fund had the use and income from the use of the compensation due claimant. See Maltese v. Universal Terminal & Stevedoring Corp., 12 BRBS 123 (1979); Grace v. Jacksonville Shipyards, Inc., 10 BRBS 945, 948 (1979).

Since the Special Fund is not the property of the United States and its assets are not a part of the general revenues, the principle that interest on claims against the government is not recoverable unless expressly authorized by statute is not applicable to the Fund. Lawson v. Atlantic & Gulf Stevedores, 9 BRBS 855, 859 (1979); see also Lewis v. American Marine Corp., 13 BRBS 637, 640 (1981); Olson v. Brady-Hamilton Stevedore Co., 13 BRBS 733 (1981).

Interest can also be charged against the Special Fund on behalf of the employer for monies paid by the employer in excess of its liability under 33 U.S.C. § 908(f), depending on who has use and income from the use of money properly owed to the claimant. Watkins, 594 F.2d at 987; Lewis, 13 BRBS at 639.

Under 33 U.S.C. § 910(h), employees whose entitlement to compensation for total disability commenced prior to enactment of the LHWCA (1972) are entitled to an adjustment, 50 percent out of the Special Fund and 50 percent out of appropriations. In such situations, as in cases involving Section 8(f), assessment of interest against the Fund is proper.

65.10 OFFSETTING OVERPAID COMPENSATION AGAINST INTEREST

The Board has determined that **interest is not "compensation" within the meaning of Section 2(12)** of the LHWCA. Accordingly, given that Section 14(j) of the LHWCA allows an employer to credit its overpayment of compensation only against "compensation" later found to be due, the Board holds that a judge properly declined to allow employer to reduce its liability for awarded interest by the amount it had previously overpaid in compensation.

The Board additionally noted that granting the employer a credit for its overpayment in this case would not further the underlying purpose of Section 14(j)--to encourage an employer to tender payments of benefits during the period of its employee's "greatest need"--since employer did not make the voluntary payments at issue until after an informal conference had been held. Castronova v. General Dynamics Corp., 20 BRBS 139 (1987).

The Board has also held that where it modified a judge's date of permanency to an earlier date, the Special Fund should have taken over sooner. The employer was thus entitled to reimbursement of overpaid compensation from the Special Fund in a lump sum with interest. Phillips v. Marine Concrete Structures, 21 BRBS 233, 239 (1988).

65.11 SECTION 33 CREDITS

Interest is to be computed on the benefits due after the award is calculated and Section 33(f) credits are deducted, since interest on the net amount is all that is required to make the claimant whole. Jones v. U.S. Steel Corp., 25 BRBS 355 (1992).