BRB No. 03-0342

EUGENE FLOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PENN TERMINALS, INCORPORATED	)	DATE ISSUED: Nov. 6, 2003
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Order Granting Claimant's Motion for Reconsideration in Part and Modifying Previous Decision and Order, and Order Granting Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Kevin J. Kotch (Hoyle, Fickler, Herschel & Mather LLP), Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Richard A. Seid (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark S. Flynn, Acting Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order, Order Granting Claimant's Motion for Reconsideration in Part and Modifying Previous Decision and Order, and Order Granting Motion for Reconsideration (96-LHC-2298) of Administrative Law Judge Paul H. Teitler 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3). The Board heard oral argument in this case on August 13, 2002, in Philadelphia, Pennsylvania.

Claimant injured his back during the course of his employment with employer on April 26, 1996. The parties submitted an application for a Section 8(i) settlement, 33 U.S.C. '908(i), whereby claimant would receive a lump sum payment of $50,000, and his attorney would receive a fee of $8,000. The administrative law judge, after considering the application and the regulatory criteria, 20 C.F.R. §702.243, approved the settlement, finding it fair, adequate, and in claimant's best interests.

Claimant thereafter filed a *pro se* appeal of the administrative law judge=s decision, challenging the adequacy of the settlement amount and the attorney's fee. In its decision, the Board vacated the administrative law judge's approval of the proposed settlement as the underlying application was deficient, *see* 20 C.F.R. §702.242(b)(6), and remanded the case to the administrative law judge for further proceedings. *Floyd v. Penn Terminals, Inc.*, BRB No. 98-1556 (Aug. 4, 1999) (unpub.).

Following a hearing on the merits, the administrative law judge found that claimant was unable to return to his usual employment, that claimant's post-injury employment from April 1997 until March 1998, served as evidence of suitable alternate employment, and that employer otherwise established the availability of suitable alternate employment by virtue of labor market surveys dated May 2001 and March 2002. Accordingly, the administrative law judge determined that claimant established entitlement to periods of total and partial

disability benefits.[1] He also concluded that claimant reached maximum medical improvement, and thus, that claimant's disabling back condition was permanent, as of September 2001. The administrative law judge, however, found that pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j), claimant forfeited his right to any compensation for the period between January 1, 1997, and October 15, 2001, and further determined that employer is entitled to a credit of $63,269.79, representing the payment made pursuant to the voided settlement agreement, and for payments of compensation made during the forfeiture period pursuant to Sections 8(j) and 14(j), 33 U.S.C. §§908(j), 914(j). Under Section 27(b) of the Act, 33 U.S.C. §927(b), the administrative law judge also certified the facts surrounding claimant's underreporting of his earnings on his January 1998, LS-200, as well as his "contemptuous conduct," to the United States District Court for the District of New Jersey.

In response to claimant's motion, the administrative law judge issued an order on reconsideration dated November 6, 2002, wherein he recalculated the compensation rate for claimant's entitlement to benefits from October 15, 2001, as well as the amount of employer's credit. Purporting to apply the decision of the United States Court of Appeals for the Third Circuit in *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979), the administrative law judge explicitly rejected claimant's contention that his post-injury wage-earning capacity, based on the labor market surveys conducted in 2001 and 2002, must be adjusted for inflation to their 1996 dollar value. In addition, the administrative law judge reduced employer's Section 14(j) credit to $58,400. In all other regards, he reiterated his earlier findings. Thus, he concluded that claimant is entitled to an award of permanent partial disability benefits commencing October 15, 2001, subject to employer's credit.

On appeal, claimant challenges the administrative law judge's calculation of claimant's post-injury wage-earning capacity, his forfeiture order pursuant to Section 8(j) of the Act, and his certification of certain facts to the federal district court under Section 27(b) of the Act. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief limited to the issue of whether the administrative law judge had the authority to initiate the Section 8(j) forfeiture proceeding in this case. On this issue, the Director urges affirmance of the administrative law judge's exercise of such authority. Claimant also has filed a brief in reply to the

[1]The administrative law judge initially relied on the parties' stipulation that claimant's average weekly wage was $489.63. In addition, he found claimant entitled to permanent partial disability benefits from October 15, 2001, until March 1, 2002, at a compensation rate of $121.89 per week, and continuing from March 1, 2002, at a compensation rate of $144.89 per week, based on the wages paid by the jobs identified in employer's labor market surveys.

Director's response, reiterating his position regarding the forfeiture issue.[2]

Wage-Earning Capacity

Claimant argues that the administrative law judge should have adjusted either claimant's pre-injury average weekly wage or his post-injury wage-earning capacity in order to account for inflation that occurred during the five to six year gap between his injury and the date of the labor market surveys. Claimant asserts that *McCabe*,602 F.2d 59, 10 BRBS 614, should not be applied in this case, and alternatively contends that even if it is applicable it does not preclude the use of the National Average Weekly Wage (NAWW) to adjust claimant's average weekly wage to account for inflation.

In *McCabe*, the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, held that in determining a claimant's loss of wage-earning capacity, the appropriate comparison should be between the wages claimant would have earned but for the injury and the wages claimant is actually earning in his post-injury position.[3] *McCabe*, 602 F.2d at 63, 10 BRBS at 620. In *McCabe*, the administrative law

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[2]Claimant's reply to the Director's response was filed subsequent to the oral argument in this case. Employer likewise filed a brief following oral argument. We accept these post-argument briefs as they were filed within the time frame set at oral argument, Oral Argument Transcript at 4. *See* 20 C.F.R. §802.215.

[3]As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, *McCabe* is controlling. *Curtis v. Schlumberger Offshore Serv., Inc.*, 23 BRBS 63 (1989), *aff'd mem.*, 914 F.2d 242 (3d Cir. 1990). As such, we reject claimant's contention that *McCabe* is not applicable. We note, however, that the statutory framework requires a comparison between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002) (proper comparison is between claimant's pre-injury wages and his post-injury earning capacity adjusted for inflation); *LaFaille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 118(CRT) (2d Cir. 1989)(claimant's post-injury earnings can only "fairly and reasonably represent his wage-earning capacity," if they have been converted to their equivalent at the time of injury); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 101(CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986) (the administrative law judge must factor out changes in wage levels by adjusting the post-injury wage rate back to the date of the injury); *see also Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996) (wages earned in a post-injury job must be adjusted to account for inflation to represent the wages that job paid at the time of claimant's injury). The Board has held that if the record is devoid of evidence regarding the wages paid by the alternate employment at the time of

judge compared the claimant's 1974 wages as a chipper with the 1976 wages of a parking lot attendant. In vacating the administrative law judge's finding, the court specifically observed that because "there was a strong likelihood that the 1976 wages of a chipper were higher than 1974 wages, evidence of 1976 chipper wages should have been considered." *Id.* In this way, the Third Circuit seemingly accounted for inflation by adjusting pre-injury wages upward, rather than adjusting post-injury wages downward. *See* n.3, *supra.*

In his original Decision and Order dated August 28, 2002, the administrative law judge did not adjust the residual wages taken from the 2001 and 2002 labor market surveys to their 1996 dollar value. On reconsideration, the administrative law judge concluded that "as this matter arises in the Third Circuit, the *McCabe* decision is controlling." Order on Reconsideration dated November 6, 2002, at 7. He thus observed that "instead of making inflationary adjustments based on the NAWW, the Third Circuit calls for any time-based adjustments to average weekly wage to be made by comparing claimant's projected pay at the time of the labor market surveys." *Id.* In this regard, the administrative law judge correctly set out the holding in *McCabe*. He then, however, considered general evidence regarding employer's overall business operations and extrapolated from the testimony of Mr. McTaggert, employer's front-line supervisor of marine operations, that it is likely, given claimant's seniority at the time of his injury, that claimant would have been earning significantly less, if employed at all by employer, by the date of the labor market surveys in 2001 and 2002. The administrative law judge stated that therefore no inflation adjustment was necessary when calculating claimant's loss in wage-earning capacity because claimant's earnings, but for the injury, would have decreased.

We reject this construction of *McCabe.* Since the court directed that "evidence of 1976 chipper wages should have been considered," *McCabe*, 602 F.2d at 63, 10 BRBS at 620, applying *McCabe* would require the administrative law judge to examine the wages that claimant's usual employment would have paid him at the time employer established the availability of suitable alternate employment; speculation as to whether claimant would have continued to be employed by employer had he not been injured is not a part of the *McCabe* formula. An adjustment in wage levels is necessary so that wages from different time periods may be compared on an equal footing, and under the *McCabe* decision, the rate paid by claimant's pre-injury employment is adjusted to a post-injury level for comparison to claimant's post-injury wage-earning capacity.

The present evidence of record is vague with regard to the amount claimant's former job as a longshoreman with employer paid at the time his post-injury wage-earning capacity

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injury, the administrative law judge should use the percentage increase in the NAWW to adjust current wages to the rates paid at the time of injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 237 (1990).

was determined. There is no specific evidence as to the wages paid by employer to longshoremen in 2001 and 2002. While Mr. McTaggert's testimony indicates that employer's workload substantially decreased between 1996 and 2001, it does not support the administrative law judge's conclusion that claimant's wage rate would have declined from that which employer paid at the time of his April 2, 1996, work injury.[4] In fact, there is no specific evidence that wages for employer's remaining workers decreased. We must therefore vacate the administrative law judge's determination and remand the case. Given the scant evidence presently in the record on this issue, the administrative law judge may elect to reopen the record in order to receive the requisite information for him to make a finding regarding claimant's loss in wage-earning capacity pursuant to *McCabe*.[5] Accordingly, we vacate the administrative law judge's loss in wage-earning capacity finding and remand for further findings.

Section 8(j)

Claimant argues that the administrative law judge erroneously considered the issue of the forfeiture of his benefits under Section 8(j) because the applicable regulation mandates that this issue first be presented to the district director. Claimant maintains that 20 C.F.R. §702.286 expressly confers original jurisdiction over all forfeitures to the district director. Moreover, he asserts that the district director's procedures provide specific protection of his due process rights since they promote early notice of the forfeiture issue, orderly presentation and development of the case by the parties, and the opportunity to understand the opposing party's position prior to any hearing on the matter if the parties disagree with the district director's recommendation. Employer and the Director each maintain that the administrative law judge had the authority to address the forfeiture issue in the first instance.

Section 8(j) of the Act permits an employer to request a claimant to report his post-injury earnings. Once the inquiry is made, the claimant must complete and return form LS-200 within 30 days of receipt whether or not he has any post-injury earnings. The claimant's

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[4]Moreover, we note that Mr. McTaggert's testimony was elicited on cross-examination as part of a discussion as to the possibility of suitable alternate employment with employer. As such, it is not responsive to the specific issue at hand, *i.e.*, the wages that claimant would have earned as a longshoreman in 2001 but for his work injury.

[5]Alternatively, as claimant suggests, the administrative law judge may find it reasonable, in light of the absence of record evidence, to apply the percentage change in the NAWW in a manner consistent with *McCabe.* That is, the percentage change in NAWW may be applied to adjust claimant's usual wages upward to 2001 and 2002 rates pursuant to *McCabe. Cf. Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990)(use NAWW to adjust post-injury wages downward).

benefits are subject to forfeiture if earnings are knowingly omitted or understated. 33 U.S.C. §908(j) (1994); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285-702.286. An employer can recover such forfeited compensation only "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3) (1994); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

In his initial decision, the administrative law judge addressed the two LS-200 forms completed and returned by claimant in this case. The administrative law judge found that in the first LS-200, which covered the period between January 1, 1997, and January 21, 1998, claimant underreported his earnings with Foulke Associates by $787.80, and that he simply did not report other earnings he received within that time period.[6] With regard to the second LS-200, for the period commencing January 22, 1998, the administrative law judge determined that, despite repeated requests by both employer and the administrative law judge, claimant did not submit this form until October 15, 2001. As such, the administrative law judge found that the forfeiture period ended on that date. In total, the administrative law judge concluded that claimant forfeited, by virtue of Section 8(j), any and all benefits due for the period between January 1, 1997, and October 15, 2001.

On reconsideration, the administrative law judge rejected claimant's assertions that he did not have the authority to address the forfeiture issue in the first instance and that he did not provide claimant with the requisite due process rights. Specifically, the administrative law judge found that he, as an administrative law judge, has the authority to consider forfeiture requests under the Act and its corresponding regulations, and that to require remand to the district director would, in this case, result in unnecessary duplicative and parallel proceedings on this issue. In addition, the administrative law judge found that claimant had ample notice of the forfeiture issue and more than a fair share of opportunities to prepare and argue against forfeiture in this case.

Section 8(j)(1), (2) of the Act provides:

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[6]Specifically, the administrative law judge found, based on claimant's subsequent deposition, that he did not report earnings of at least $3,174.82 for the period in question which were earned with four separate companies. *See* Decision and Order at 37; Employer's Exhibits (EX) 14, 31, 32; Claimant's Exhibit (CX) 27.

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who--
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings, and
>
> who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, *forfeits his right to compensation with respect to any period during which the employee was required to file such report*.

33 U.S.C. §908(j) (1)-(2) (1994) (emphasis added). The Board has held that an administrative law judge has the authority to adjudicate whether benefits should be suspended pursuant to Section 8(j). If he so decides, then the district director must consider the claimant's financial situation and establish a forfeiture schedule. *Moore*, 28 BRBS at 183-184; 20 C.F.R. §702.286(b), (c).

We first address claimant's contention regarding the administrative law judge's authority to initiate consideration of forfeiture pursuant to Section 8(j). When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *see also Governor of Virgin Islands v. Knight*, 989 F.2d 619 (3d Cir. 1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the instant case, Section 8(j) provides no direction on the procedures for adjudicating forfeiture proceedings.[7] Thus, its implementing regulations must be considered.

The implementing regulations for Section 8(j) are 20 C.F.R. §§702.285 and 702.286. Section 702.285 authorizes an employer to require a disabled employee to submit earning

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[7]As the Director observes in his brief, the legislative history is equally lacking any relevant information that might indicate whether Congress intended to make the district director the exclusive initial adjudicator of forfeitures. *See* H.R. Rep. No. 98-570(I), at 17-18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2750-51.

reports. Section 702.286 sets the procedures for adjudicating forfeiture and thus serves as the basis for claimant's contention that all such adjudications must commence with the district director. Section 702.286, states, in pertinent part, that:

> (a) Any employee who fails to submit the report on earnings from employment or self-employment under § 702.285 or, who knowingly and willingly omits or understates any part of such earnings, shall upon a determination by the district director forfeit all right to compensation with respect to any period during which the employee was required to file such a report. The employee must return the completed report on earnings (even where he or she reports no earnings) within thirty (30) days of the date of receipt; this period may be extended for good cause, by the district director, in determining whether a violation of this requirement has occurred.
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> (b) Any employer or carrier who believes that a violation of paragraph (a) of this section has occurred *may file a charge with the district director*. The allegation shall be accompanied by evidence which includes a copy of the report, with proof of service requesting the information from the employee and clearly stating the dates for which the employee was required to report income. Where the employer/carrier is alleging an omission or understatement of earnings, it shall, in addition, present evidence of earnings by the employee during that period, including copies of checks, affidavits from employers who paid the employee earnings, receipts of income from self-employment or any other evidence showing earnings not reported or underreported for the period in question. Where the district director finds the evidence sufficient to support the charge he or she shall convene an informal conference as described in subpart C and shall issue a compensation order affirming or denying the charge and setting forth the amount of compensation for the specified period. *If there is a conflict over any issue relating to this matter any party may request a formal hearing before an Administrative Law Judge as described in subpart C.*

20 C.F.R. §702.286 (emphasis added). Section 702.286(b) thus provides that an employer *may* initiate forfeiture proceedings by filing a charge with the district director, who shall then convene an informal conference and issue a decision on the merits. Nevertheless, if either party disagrees with the district director's decision, the regulation authorizes an administrative law judge to consider "any issue" pertaining to the forfeiture. For this reason, despite the statutory reference to the deputy commissioner, the Board held in *Moore*, 28 BRBS at 183-184, that the administrative law judge has the authority to adjudicate a forfeiture charge. *See also Hundley*, 32 BRBS at 256 n. 2. Section 702.286 sheds further light on the instant query. Specifically, Section 702.286(b) makes the subpart C rules for administrative law judge hearings (20 C.F.R. §§702.331 – 702.351) applicable to forfeiture

disputes. Section 702.336, in turn, authorizes an administrative law judge to consider "any" new issue at "any" time prior to the issuance of a compensation order. Thus, as the Director suggests, Sections 702.286 and 702.336 may be construed harmoniously because Section 702.286 does not qualify the authority conferred by Section 702.336. Consequently, the formal hearing procedures permit a party to raise the forfeiture issue for the first time at the hearing. We therefore reject claimant's contention that all forfeiture proceedings must begin with the district director, and hold, based on a consideration of the relevant statute and its implementing regulations, that forfeiture proceedings may, depending upon the specific facts of a case, be initiated before the administrative law judge.

In addition, we reject claimant's contention that his right to procedural due process would be abridged unless the district director initially considers all forfeiture charges. This suggestion is without merit, as administrative law judge hearings include protective procedural safeguards, *see* 20 C.F.R. §§702.336(b),702.338 – 702.343, and claimant herein had notice of employer's forfeiture request, several opportunities to present evidence, and a forum within which to argue his position. Moreover, we hold that the administrative law judge properly considered and rejected each of claimant's defenses to forfeiture; *i.e.*, that employer failed to prove that claimant "knowingly and willfully" understated earnings; that his earnings should be forfeited only for the period of time that he underreported and not for the entire period of time listed on the LS-200; and that he was denied the opportunity to request that the district director extend the time for responding to an LS-200 for good cause. As the administrative law judge has, in contrast to claimant's assertion, allowed claimant to fully present these defenses and has explicitly considered and ruled upon them, and as his findings in this regard are rational, supported by substantial evidence and in accordance with law, they are affirmed. *See* Order on Reconsideration at 9-10; *Hundley*, 32 BRBS at 257 (period of forfeiture means "*any period* during which the employee was required to file such report.").

Claimant lastly argues that the administrative law judge erred by not including the $50,000 paid by employer to claimant in 1998 in the aborted settlement agreement as compensation forfeited by claimant pursuant to Section 8(j). Claimant maintains that pursuant to Section 702.286(c), this sum should be included in the repayment schedule before the district director since it was money received, in lieu of benefits, during the forfeiture period, *i.e.*, from January 1, 1997, through October 15, 2001.

In this case, the administrative law judge determined that employer is entitled to a credit in the amount of $58,400 to be taken against compensation due on or after October 15, 2001, pursuant to Section 14(j), 33 U.S.C. §914(j).[8] Order on Reconsideration at 11. The

[8]Section 14(j), 33 U.S.C. §914(j), states:

administrative law judge then found that only $8,400 covers compensation already paid by employer during the forfeiture period and thus he concluded that only that amount is subject to forfeiture by claimant, following the establishment of a repayment schedule by the district director in accordance with Section 702.286(c). Employer paid benefits during the forfeiture period only from January 1, 1997, until October 29, 1997, totaling $8,400. The administrative law judge determined that the remaining $50,000 shall remain a Section 14(j) credit against any future compensation due claimant after October 15, 2001, as that amount was created by a rejected settlement and improperly retained by claimant. The administrative law judge thus ordered that employer need not make any payments until this $50,000 credit is exhausted.

Section 702.286(c) states:

> (c) *Compensation forfeited* under paragraph (b) of this section, *if already paid*, shall be recovered by a deduction from the compensation *payable* to the employee if any, on such schedule as determined by the district director. The district director's discretion in such cases extends only to rescheduling repayment by crediting future compensation and not to whether and in what amounts compensation is forfeited. For this purpose, the district director shall consider the employee's essential expenses for living, income from whatever source, and assets, including cash, savings and checking accounts, stocks, bonds, and other securities.

20 C.F.R. §702.286(c) (emphasis added). As outlined in this provision, claimant must forfeit any compensation, already paid by employer, to which he would have been entitled during the period of forfeiture (*i.e.*, the amount "payable"). The issue herein thus concerns whether the $50,000 that claimant received as part of the aborted settlement agreement is already paid compensation subject to forfeiture, or whether the Section 14(j) credit for the $50,000 only begins to run when the forfeiture period ends. We hold that the administrative law judge properly determined that once the approval of the settlement was vacated, claimant's entitlement to that money, as disability compensation, was subject to adjudication and is properly viewed as an advance payment of compensation within the meaning of Section 14(j) of the Act and not as compensation already paid pursuant to Section 702.286(c) As the $50,000 was not compensation already paid, we hold that the administrative law judge properly found that employer's credit for the $50,000 advance payment starts to run only after the forfeiture period of Section 8(j) ends.

> 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.

Section 27(b)

Claimant argues that the administrative law judge erred by certifying facts to the federal district court pursuant to Section 27(b) of the Act, 33 U.S.C. §927(b), regarding alleged misstatements on an LS-200 form and regarding a pre-existing back condition. Claimant maintains that the proper remedy for misrepresentations on an LS-200 are set forth by Section 8(j) of the Act and its implementing regulations, 20 C.F.R. §§702.285, 702.286, and thus, that the administrative law judge's use of Section 27(b) as a remedy in this case was improper.

In his Decision and Order, the administrative law judge addressed employer's motion, dated February 11, 2002, to certify the facts of the case to the District Court of New Jersey in light of claimant's numerous attempts at concealing post-injury earnings. Following a discussion of Section 27(b) of the Act, the administrative law judge found that claimant underreported earnings on his January 1998 LS-200, and that claimant lied to all of his examining physicians in this case with regard to a pre-existing condition. The administrative law judge therefore certified these facts of this case to the appropriate district court.

Section 27(b) of the Act provides:

> If any person in proceedings before a deputy commissioner or Board *disobeys or resists any lawful order or process, . . . or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, . . .* the deputy commissioner or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish the person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

33 U.S.C. §927(b) (emphasis added).[9] Thus, under Section 27(b) of the Act, the district court may punish as contempt of court any disobedience or resistance to a lawful order or process issued in the course of administrative proceedings under the Act. *See A-Z Int'l v. Phillips* [*Phillips I*], 179 F.3d 1187, 33 BRBS 59(CRT) (9th Cir. 1999), *citing Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *but see A-Z Int'l v. Phillips* [*Phillips II*], 323 F.3d 1141, 37 BRBS 1(CRT) (9th Cir. 2003) (Section 27(b) does not authorize a district court to sanction a claimant for contempt for filing a false claim under the Act as Congress has provided specific mechanisms to deal with this situation in Section 31, 33 U.S.C. §931). Under Section 27(b), the administrative law judge certifies the facts surrounding a party's failure to obey an order or to produce pertinent documents after being ordered to do so to the district court for action.

The Ninth Circuit has held that the Board lacks jurisdiction to review the administrative law judge's certification of facts to the district court. The court held that the express grant of factfinding and contempt power to the district court pursuant to Section 27(b) implicitly removes review power from the Board to review an administrative law judge's findings in this regard. *Phillips I*, 179 F.3d 1187, 33 BRBS 59(CRT). We find this reasoning persuasive and, therefore, decline to review the administrative law judge's certification of the facts in this case.

[9]In 1972, the Act was amended to add Section 19(d), which provides for the transfer of adjudicative functions to the Office of Administrative Law Judges. 33 U.S.C. §919(d). Thus, since 1972, administrative law judges, rather than deputy commissioners (now referred to as district directors), conduct formal hearings, and hold the powers and duties granted deputy commissioners under Section 27 of the Act. *See Percoats v. Marine Terminal Corp.*, 15 BRBS 151, 153-154 (1982).

Accordingly, the administrative law judge's finding regarding claimant's post-injury wage-earning is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's decisions are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge