BRB No. 08-0531

Estate of C. H.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHEVRON USA, INCORPORATED	)	DATE ISSUED:
	)	03/13/2009<u>2009</u>
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
		DECISION and ORDER

Appeal of the Supplementary Compensation Order Declaring Default Under Section 18(a) of Eric L. Richardson, District Director, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Eric A. Dupree, San Diego, California, for claimant.

James P. Aleccia and Melody C. Chang (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

Kathleen H. Kim (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplementary Compensation Order Declaring Default Under Section 18(a) (Case No. 07-105398) of District Director Eric L. Richardson 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act).[1] We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See McCrady v. Stevedoring Serv. of America*, 23 BRBS 106 (1989).

Claimant was injured on October 13, 1986, during the course of his employment for employer on an offshore oil platform when he fell approximately 40 feet during a rainstorm. Claimant fractured his ribs, back, hip, and right femur. He also sustained a ruptured spleen and injuries to other internal organs.

Claimant underwent psychological examinations in 1993 from which it was determined that he had organic mental and affective disorders. A comprehensive neuropsychiatric examination in 1997 by Dr. Addario revealed that claimant sustained a mild traumatic brain injury due to the October 1986 work injury; in January 2003 Dr. Addario recommended counseling and medication for depression and anxiety. Claimant was diagnosed in 1997 with the hepatitis C virus related to the approximately 48 blood transfusions he received immediately after his work injury to alleviate internal bleeding. Claimant underwent Interferon treatment for hepatitis C from March 1998 to March 1999.

In her Decision and Order Granting Permanent Total Disability Benefits dated December 11, 2003, the administrative law judge found that claimant's work injuries reached maximum medical improvement on July 6, 1988. The administrative law judge found that the combination of claimant's physical injuries, metabolic factors, pain disorders, and psychiatric condition render him unable to work. The administrative law judge therefore awarded claimant permanent total disability benefits, 33 U.S.C. §908(a), commencing July 6, 1988. The administrative law judge found that claimant's average weekly wage was $1,009.63. With regard to medical benefits, 33 U.S.C. §907, the administrative law judge found claimant entitled to reimbursement from employer for

[1] By motion filed February 25, 2009, claimant's counsel states that claimant died on October 14, 2008. Counsel moves to substitute claimant's estate as the petitioner herein. This motion is granted. *M.M. v. Universal Maritime APM Terminals*, 42 BRBS 54 (2008).

sums he personally paid for a month of Interferon treatment. However, the administrative law judge determined that claimant is not entitled to receive from employer the value of 11 months of Interferon treatment that the University of California, San Diego, Hospital provided to claimant free of charge, but that the hospital is entitled to payment from employer. Employer was further ordered to authorize all requested medical evaluations, treatment, and prescriptions relating to claimant's medical conditions referenced in the decision, including claimant's psychological conditions.

In her Order Granting Request for Modification of Decision dated February 26, 2004, the administrative law judge additionally awarded claimant compensation for temporary total disability, 33 U.S.C. §908(b), from the date of injury, October 14, 1986, to July 5, 1988. The administrative law judge clarified that claimant's total disability remained permanent, rather than temporary, while he received Interferon treatment from March 13, 1998, to March 15, 1999. The administrative law judge found claimant entitled to reimbursement from employer for the $7,050 cost of medical testing performed by Dr. Wegman, plus interest. Finally, the administrative law judge found claimant is entitled to an additional assessment pursuant to Section 14(e), 33 U.S.C. §914(e), due to employer's failure to timely controvert claimant's claim that employer used an incorrect average weekly wage in making its voluntary payments of compensation.

In her Order Denying Request for Modification dated May 7, 2004, the administrative law judge rejected employer's contention that claimant should receive compensation for temporary total disability while he underwent Interferon treatment. The administrative law judge also denied reconsideration of the Section 14(e) assessment.

In summary, the administrative law judge awarded claimant compensation, at an average weekly wage of $1,009.63, for temporary total disability from October 14, 1986, to July 5, 1988, and for ongoing permanent total disability from July 6, 1988, interest, and reimbursement to claimant of $1,976.29 for his purchase of Interferon and $7,050 for medical testing performed by Dr. Wegman, and a Section 14(e) assessment. In her December 11, 2003 decision and February 26, 2004 order, the administrative law judge specified that the district director should make the necessary calculations to effectuate the compensation award. These calculations were sent to the parties in an April 8, 2004 letter from the district director's office. A claims examiner determined employer's liability from October 14, 1986 through April 7, 2004, as $702,594.38 and the amount of employer's credit for prior payments as $294,337.22. Employer's liability for interest was calculated through March 3, 2004, at $31,219.96. Employer was further instructed to pay claimant interest of approximately $60 for claimant's medical testing expense of $7,050. Finally, employer's Section 14(e) assessment was calculated as $15,511.43. *See* April 8, 2004, letter at EXs F-L.

Employer appealed the administrative law judge's decisions to the Board. *[C.H.] v. Chevron USA, Inc.*, BRB No. 04-0661 (Apr. 26, 2005) (unpub.), *aff'd*, 204 Fed.Appx. 361 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2088 (2007). In its decision, the Board affirmed the administrative law judge's finding that claimant's injuries reached maximum medical improvement on July 6, 1988, and her rejection of employer's contention that claimant was only temporarily totally disabled from March 13, 1998, to March 15, 1999, while claimant underwent Interferon treatment. *[C.H.]*, slip op. at 4-6. The Board affirmed the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, her award of compensation for permanent total disability from July 6, 1988, and the administrative law judge's average weekly wage calculation. *Id*. at 6-9. The Board reversed the Section 14(e) assessment. The Board stated that although employer was notified of a dispute regarding claimant's average weekly wage on March 21, 1997, and did not file a notice of controversion until July 29, 1999, the administrative law judge found that the issue was discussed at an informal conference on March 24, 1997. The Board held that the informal conference is the *de facto* date at which employer timely provided its notice of controversion. *Id*. at 9-10. Finally, the Board affirmed the administrative law judge's denial of Section 8(f) relief, 33 U.S.C. §908(f). *Id*. at 11-12.

While employer's appeal was pending, claimant's counsel wrote a letter to the district director dated December 3, 2004, requesting recalculation of the amounts claimant is entitled to receive as a result of the administrative law judge's decisions. Claimant's counsel contended that claimant should receive additional compensation and interest totaling approximately $15,825.96, plus interest on his out-of-pocket medical expenses. While this request was pending before the district director, the Board issued its decision reversing the Section 14(e) assessment. *[C.H.]*, slip op. at 9-10. In a follow-up letter to the district director dated March 13, 2008, claimant's counsel summarized claimant's contentions as: entitlement to a Section 14(f) assessment, 33 U.S.C. §914(f), on both the compensation and interest overdue; interest should be calculated on a compound basis at a rate in excess of that currently applied; and the applicable compensation rate pursuant to Section 6 of the Act, 33 U.S.C. §906.

In a Supplementary Compensation Order Declaring Default Under Section 18(a) (Supplementary Order), which is the order now appealed by claimant, filed on March 31, 2008, the district director addressed claimant's underpayment contentions, which the district director construed as a request for a default declaration. *See* 33 U.S.C. §918(a). The district director stated that the parties were unable to reconstruct the exact payment record and to resolve the underpayment claim over the course of 18 months of correspondence and conversations. The district director determined, based on the incomplete record, that employer underpaid claimant $13,908.05 through June 11, 2007. The district director found that claimant also is entitled to interest of $180.12 and an

assessment under Section 14(f) totaling $2,781.61. The district director rejected claimant's contention that interest should be calculated on a compound rather than simple basis, citing *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007). The district director also found that under *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006), claimant's compensation rate is limited under Section 6(b) to the maximum rate in effect at the time of the injury in 1986. Employer paid the amount ordered by the district director.

On appeal, claimant challenges the district director's calculation of employer's liability under the administrative law judge's awards and the additional amount due pursuant to Section 14(f). Claimant also challenges the calculation of his compensation rate under Section 6(b) and the calculation of employer's liability for interest on past-due compensation. Employer responds, urging affirmance of the district director's Supplementary Order. The Director, Office of Workers' Compensation Programs, responds only to the Section 6(b) issue.

Section 14(f) Issues

We first address claimant's contentions that the district director erred in calculating employer's liability under the administrative law judge's awards and determining the additional amount due under Section 14(f). Claimant argues that employer's payment of compensation pursuant to the administrative law judge's December 2003 decision and February 2004 order was untimely and that the district director erroneously calculated employer's liability as of the arbitrary date of June 11, 2007, rather than as of ten days after the filing of each of the administrative law judge's decisions.

Initially, we note the Board has jurisdiction to decide the Section 14(f) issues raised on appeal. Claimant does not seek enforcement of the district director's imposition of a Section 14(f) penalty but a determination of the extent of employer's liability under the administrative law judge's awards. *See Lynn v. Comet Constr. Co.*, 20 BRBS 72 (1986). Moreover, claimant states that employer has paid the penalty, which also provides a basis for the Board's jurisdiction over the Section 14(f) issues raised on appeal. *Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993).

We reject claimant's contention that employer was required to pay compensation pursuant to the administrative law judge's December 2003 and February 2004 decisions

within ten days of the date these decisions were filed.[2] The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, held in *Keen v. Exxon Corp.*, 35 F.3d 226, 28 BRBS 110(CRT) (5th Cir. 1994), that in cases where the administrative law judge orders the district director to calculate the amount of compensation due, an order is not final and enforceable until the district director complies with that directive. *See also Severin v. Exxon Corp.*, 910 F.2d 286, 24 BRBS 21(CRT) (5th Cir. 1990). In this case, the administrative law judge specified in her December 2003 decision and February 2004 order that the district director should make the necessary calculations to effectuate claimant's compensation award. These calculations were sent to the parties in a letter from the district director dated April 8, 2004. Thus, the earliest date from which compensation was due pursuant to the administrative law judge's decisions was ten days after the April 8, 2004, letter was filed.[3] *See Keen*, 35 F.3d 226, 28 BRBS 110(CRT); *see also Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 18 BRBS 60(CRT) (5th Cir. 1985).

Claimant contends that employer has not paid the full past-due amounts or the correct amount of periodic payments, and that in any event, employer has not adequately proven the amount of back payments it made. In his 2008 Order, the district director stated that he and the parties had attempted unsuccessfully to reconstruct the payment record and that the parties do not agree on the amount of the underpayment. Based on his best estimation given on an incomplete record, the district director calculated an underpayment of $13,908.05 through June 11, 2007.[4] Supplementary Order at EX A at 1. We must vacate this order and remand the case for further proceedings.

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[2] Section 14(f) states:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. §914(f).

[3] The administrative law judge's May 7, 2004 order denying modification did not alter employer's compensation liability.

[4] Employer provided the district director with a printout of the payment history through June 9, 2007. *See* Supplementary Order EX A.

Initially, employer cannot be held in default for amounts that have not been specifically awarded by the administrative law judge or calculated by the district director pursuant to the administrative law judge's directive. *See Keen*, 35 F.3d 226, 28 BRBS 110(CRT). Thus, the initial issue is whether employer paid the full amount calculated in the April 8, 2004, letter within 10 days. Any amounts not timely paid are subject to a Section 14(f) assessment. Similarly, if employer failed to pay the calculated amount of periodic payments due after the April 8, 2004, implementation of the administrative law judge's decisions, then it accrues additional benefits due and corresponding assessments under Section 14(f). These determinations are properly before the district director as the necessary calculations have been made. If employer timely paid the amounts found due by the district director in April 2004 and made timely periodic payments in the awarded amounts in the ensuing years, employer cannot be found in default at this time.

In this case, however, claimant asserts that the April 2004 calculation did not correctly determine the amount of benefits due. In December 2004, claimant sent a letter to the district director claiming that benefits were still underpaid. After investigating, the district director made his "best guess" as to the amount due, but the parties continue to disagree on the amount of employer's prior payments and thus on the amount due claimant as a result of the administrative law judge's award. We conclude that resolution of this issue requires additional fact finding, and the case must be transferred to the Office of Administrative Law Judges (OALJ) for further proceedings.

In this regard, claimant challenges the district director's assumption that employer made payments totaling $77,933.44 from October 1, 1988, to April 14, 1992. Order at EX A at 1-2. Claimant argues that Section 14(k), 33 U.S.C. §914(k), places the burden on employer to document its prior payments.[5] In a letter dated June 5, 2007, employer provided a computer printout to the district director of its payments to claimant from the date of injury. The district director's order notes this printout but states there are no company records of compensation payments for the period in question. Supplementary Order at EX A. In its response brief, employer states that it was unable to provide the actual records documenting its payments during this period due to Hurricane Katrina. Emp. Resp. Br. at 3.

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[5] Section 14(k) provides:

> An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

33 U.S.C. §914(k).

As it is apparent that the parties do not agree on the amount of compensation due, and indeed the district director so found, determining the extent, if any, of employer's underpayment to claimant requires fact finding by an administrative law judge under the Board's decision in *Hanson v. Marine Terminals Corp.*, 34 BRBS 136 (2000); *see also Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981). In *Hanson*, the Board addressed Section 702.372 of the regulations, 20 C.F.R. §702.372, which provides that proceedings for a declaration of default shall be instituted as if the claim were an initial claim for compensation, and held that where the parties agree on the amount due, the district director is authorized to issue an order under 20 C.F.R. §702.315. The procedures at 20 C.F.R. §702.316 apply where the parties do not agree. Thus, proceedings before an administrative law judge are necessary where a factual matter is raised with regard to the amount of compensation due. *Hanson*, 34 BRBS at 138. The present case clearly falls in the latter category.

As is readily apparent, moreover, employer's precise liability cannot be ascertained from the face of the administrative law judge's decision or without resort to additional documentation. In this regard the Fifth Circuit's decision in *Severin*, 910 F.2d 286, 24 BRBS 21(CRT), is controlling. The Fifth Circuit stated the facts therein as,

> the compensation order listed the gross amounts owed to Severin for back compensation and stated that Exxon "shall receive credit for all compensation previously paid [and] any wages paid to claimant during the period specified.…" The order further provided that "[t]he specific dollar computation shall be administratively performed by the Deputy Commissioner." While the order listed the amount of compensation Exxon had previously paid, it did not specify the amount of Exxon's wage credit or the manner in which to calculate it.

910 F.2d at 287-88, 24 BRBS at 21-22(CRT). Exxon filed a timely motion for reconsideration on the ground that the order did not provide sufficient information for it to comply with the order to pay compensation. The parties subsequently stipulated to the amounts and the administrative law judge incorporated the stipulation into his decision on reconsideration. Exxon paid compensation within 10 days of the filing of this latter order.

The claimant sought a default order on the ground that employer had not paid compensation within 10 days of the filing of the original compensation order. The district director entered a default order. In addressing the district court's refusal to enforce the order, the Fifth Circuit affirmed, holding that the first compensation order was not "final and enforceable" because "the order must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount

without resort to extra-record facts which are potentially subject to genuine dispute between the parties." *Id.*, 910 F. 2d at 289, 24 BRBS at 23(CRT). The court stated that the administrative law judge had awarded employer a credit for payments made, "but did not specify the amount of the credit or provide a method for its calculation based on facts contained in the record." *Id.*; *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 25 BRBS 145(CRT) (5th Cir. 1992)("The ALJ must not delegate the task of calculating the amount of the award to the [district director] unless [he] provides some method of doing so."); *accord Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, __ BRBS __(CRT) (2d Cir. 2008). In *Severin*, as the administrative law judge's first order was not "final," employer could not be held in default for failing to pay compensation after this order was filed.

Similarly, in this case, the administrative law judge, both in her original decision issued in December 2003 and in the order on modification issued in February 2004, stated that employer was to pay temporary total disability benefits for a specified period and ongoing permanent total disability benefits. The administrative law judge awarded employer a credit for its prior compensation payments for temporary total and temporary partial disability. The administrative law judge did not specify the amount of the credit, nor did the parties stipulate to the amount of any benefits previously paid. The district director performed an initial calculation in April 2004, and this amount as well as the amount of periodic payments due was precisely stated and thus enforceable at that time. However, claimant filed a letter with the district director in December 2004 alleging an underpayment of compensation, which resulted in the order currently disputed. As this order makes clear, the parties did not agree on the amount of the alleged undercompensation, and the district director was required to seek additional documentation in an effort to resolve the dispute. *See* Supplementary Order at 2. The district director attempted to calculate the amount employer had paid and the amount owed with resort to extra-record facts, soliciting from the parties whatever printouts, checks, *etc.*, they could find. Supplementary Order at EX A. Pursuant to *Severin*, as the full amount due cannot be determined without findings regarding employer's credit for past payments, which requires resort to extra-record facts which are the subject of a genuine dispute, employer cannot be held in default for the additional amount. Consequently, employer is not liable for a Section 14(f) assessment on any additional underpayment of disability compensation until this dispute is resolved by fact finding.

Accordingly, pursuant to *Severin*, the district director's Supplementary Order declaring default is vacated. The case is remanded to the district director for a determination as to whether employer made timely payments of the amounts previously

calculated.[6] The district director must transfer the case to the OALJ for assignment to an administrative law judge for findings of fact on the disputed amounts in accordance with this opinion. On remand, the administrative law judge may re-open the record for the parties to submit evidence addressing this issue. The administrative law judge should hold employer liable for interest on any overdue benefits. *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43(CRT), *reh'g granted on other grounds*, 918 F.2d 33, 24 BRBS 55(CRT) (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); *see* discussion *infra*. The administrative law judge's compensation order will be final and enforceable from the date it is filed provided it orders specific amounts due, accounting for employer's credit.

Claimant next argues that employer is liable for an assessment pursuant to Section 14(f) for not timely paying the Section 14(e) assessment totaling $15,511.43 found due by the administrative law judge in her February 2004 order, notwithstanding that the Board subsequently reversed the administrative law judge's finding of liability under Section 14(e).[7] In her order, the administrative law judge found that employer is liable for a Section 14(e) assessment on compensation due and unpaid from October 14, 1986, to March 24, 1997, when the parties held an informal conference. Claimant's counsel stated that employer paid the Section 14(e) assessment after May 20, 2004. Dec. 3, 2004 letter at 2. In its prior decision, the Board reversed the administrative law judge's Section

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[6] Claimant's counsel stated that in January 2004, employer paid $25,925.14 of the $31,219.96 in interest found due on April 7, 2004, but that claimant had yet to receive the additional $5,594.82 found due. *See* Dec. 3, 2004 letter. This contention must be addressed on remand. As we have vacated the Supplementary Order and there is as yet no finding that employer was in default on interest due in April 2004, we need not address claimant's argument that he is entitled to a Section 14(f) assessment on interest.

[7] Section 14(e) provides:

> 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).

14(e) assessment.[8] *[C.H.]*, slip op. at 9-10. We reject claimant's contention that a Section 14(f) assessment need not be predicated on a valid underlying award. The Board has held that additional compensation pursuant to Section 14(f) cannot be assessed when the underlying award is vacated. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Accordingly, we hold that employer is not liable for additional compensation pursuant to Section 14(f) for untimely paying a Section 14(e) assessment, as the Board reversed the administrative law judge's Section 14(e) assessment in its prior decision. *See Jennings v. Sea-Land Serv. Inc.*, 23 BRBS 12 (1989), *vacated on recon.*, 23 BRBS 312 (1990); *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986); *Shoemaker v. Schiavone & Sons, Inc.*, 11 BRBS 33 (1979).

Claimant also asserts he is entitled to a Section 14(f) assessment for employer's alleged untimely payment of his out-of-pocket medical expenses. Claimant's December 4, 2004, letter states that, pursuant to the administrative law judge's December 2003 decision, employer timely reimbursed claimant $1,976.29 in January 2004 for Interferon treatment obtained in March 1998. *See* Dec. 4, 2004 letter at 2, 3. However, this letter further alleges that employer did not timely reimburse claimant $7,050 for testing performed by Dr. Wegman. *Id.* at 3. This specific amount was awarded by the administrative law judge in her February 2004 order. Order at 3-4.

In *Lazarus*, 958 F.2d 1297, 25 BRBS 145(CRT), the Fifth Circuit held that medical benefits are "compensation" for purposes of accelerated enforcement procedures under Section 18(a). The court held that the definition of "compensation" in Section 2(12) of the Act, 33 U.S.C. §902(12), can constitute money payable to claimant under Section 7 of the Act.[9] The court found support for its interpretation in Section 4(a), 33 U.S.C. §904(a), and stated that its holding is limited to medical expenses paid by

[8] Claimant does not challenge the inclusion of employer's Section 14(e) payment in determining the extent of employer's credit against its compensation liability.

[9] Section 2(12) provides:

> "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

33 U.S.C. §902(12).

claimant which employer must reimburse.[10] *Lazarus*, 958 F.2d at 1301-1303, 25 BRBS at 148, 150(CRT); *see also Marshall v. Pletz*, 317 U.S. 383 (1943)(Section 4(a)'s reference to Section 7 benefits as "compensation" refers only to reimbursement to claimant when employer fails to pay the provider directly). Thus, in this case, claimant is entitled to a Section 14(f) assessment on this medical expense should the district director find on remand that employer's reimbursement of this expense was untimely.[11]

Compensation Rate

Claimant next argues that, pursuant to *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), his entitlement to compensation for temporary total disability benefits is restricted under Section 6(b), 33 U.S.C. §906(b), only by the statutory maximum compensation rate in effect when the administrative law judge entered the award in December 2003, rather than the maximum rate in effect at the date disability commenced in 1986.[12] Claimant thus contends he was underpaid because

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[10] Section 4(a) provides, in pertinent part,

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. . . .

33 U.S.C. §904(a).

[11] The distinction between an employer's paying a medical provider directly and reimbursing claimant for expenses incurred in obtaining such services is important to our holding here. If an employer directly pays a health care provider for services, it does not pay "compensation" within the meaning of the Act. *See Caudill v. Sea-Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem.*, 8 F.3d 29 (9th Cir. 1993). In *Caudill*, the Board stated that, "Medical benefits are generally not considered to be compensation because, in the normal case, the insurer defrays the expense of medical care but does not pay the employee anything on account of such care." *Caudill*, 22 BRBS at 16; *see also Marshall v. Pletz*, 317 U.S. 383 (1943). Thus, in *Caudill*, the Board held that a Section 14(f) assessment was not owed on a medical benefits because there was no indication that the medical benefits were payable to claimant. If, however, the employer refuses or neglects to furnish medical services, and the employee incurs expenses in obtaining such services, an award of medical expenses obtained by the employee against employer is "compensation" within the meaning of Section 2(12). *Lazarus*, 948 F.2d at 1301, 25 BRBS at 148(CRT).

the compensation rate from 1986 was used in this case to calculate claimant's benefits. The Director agrees that *Wilkerson* is controlling authority and that it applies in this case.[13] The district director applied the Board's decision in *Reposky*, 40 BRBS 65, and thus utilized the maximum Section 6(b) rate in effect in 1986 to determine claimant's compensation rate for temporary total disability.[14] In her decisions, the administrative law judge did not state a compensation rate. She found only that claimant's compensation should be based on an average weekly wage of $1,009.63.

The issue of the applicable maximum compensation rate was raised before the district director by claimant as support for his contention that he was underpaid. In his Supplementary Order, the district director stated that *Reposky* governs the compensation rate issue and that the rate had been correctly calculated in the April 8, 2004, letter from his office. In *Reposky*, the issue involved the interpretation of Section 6(c), 33 U.S.C. §906(c), which provides that determinations of the maximum compensation rate under

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[12] Despite this claim's subsequent transfer to the Long Beach, California, district office as claimant resided in California, the law of the Fifth Circuit applies to this case since claimant was injured within its jurisdiction. 33 U.S.C. §921(c); *see Dantes v. W. Found. Corp.*, 614 F.2. 299, 11 BRBS 753 (1st Cir. 1980).

[13] The Director also states his disagreement with *Wilkerson* on the issue here for purposes of preserving his right to challenge it should proceedings ensue before the United States Court of Appeals for the Fifth Circuit.

[14] Section 6(b) provides in pertinent part:

> (1) Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> * * *
>
> (3) As soon as practicable after June 30 of each year, and in event prior to October 1 of such year, the secretary shall determine the national average weekly wage of the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending September 30 of the next year….

33 U.S.C. §906(b)(1), (3).

Section 6(b)(3) apply to claimants receiving compensation for permanent total disability as well as those "newly awarded compensation."[15] The Board held that "newly awarded" means the maximum compensation rate at the time the disability commences rather than the date the Decision and Order awarding disability compensation is issued. *Reposky*, 40 BRBS at 74-76. Thus, the Board held in *Reposky* that the claimant's temporary total disability compensation rate under Section 6(b) remained at the maximum in effect at the time the disability commenced. When claimant's disability became permanent and total, she became entitled to the new maximum rate on the next October 1, and this rate was then subject to annual adjustments. *See* 33 U.S.C. §§906(c), 910(f). *Reposky*, 40 BRBS at 76-77.

The claimant argued in *Reposky* that *Wilkerson* supported application of the maximum rate effective at the date the administrative law judge issues an award. The Board extensively discussed *Wilkerson* and rejected the contention:

> In *Wilkerson*, the claimant retired in 1972. Audiometric testing in 1992 revealed a binaural hearing impairment of 19.23 percent. Claimant filed a claim, which employer voluntarily paid based on claimant's average weekly wage in 1972. The administrative law judge found that claimant was entitled to benefits at the statutory maximum rate in effect at the time of claimant's retirement in 1972 of $70. This decision was administratively affirmed by the Board. On appeal, the Fifth Circuit summarily held that Section 6(c) "makes plain that compensation is governed by the maximum rate in effect at the time of an award," which the court stated is "an unequivocal statutory imperative." *Wilkerson*, 125 F.3d at 906, 31 BRBS at 151-152(CRT). The court stated that claimant was "newly awarded compensation" in 1993, and that his actual compensation rate was well below the 1993 maximum rate. Claimant was awarded compensation for scheduled permanent partial disability based on his two-thirds of his average weekly wage in 1972 of $111.80, rather than on the statutory maximum in effect in 1972 of $70.

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[15] Section 6(c) provides:

> Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(c).

> We reject claimant's assertion that *Wilkerson* mandates that we overrule *Puccetti* [*v. Ceres Gulf*, 24 BRBS 25 (1990)]. *Wilkerson* is a Fifth Circuit case and is not binding authority, inasmuch as this case arises in the Ninth Circuit, which has not addressed this issue. More importantly, the issue before the court was the applicability of the maximum compensation rate under the pre-1972 Act as opposed to the compensation scheme provided by the 1972 Amendments. It was well established that the pre-1972 Act limits on awards for permanent disability did not apply to cases decided after enactment of the 1972 Amendments. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Simpson [v. Bath Iron Works Corp.]*, 22 BRBS 25 [(1989)]; *see generally Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (an appellate court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary). Thus, in *Wilkerson*, claimant's award was entered after the effective date of the 1972 Amendments and the prior maximum compensation rate thus was not applicable as a matter of law. There was no issue regarding the statutory interpretation of Section 6(c) before the court. Under these circumstances, the single sentence in *Wilkerson* is not persuasive authority for overruling *Puccetti.*

Reposky, 40 BRBS at 75.

In *Reposky*, the Board agreed with the Director that the applicable maximum rate for compensation should not be based on the date a compensation order is entered. The Board held that this result is consistent with the holdings in *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990), and *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), and that the Director's interpretation lends further support for the conclusion that the applicable maximum rate is determined by the date benefits commence for those "newly awarded" compensation. This interpretation treats similarly situated claimants in an identical manner in that the maximum compensation rate is not dependent upon the vagaries of the date an award is issued.

We reject claimant's contention that *Wilkerson* requires that claimant receive the statutory maximum in effect on the date of the administrative law judge's decision. In *Wilkerson*, a claimant who retired in 1972 sought benefits for a scheduled hearing loss under the 1984 Amendments which expanded the rights of retirees to receive compensation for hearing loss. *See* 33 U.S.C. §§902(10), 908(c)(13), 910(d)(2). The issue before the court concerned the applicability of the maximum weekly compensation rate of $70 under the pre-1972 Act to an award entered in 1993 based on a binaural

impairment revealed in 1992 audiometric testing. In that context, the court held claimant entitled to his full compensation rate which was well below the statutory maximum in effect at the time of the administrative law judge's decision. *Wilkerson*, 125 F.3d at 906, 31 BRBS at 151-152(CRT). The court did not analyze Section 6(c) or discuss its application to a case like the present one, involving a claimant who received an award of temporary total disability benefits commencing in 1986, and permanent total disability benefits from 1988 and continuing by virtue of a 2003 administrative law judge's decision. As these dates are the dates claimant was awarded compensation, for the reasons expressed in *Reposky* we reject claimant's contention. The district director's use of the maximum rate applicable as of the date claimant's temporary total disability benefits commenced in 1986 to calculate his rate for temporary total disability is affirmed.

With regard to claimant's permanent total disability benefits, we agree with claimant's alternative argument that, assuming the applicability of *Reposky*, the district director erred in calculating the compensation rate as of October 1, 1988. Claimant's condition reached maximum medical improvement on July 6, 1988. Thus, as claimant was "currently receiving" permanent total disability benefits on October 1, 1988, he became entitled to the maximum rate in effect on that date. *Reposky,* 40 BRBS at 77. The district director calculated claimant's compensation rate on October 1, 1988, as $624. Supplementary Order at EX A at 2. We agree that this is error. Commencing October 1, 1988, the beginning of fiscal year 1989, claimant is entitled to compensation for permanent total disability at the Section 6(b) maximum rate in effect at that time with yearly adjustments to the maximum and under Section 10(f) commencing every October 1 thereafter. *Reposky*, 40 BRBS at 77. The maximum rate for fiscal year 1989 is $636.24. Notice No. 67, 1998 A BRBS 3-113. Pursuant to *Reposky*, claimant is entitled to permanent total disability compensation at this rate commencing on October 1, 1988, with annual adjustments thereafter. On remand, the administrative law judge shall correctly calculate the compensation rate for claimant's permanent total disability benefits.

Interest Calculation

Claimant asserts that the Board should overturn its holding in *B.C. v. Stevedoring Services of America*, 41 BRBS 107 (2007), which affirmed an administrative law judge's award of simple, rather than compound, interest on past-due compensation. The district director denied claimant's request for calculation of interest on a compound basis, pursuant to this case. Supplementary Order at 2. For the reasons stated in this recent Board decision, we reject claimant's contention that he is entitled to compound interest on employer's past-due compensation. *B.C.*, 41 BRBS at 110-112.

As we have vacated the supplementary order, we need not address claimant's argument that the district director erred by calculating employer's liability for interest as of June 11, 2007, until the date his Supplementary Order was issued on March 31, 2008. However, we note that claimant is entitled to interest from the date benefits were due under Section 14(a), (b), 33 U.S.C. §914(a), (b). *Wilkerson*, 125 F.3d at 906, 31 BRBS at 153(CRT). This law should be applied to any interest awarded on remand.

Accordingly, the district director's Supplementary Order is vacated. The case is remanded to the district director for findings regarding any default on amounts previously calculated, including the medical reimbursement awarded by the administrative law judge, in accordance with this opinion, and for transfer to the OALJ for assignment to an administrative law judge for findings to resolve the disputed amount of compensation. The administrative law judge may re-open the record for admission of evidence addressing employer's compensation payments so that the amount of its credit, and therefore any underpayment, may be determined. The benefits awarded are subject to Sections 6(b) and 10(f) in accordance with this opinion, and interest shall be assessed on a simple rather than compound basis on benefits due and unpaid.

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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BETTY JEAN HALL
Administrative Appeals Judge