U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0635

MICHAEL ROBIRDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ICTSI OREGON, INCORPORATED	)	
	)	DATE ISSUED: 01/28/2019
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	EN BANC

Appeal of the Decision and Order Awarding Compensation and Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Offices of Charles Robinowitz), Portland, Oregon, for claimant.

James R. Babcock (Holmes, Weddle & Barcott, P.C.), Lake Oswego, Oregon, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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: HALL, Chief Administrative Appeals Judge, BOGGS, BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.[1]

HALL, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Awarding Compensation and Benefits (2016-LHC-00905) of Administrative Law Judge Richard M. Clark 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his right leg (knee and thigh), neck, ribs, and back on September 12, 2011, while working for employer as a crane mechanic.[2] Tr. at 20-21. He was diagnosed with arthritis and two meniscus tears in his knee. Employer began paying claimant temporary total disability benefits on September 13, 2011. EX 3. Claimant underwent surgery on November 14, 2011. After physical therapy and a work-hardening program, claimant's conditions reached maximum medical improvement, and he was released to return to work on November 15, 2012. JX 15. Due to a lack of job openings on the hiring board, claimant did not return to work until November 18, 2012.[3] EX 1.

On November 20, 2012, employer filed an LS-208 form terminating claimant's temporary total disability benefits retroactive to November 15 and converting the

[1] We grant the motion of the Director, Office of Workers' Compensation Programs, for en banc review. *See* 20 C.F.R. §801.301.

[2] Claimant was unloading tools from his pickup truck when a semi-truck collided with the front of his truck, pushing it backwards over claimant. Tr. at 20-21.

[3] Dr. Yoshinaga, claimant's treating surgeon, released claimant to his regular work of "medium physical demand" following claimant's office visit on the afternoon of November 15, 2012. JX 15 at 44-46. The parties stipulated that claimant returned to his usual work on November 18, 2012. Tr. at 9.

overpayment of temporary total disability benefits to permanent partial disability benefits. EX 4. Employer completed another LS-208 form on April 3, 2013, indicating it paid claimant a lump sum of $18,098 and terminated further permanent partial disability benefits.[4] EX 5. The parties agreed that claimant had a 10 percent impairment due to his meniscus tear, but disputed whether any disability due to arthritis also should be compensated. Decision and Order at 8.

The administrative law judge found that claimant suffered from arthritis prior to his knee injury and that the arthritis and work injury combined to result in his leg impairment. Decision and Order at 11-12. Affording the opinion of claimant's medical expert, Dr. James, greater weight than that of employer's medical expert, Dr. Youngblood, the administrative law judge found that claimant has a 19 percent permanent impairment to his right lower extremity, entitling him to 54.72 weeks of permanent partial disability benefits commencing November 15, 2012. 33 U.S.C. §908(c)(2), (19); Decision and Order at 12.

The administrative law judge also awarded claimant interest on past-due disability benefits and a Section 14(e), 33 U.S.C. §914(e), assessment for the period between November 20, 2012 and April 3, 2013, because employer did not timely controvert claimant's claim for permanent partial disability benefits.[5] Decision and Order at 14-15; *see* 33 U.S.C. §914(e); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). In light of the Board's decision in *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), the administrative law judge denied claimant's request for interest on the Section 14(e) assessment. Decision and Order at 13-15. The administrative law judge also rejected claimant's assertion that he is entitled to permanent total disability benefits from November 15 to 18, 2012, because his injury

[4] The $18,098 represented 14.4 weeks of permanent partial disability benefits for a five percent impairment of the right leg. JX 1.

[5] The administrative law judge found that a controversy arose on December 7, 2012, when a doctor rated claimant's impairment, to the extent that he would be entitled to 28.8 weeks of benefits while employer had paid only three days of permanent partial disability benefits. Because employer's November 2012 notice of controversion controverted the payment of additional temporary total disability benefits but did not controvert the payment of additional permanent partial disability benefits, the administrative law judge found that it did not constitute a sufficient challenge to the correct dispute between the parties. He determined that the controversy was retroactive to November 20, 2012, when employer ceased payment, and that a proper notice of controversion was not filed until April 3, 2013, thus defining the period for the Section 14(e) assessment. Decision and Order at 4, 14-15. The assessment is not challenged on appeal.

was not the cause of his inability to work. *Id.* at 16. Finally, the administrative law judge found that claimant's average weekly wage is $2,120.72, which entitles him to the maximum compensation rate of $1,256.84. *Id.* at 18.

Claimant appeals the denial of interest on the Section 14(e) assessment and the denial of permanent total disability benefits. He urges the Board to overrule *Cox* in light of more recent circuit court precedent, as well as other long-established Board precedent. He also asserts entitlement to permanent total disability benefits from November 15 to 18, 2012, arguing he was medically stable but employer did not provide him with work.

Employer responds, asserting that the issues on appeal have been rendered moot by its overpayment of benefits, as the $885.18 it overpaid between November 15 and 19, 2012, subsumes the request for interest ($746.05 as calculated by the Office of Workers' Compensation Programs). Employer also urges affirmance of both the denial of interest on the Section 14(e) assessment pursuant to *Cox* and of permanent total disability benefits because claimant did not show an injury-related inability to return to work after November 15, 2012. Because he testified there were no jobs available, employer asserts it is inappropriate for claimant to now aver that his knee condition prevented his return to work or to introduce speculation that, had he never been injured, he would have obtained work on those days. Claimant filed a reply brief.

The Director, Office of Workers' Compensation Programs (the Director), also responds to claimant's appeal, agreeing with claimant that *Cox* should be overruled and that interest may be awarded on "additional compensation" under Section 14(e).[6] Employer replied to the Director's brief.

Claimant first contends the administrative law judge erred in denying interest on the Section 14(e) award. Employer asserts the issue is moot because its overpayment of compensation would cover any amount that might be awarded to claimant by virtue of his appeal. The Director disagrees[7] because, absent an order or stipulation identifying the overpayment as a payment of interest, employer could change its mind and seek credit for the overpayment, leaving claimant without the sought-after interest. Employer asserts that

[6] The Director takes no position on the issue of claimant's entitlement to permanent total disability benefits.

[7] The Director noted that she interprets the Board's denial of employer's motion to dismiss this appeal, Order (Dec. 7, 2017), as a ruling that the Section 14(e) issue raised by claimant is not moot. However, other than to state that claimant identified disputed issues, the Board did not address the mootness argument in originally denying the motion to dismiss.

claimant would lose nothing by dismissal of this claim because he already received the money, it unequivocally waived its right to receive a credit for the overpayment, and its waiver is enforceable under *Groves v. Prickett*, 420 F.2d 1119, 1125–1126 (9th Cir. 1970).

We agree with the Director: the controversy is not moot. Without modifying the administrative law judge's compensation order, employer could still be relieved of the obligation to waive its credit for the overpayment. *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005) (a claim remains alive as long as a plaintiff lacks an enforceable right to complete relief). Moreover, without our review, the Director's legal challenge to the Board's holding in *Cox* will inevitably recur. *See, e.g., Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 101 n.1, 51 BRBS 45, 46 n.1(CRT) (4th Cir. 2018) (case not moot where employer opted to pay benefits and moved to dismiss because challenged conduct was likely to recur given the Board's "erroneous" decisions); *Payne Enter. Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988) (if a party challenges both a specific agency action and the policy that underlies that action, the challenge to the policy is not necessarily mooted because the challenge to the particular agency action is moot); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), *aff'd and modified on recon*, 22 BRBS 430 (Director, as a party-in-interest, has standing to challenge entitlement to benefits despite a purported settlement, as issue affects the proper administration of the Act).

On the merits, claimant and the Director contend the Board's decision in *Cox* should be overruled so as to permit an award of interest on "additional compensation" obtained pursuant to Section 14(e). They assert that *Cox* was incorrectly decided based on the plain language of the Act, Section 14(e)'s similarity to Section 14(f), 33 U.S.C. §914(f), and subsequently decided cases. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007); *Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004); *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (3d Cir. 1994). For the following reasons, we agree and overrule *Cox*.

Although not specifically provided for in the statute, pre-judgment interest is due on overdue compensation payable for disability or death. *Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012) (en banc); *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Section 14 of the Act addresses the payment of compensation to claimants, including when it becomes

due, and is entitled: "Payment of Compensation."[8] Section 14(e), entitled "Additional compensation for overdue installment payments payable without award," states:

> 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). Section 14(f) of the Act, entitled "Additional compensation for overdue installment payments payable under terms of award," 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). Neither subsection, within its provisions, explicitly identifies the additional "amount" as either "compensation" or as a "penalty."

In *McKamie v. Transworld Drilling Co.*, 7 BRBS 315 (1977), the Board summarily held that the amount assessed pursuant to Section 14(f) was "additional compensation" and, because interest on past-due compensation is mandatory, interest was due on the Section 14(f) assessment. *McKamie*, 7 BRBS at 320; *see also Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (awarding post-judgment interest on late Section 14(f) payment). In *Cox*, however, the Board held that interest is not due on an award of a Section 14(e) assessment, stating:

---

[8] *See Almendarez–Torres v. United States*, 523 U.S. 224, 234 (1998) (titles and headings "are tools available for the resolution of a doubt about the meaning of a statute."); *Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir. 2007) ("Although statutory titles are not part of the legislation, they may be instructive in putting the statute in context."); *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 977, 31 BRBS 77, 81(CRT) (Fed. Cir. 1997) (titles are not conclusive but are instructive).

> Interest is imposed on awards of overdue benefits to ensure that those claimants who are entitled to receive such awards are fully compensated for their work-related injuries. In contrast, the assessment provided by Section 14(e) is imposed "to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the attention of the Department of Labor." Awarding interest on the Section 14(e) assessment would not further the purpose of fully compensating claimants, but instead would add an additional penalty for failing to controvert a claim.

Cox, 19 BRBS at 198 (internal citations omitted). The Board concluded there was "no compelling equitable reason" to apply *McKamie* because that case addressed Section 14(f) and is not controlling "due to the different nature" of the two assessments. *Cox*, 19 BRBS at 198 n.2.

Claimant and the Director contend there is no basis for treating the assessments in subsections 14(e) and (f) differently, as both are "additional compensation" and interest is payable on overdue "compensation." The titles identified above, which indicate that these subsections require the payment of "additional compensation," calculated as a percentage of the underlying compensation due, when compensation is not paid in a timely manner, support their contention.[9] *Dalton*, 119 F.3d at 977, 31 BRBS at 81(CRT) ("While titles are not conclusive indicators of the meaning of provisions which are listed thereunder, they do tell us something, particularly in comparison with other provisions of a statute. In this case, the title gives us a first clue that payments under § 914(e) are compensation"); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (headings, titles, and legislative history are useful tools when the meaning of a statute is not plain from its

[9] The purpose of Section 14(e) is to encourage prompt payment of compensation without an award or prompt controversion of a claim, bringing to the attention of the Department of Labor the fact that a dispute exists between the parties. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990); *Nat'l Steel & Shipbuilding Co. v. United States Dep't of Labor*, 606 F.2d 875, 11 BRBS 68 (9th Cir. 1979); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984). Similarly, the purpose of Section 14(f) is to encourage prompt payment of awarded benefits so as to comport with the goals of the Act to provide "an efficient mechanism for enforcing unpaid compensation awards and to encourage the prompt payment of injured workers." *Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1142, 36 BRBS 63, 65(CRT) (9th Cir. 2002); *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 16 BRBS 10(CRT) (5th Cir. 1983).

words); *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947).

Most courts analyzing the text of the Act have drawn the conclusion that assessments under subsections 14(e) and (f) are payments of "compensation" as opposed to "penalties" or "fines." *Tahara*, 511 F.3d 950, 41 BRBS 53(CRT) (Section 14(f)); *Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (Section 14(f)); *Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Section 14(e)); *Barry*, 41 F.3d 903, 29 BRBS 1(CRT) (Section 14(f)); *but see Burgo v. General Dynamics Corp.*, 122 F.3d 140, 31 BRBS 97(CRT), *reh'g denied*, 128 F.3d 801 (2d Cir. 1997), *cert. denied*, 523 U.S. 1136 (1998) (Section 14(f)). *Dalton* is the only circuit court case to specifically address whether the Section 14(e) assessment is "compensation." In that case, Ingalls sought to recover payments it made to claimants pursuant to Section 14(e) by charging that amount to the Navy under its contract. The Navy disputed liability for the charges, asserting that Section 14(e) assessments are fines or penalties for which it cannot be held liable. *Dalton*, 119 F.3d at 974-975, 31 BRBS at 79-80(CRT). After addressing the title and structure of Section 14, and the general definition of a "penalty," the United States Court of Appeals for the Federal Circuit held that a payment made under Section 14(e) is not a "penalty" or a "fine," but is "additional compensation" that was chargeable to the Navy contract. *Id.*, 119 F.3d at 979, 31 BRBS at 83(CRT). The court stated that a penalty or fine is: 1) unrelated to the actual harm suffered but is related more to the penalized party's conduct; 2) collected by the state and not the individual harmed; and 3) meant to address a harm to the public. The payment assessed by Section 14(e), however, is paid to the injured employee and is related to the benefits he is owed.[10]

In comparison, the court identified 11 other sections in the Act that expressly impose fines or civil penalties.[11] *Dalton*, 119 F.3d at 977-978, 31 BRBS at 81-82(CRT); *see* 33 U.S.C. §944(c)(3). The Federal Circuit also found it unpersuasive that prior tribunals "casually referred to" the Section 14(e) payments as "penalties," declaring that language merely to be "a convenient way of distinguishing the § 914(e) payments from the underlying awards." *Dalton*, 119 F.3d at 978-979, 31 BRBS 83(CRT); *see* n.15, *infra*.

Because subsections 14(e) and (f) contain substantially similar language, Section 14(f) cases provide guidance in interpreting Section 14(e). In *Tahara*, 511 F.3d 950, 41

[10] Section 2(12) of the Act, 33 U.S.C. §902(12), defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein."

[11] *See* 33 U.S.C. §§914(g), 915(a), 928(e), 930(e), 931(a)(1), 931(c), 937, 938(a), 938(b), 941(f), 948a.

BRBS 53(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, addressed whether the late payment awarded under Section 14(f) is "compensation." The court found persuasive the reasoning in *Dalton* and *Brown*, 376 F.3d 245, 38 BRBS 37(CRT),[12] agreeing that "compensation" is a "money allowance payable to an employee," *see* 33 U.S.C. §902(12), and that an award under Section 14(f) "falls squarely within this definition."[13] *Tahara*, 511 F.3d at 953, 41 BRBS at 55(CRT). It also rejected the reasoning of the United States Court of Appeals for the Second Circuit in *Burgo*, 122 F.3d 140, 31 BRBS 97(CRT), that the statutory language precludes a determination that an award under Section 14(f) is compensation. *Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT); *Burgo*, 122 F.3d at 146, 31 BRBS at 101(CRT) (the language of Section 14(f) "supports the common sense conclusion that payments under this section are properly characterized as penalties, and are distinguishable from compensation.").[14]

[12] In *Brown*, the United States Court of Appeals for the Fourth Circuit held that the payment under Section 14(f) is "compensation," and that the successful prosecution of a claim resulting in a Section 14(f) payment warrants holding the employer liable for the claimant's attorney's fee under 33 U.S.C. §928. The Fourth Circuit relied on the language of Section 14(f), the definition of "compensation" in Section 2(12) of the Act, and the distinction between compensation and penalties under the Act, specifically stating "the amount due for late payment satisfies the definition [of compensation under the Act] because it is a 'money allowance payable' to the employee who is due the basic compensation award." *Brown*, 376 F.3d at 248-249, 38 BRBS at 39(CRT) (quoting 33 U.S.C. §902(12)); *see also Byrge v. Premium Coal Co., Inc.*, 301 F. Supp. 3d 785 (E.D. Tenn. 2017) (relying on *Brown* and *Tahara*, Section 14(f)'s 20 percent assessment is "additional compensation" and interest is due on late payment of additional compensation).

[13] The Ninth Circuit also noted that the title of Section 14 has been "Payment of Compensation" since the enactment of the Longshore Act in 1927, and that "until its repeal in 1972 for unrelated reasons," Section 14(m) referred to payments for "delay or default" under Section 14 as "additional compensation," supporting the conclusion that "Congress considered awards for 'delay or default' to be 'additional compensation.'" *Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT); *see also Brown*, 376 F.3d at 248-249, 38 BRBS at 39(CRT).

[14] The *Burgo* court cited *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), in support of its conclusion. *Burgo*, 122 F.3d at 145-146, 31 BRBS at 101(CRT). However, *Wedemeyer* involved the question of whether the deputy commissioner had the authority to award pre-judgment interest in addition to awarding benefits and did not involve an untimely controversion or payment of benefits. In *dicta*, the United States Court of Appeals for the Fifth Circuit identified Section 14(e), (f), as addressing delinquent compensation and stated: "These 10 per cent and 20 per cent

Therefore, the Ninth Circuit held that an attorney may receive an employer-paid fee for work performed in securing the assessment of a late payment under Section 14(f) because it is additional compensation to the claimant.[15] *Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT).

In accordance with *Tahara*, *Brown*, and *Dalton*, we hold there is no basis in the statutory scheme of the Act for treating Section 14(e) payments differently from Section 14(f) payments. Although the Section 14(e) and (f) payments have a punitive characteristic in that they require an employer to make additional payments for certain untimely actions, they are predominantly compensation-like in that they are related to the claimant's benefit entitlement and are paid directly to him. *See* 33 U.S.C. §902(12). Therefore, as Section 14(f) payments have been held to be compensation, *Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT); *Brown*, 376 F.3d at 248-249, 38 BRBS at 39(CRT); *McKamie*, 7 BRBS at 320, we agree with the *Dalton* court that Section 14(e) payments are also "compensation." *Dalton*, 119 F.3d at 978-979, 31 BRBS at 82-83(CRT). Because it is well established that interest is awardable on past-due compensation for disability and death benefits, *Price*, 697 F.3d 820, 46 BRBS 51(CRT); *Matulic*, 154 F.3d 1052, 32 BRBS 148(CRT); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT), as well as for overdue payments of Section 14(f) additional compensation, *Barry*, 41 F.3d 903, 29 BRBS 1(CRT); *McKamie*,

---

additions are not increased by the length of the delinquency. They bear little resemblance to interest, and should rather be treated as penalties." *Wedemeyer*, 452 F.2d at 1228. The Fifth Circuit has since recognized *Tahara*'s holding that Section 14(f) payments are "compensation" although it declined to address the issue itself because it was not properly raised before the court. *Carillo v. Louisiana Ins. Guaranty Ass'n*, 559 F.3d 377, 43 BRBS 1(CRT) (5th Cir. 2009).

[15] In line with other courts, the Ninth Circuit stated that courts' casual reference to the 14(e) or (f) payments as "penalties" is insignificant and does not change their nature as "compensation" but is merely a convenient method of distinguishing Section 14 payments from underlying awards. *Tahara*, 511 F.3d at 953-954, 41 BRBS at 55(CRT); *see Dalton*, 119 F.3d at 978-979, 31 BRBS at 83(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Watkins]*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979); *compare with Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 533 (1983), *and Hanson*, 307 F.3d at 1142, 36 BRBS at 65(CRT). In a footnote in *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012), the Supreme Court cited Section 14(e) and (f) as examples of how the term "award" is used differently in some sections of the Act. In referring to those subsections, the Court called the 10 and 20 percent payments "penalties." *Id.*, 566 U.S. at 108 n.8, 46 BRBS at 20 n.8(CRT). The Court, however, was not addressing the issue of whether the payments were "compensation."

7 BRBS 315, we hold that interest is awardable on overdue payments of Section 14(e) additional compensation, and thus overrule this aspect of the Board's decision in *Cox*. *Barry*, 41 F.3d 903, 29 BRBS 1(CRT); *McKamie*, 7 BRBS 315; *see Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT); *Dalton*, 119 F.3d at 978-979, 31 BRBS at 82-83(CRT). We further hold that interest on a Section 14(e) payment is to be awarded on a post-judgment basis, to be calculated from the date the administrative law judge enters the Section 14(e) award. *See Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160 (1994) (citing 28 U.S.C. §1961 and *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990)).[16] Accordingly, we reverse the administrative law judge's denial of interest, and we remand this case to the district director for a calculation of the interest due claimant on the award of Section 14(e) compensation.

Claimant also contends the administrative law judge erred in denying permanent total disability benefits from November 15 through November 18, 2012, because his injury was medically stationary as of November 15, 2012, but employer made no work available to him. He asserts the administrative law judge applied an incorrect standard by considering only his physical abilities. Employer argues that claimant's injury was not the reason for jobs being unavailable to him, and the administrative law judge's decision is correct.

Disability is defined as the "incapacity *because of injury* to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. §902(10) (emphasis added). To be entitled to total disability benefits, a claimant must establish that he cannot return to his usual work due to his work injury. *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018).

Claimant testified that the procedure for getting jobs is to place a "plug" in a window on a hiring board. Employees are hired sequentially when their numbers are called, at which time they select their jobs. Claimant testified that once he was released to return to work on November 15, he placed his plug on the board but was not called for work until November 18, 2012. Tr. at 33-34. The administrative law judge found this testimony establishes that claimant's inability to work from November 15 to November 18 was not

[16] The purpose of post-judgment interest is "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Bonjorno*, 494 U.S. at 835-836; *Brown*, 28 BRBS at 163-165 (acknowledging the agreement among the courts that interest is allowed on interest; claimant awarded post-judgment interest on the assessed but unpaid pre-judgment interest to which he was entitled).

due to his injury but, rather, was due to the lack of available work. Decision and Order at 16. The administrative law judge's conclusion is rational.

Claimant's reliance on *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), is misplaced. Unlike the situation here, the court held in *McBride* that the evidence submitted to the administrative law judge indicated the claimant's injury was the factor that made his usual work unavailable.[17] *McBride*, 844 F.2d at 799, 21 BRBS at 49(CRT). In this case, claimant's inability to obtain work was strictly due to the number of jobs available through the hiring board.

Further, claimant was released to return to his usual work, and he testified he was physically able to return to work and was actively attempting to sign up for open jobs. JX 15; Tr. at 33-34. Claimant cannot now argue before the Board that he was unable to work on November 15, 16, and 17 because his injury placed him too far down on the hiring board. Claimant did not raise this theory before the administrative law judge and cannot raise it for the first time on appeal. *Johnston v. Hayward Baker*, 48 BRBS 59 (2014); *Z.S. v. Science Applications Int'l Corp.,* 42 BRBS 87 (2008). Because claimant did not establish an inability to return to work due to his work injury between November 15 and 18, 2012, he did not establish entitlement to total disability benefits for that period. We therefore affirm the administrative law judge's denial of permanent total disability benefits from November 15 to 18, 2012. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 17 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1448 (9th Cir. 1990).

[17] The court determined that Kodak, prior to the injury, anticipated the claimant would undergo training and resume his usual work in the District of Columbia, but that after the injury Kodak believed he would undergo training and be assigned to an accommodating position elsewhere. Thus, the court held, the claimant established his inability to return to his usual employment was a result of his injury. *McBride*, 844 F.2d at 799, 21 BRBS at 49(CRT).

Accordingly, we overrule *Cox*, 19 BRBS 195, and hold that payments made pursuant to Section 14(e) are "compensation" on which post-judgment interest is awardable. We reverse the administrative law judge's denial of interest on the awarded Section 14(e) compensation, and we remand the case to the district director for the calculation of interest on the past-due Section 14(e) assessment. In all other respects, we affirm the administrative law judge's Decision and Order Awarding Compensation and Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result in this Ninth Circuit case. As an initial matter, I am dubious that this appeal is not moot. It appears incapable of repetition as to these parties and the particular creditable amount involved, employer has waived its right to assert the credit, the waiver is enforceable as a defense under circuit precedent, and any subsequent change of position by employer likely would be subject to judicial estoppel in any event. *Already L.L.C. v. Nike, Inc.*, 568 U.S. 85 (2013) (criteria for mootness); *Groves v. Prickett*, 420 F.2d 1119 (9th Cir. 1970) (criteria for waiver); *New Hampshire v. Maine*, 532 U.S. 742 (2001) (applying judicial estoppel); *Sparks v. Serv. Employees Int'l, Inc.,* 44 BRBS 11, *aff'd on recon.,* 44 BRBS 77 (2010) (criteria for application of judicial estoppel). Under the circumstances, it appears unnecessary to proceed further. Nonetheless, the other members of the Board having found to the contrary, on the merits I agree that the proper outcome in this case is for post-judgment interest to be provided on past-due payments of

the Section 14(e) assessment. As to the determination that the Section 14(e) assessment is compensation, I concur based on the Ninth Circuit's reasoning in *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007). The statutory language in Section 14(f) is substantially similar to the Section 14(e) language at issue here. In *Tahara*, the Ninth Circuit held that the Section 14(f) additional payments are "compensation" as opposed to "penalties" or "fines."[18] *Tahara*, 511 F.3d at 954, 41 BRBS at 56(CRT). Consequently, the Board has reached the correct result with regard to considering Section 14(e) payments to be compensation in this case arising in the Ninth Circuit, and it is not necessary to further analyze this issue or to overrule *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987), generally.[19] In all other respects, I agree with the majority's decision.

JUDITH S. BOGGS
Administrative Appeals Judge

[18] There are other court decisions characterizing the Section 14(e) and (f) payments as penalties. *See, e.g., Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 108 n.8, 46 BRBS 15, 20 n.8(CRT) (2012); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 145-146, 31 BRBS 97, 101(CRT) (2d Cir. 1997); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228 (5th Cir. 1971). Before *Tahara* was issued, the Ninth Circuit also viewed the Section 14(e) and (f) payments as penalties. *See, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 1059, 32 BRBS 148, 152-153(CRT) (9th Cir. 1998). Those courts seem to be distinguishing between compensation, which they recognize as payment directed toward making a party whole, and a penalty, which they recognize as a payment directed toward deterring or punishing undesirable conduct. Thus, they drew the line between compensation and penalty differently than did the court in *Tahara*. The requirement for interest on compensation is court-imposed, rather than established by statute. The rationale for its imposition is that otherwise the claimant would not be made whole. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

[19] Unlike the majority, I am not convinced that weight should be given to the section subtitle of "Additional compensation" as support for concluding that a Section 14(e) assessment is "compensation" and overruling *Cox*. While the Section title was included at the time of enactment, it appears that the subtitle was added by the statute compiler. Even headings and titles included in the legislation as enacted have limited weight. *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947); *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n,* 316 F. Supp.

3d 349, 396 (D.D.C. 2018); *Bautista v. Star Cruises*, 286 F. Supp. 2d 1352, 1360-1361 (S.D. Fla. 2003), *aff'd*, 396 F.3d 1289 (11th Cir. 2005).