BRB No. 92-388

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| JESSE C. VINSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: |
| | ) | |
| Self-Insured Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order of Theodor P. von Brand, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

William C. Bell, Newport News, Virginia, for self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-307) of Administrative Law Judge Theodor P. von Brand 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).

Claimant sustained an injury during the course of his employment with employer on

September 25, 1987. Thereafter, employer voluntarily paid claimant temporary partial disability benefits from September 29, 1987 to August 7, 1989, at which time claimant returned to work without restrictions. Employer subsequently made voluntary payments of temporary partial disability benefits to claimant from August 8, 1989 to October 29, 1989, totalling $794.78. Employer contends, and claimant does not dispute, that claimant did not suffer from a loss in wage-earning capacity during the period August 8, 1989 to October 29, 1989, and thus the payments of temporary partial disability benefits made during that period constituted an overpayment of compensation. Thereafter, on August 9, 1990, claimant sustained a second, unrelated work injury; employer subsequently credited the overpayment which it made as a result of claimant's 1987 injury against its liability for compensation due as a result of claimant's uncontroverted 1990 injury.

The sole issue presented to the administrative law judge for adjudication was whether employer was entitled to credit the overpayment it made as a result of claimant's 1987 injury against its liability for compensation due as a result of claimant's subsequent, unrelated 1990 work injury. In his Decision and Order, the administrative law judge, based upon his determination that Section 14(j) of the Act, 33 U.S.C. §914(j), relates only to payments for the same or related injuries, rejected employer's argument that, pursuant to Section 14(j), its overpayment of compensation for claimant's 1987 injury should be construed as an advance payment of compensation for claimant's 1990 injury. Thus, the administrative law judge found that employer may not take a credit for the overpayment made to claimant as a result of claimant's 1987 injury against compensation due as a result of claimant's 1990 injury, and ordered employer to reimburse claimant for all payments withheld from compensation due for the 1990 injury.[1]

On appeal, employer contends that, pursuant to Section 14(j), it is entitled to credit its overpayment of compensation made on the 1987 injury against compensation due on the 1990 injury, even though that subsequent injury is unrelated to the 1987 injury. Specifically, employer argues that, since the purpose of the Act is to encourage prompt payments of compensation, not allowing employers to recover their overpayments will discourage employers from making prompt and voluntary payments of compensation to claimants. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision.

[1] Employer asserts, and claimant does not dispute, that following the administrative law judge's decision, it remitted this sum to claimant.

Section 14(j) of the Act, 33 U.S.C. §914(j), provides the only method whereby an employer may be entitled to reimbursement of advance compensation payments made by it to a claimant. Specifically, Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). The Act, therefore, provides for reimbursement of advance compensation payments made by an employer only if unpaid installments of compensation remain owing. *See Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT)(5th Cir. 1992). In support of its interpretation of this subsection, employer notes that Section 14(j) does not specifically state that reimbursement for advance payments of compensation is limited to compensation paid as a result of only one compensable injury. In response, the Director contends that Section 14(j) does not allow reimbursement "out of unpaid installments of compensation due" for a subsequent unrelated injury. The Director notes that if claimant's 1990 unrelated injury had not occurred, it is undisputed that employer's overpayment would not be recoverable since there are no unpaid installments of compensation due as a result of claimant's 1987 injury. *See Cooper*, 957 F.2d at 1199, 25 BRBS at 125 (CRT)(5th Cir. 1992); *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir.), *cert. denied*, U.S. , 112 S.Ct. 3056 (1992). Furthermore, the Director avers that since at the time of employer's overpayment for claimant's 1987 injury neither the claim for the 1990 injury nor the 1990 injury itself was yet in existence, employer is not entitled, pursuant to Section 14(j), to a credit of its overpayment on the 1987 injury for compensation due on the 1990 injury, since the 1987 payments of compensation cannot logically be considered advance payments for an injury or claim not yet in existence. Based upon this interpretation, the Director concludes that since employer's 1989 overpayment was not the result of an advance payment of compensation for claimant's 1990 injury, Section 14(j) cannot be used to allow employer to credit that overpayment against its liability for compensation arising from claimant's 1990 unrelated work-injury.

The question of whether advance payments of compensation for one injury by an employer may be credited against payments due for a subsequent injury under Section 14(j) appears to be one of first impression for the Board. 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, 109 S.Ct. 1814 (1989); *see Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well 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, 104 S.Ct. 2778 (1984). If, however, the statute is silent or ambiguous with respect to the specific issue, the agency's interpretation should be given special deference if it is based on a permissible construction of the statute; the court may not substitute its own construction of a statutory provision for a reasonable one made by the agency. *See id.* at 843, 104 S.Ct. at 2781-82; *see also Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990). Thus, where the Director's position is reasonable and does not contravene plain statutory language, it is entitled to

some degree of deference. *See Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991).

Our review of Section 14 in *toto* indicates that Section 14(j) was not intended to allow an employer to credit an overpayment of compensation made as a result of an injury arising under the Act against a subsequent, non-related work-injury. Specifically, Section 14(b) states that the first installment of compensation shall become due on the fourteenth day after the employer has knowledge of "the injury or death." 33 U.S.C. §914(b). Similarly, Section 14(d) provides that an employer's controversion of a claim is due on or before the fourteenth day after it has knowledge of "the alleged injury or death." 33 U.S.C. §914(d). Lastly, pursuant to Section 14(g), an employer's notice of final payment of compensation shall state "the date of the injury or death." 33 U.S.C. §914(g). Thus, the plain language of Section 14 references a *single* compensable injury.

Moreover, as the Director asserts, employer's voluntary payments of compensation to claimant in 1989 cannot rationally be deemed as "advance" payments of compensation for claimant's 1990 injury, which had yet to occur. The voluntary payments of compensation made by employer in 1989 were due solely to the occurrence of claimant's injury in 1987; employer, based upon a subsequent event, in this case claimant's 1990 work injury, cannot rename those payments in order to obtain a financial windfall. As Section 14 references a single work injury, it would not be logical to interpret Section 14(j) as allowing an overpayment of compensation for one injury to be credited against compensation due on a subsequent, unrelated injury. We therefore hold that, pursuant to Section 14(j), an employer is not entitled to reduce its liability for compensation due as a result of a subsequent work-related injury by crediting an overpayment of compensation made as a result of a prior, unrelated work injury.

Employer additionally argues, citing to *Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT), that since it has no remedy in either state or federal court to recoup its overpayment of compensation to claimant, it must have relief under Section 14(j) of the Act. Employer's reliance upon *Eggert* is misplaced. In that case, the United States Court of Appeals for the Ninth Circuit stated that Section 14(j) shows congressional recognition that there might not be "any" unpaid installment of compensation to recover. *Eggert*, 953 F.2d at 556, 25 BRBS at 97 (CRT); *see also Cooper*, 957 F.2d at 1207, 25 BRBS at 131-132 (CRT).[2] In the instant case, no unpaid installment of compensation is due claimant as a result of his 1987 work injury. We therefore reject employer's contention, and we affirm the administrative law judge's determination that employer may not, pursuant to Section 14(j) of the Act, credit its 1989 overpayment of compensation made to claimant against its liability for compensation due as a result of claimant's 1990 injury.

[2]Employer also cites to the Board's decision in *Klubnikin v. Crescent Wharf and Warehouse Co.*, 16 BRBS 182 (1984), contending that had the Board not held that the overpayment issue was moot in that case, it could cite it for the proposition that an employer is allowed to take a credit for payments due on a second unrelated injury where it had made an overpayment of benefits due on a first injury. As employer acknowledges, the Board in *Klubnikin* did not address the overpayment issue under then existing Section 14(k), 33 U.S.C. §914(k)(1982); accordingly, that case does not affect our decision in the case at bar.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge