

THOMAS EDWARD BROWN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DATE ISSUED:_____
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Walter R. Meigs, Mobile, Alabama, for self-insured employer.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. 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.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (90-LHC-2013) of Administrative Law Judge Ben H. Walley awarding benefits 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v.*

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The facts of this case are undisputed. Claimant sustained a work-related hearing loss, and the administrative law judge awarded benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), for an 8.8 percent binaural impairment. Decision and Order at 5. The administrative law judge also awarded medical benefits, interest, and an attorney's fee. *Id.* at 5-6. Employer paid benefits but refused to pay the interest. It now appeals that portion of the administrative law judge's award, contending there is no provision in the Act for awarding interest. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance. Additionally, claimant asks the Board to assess interest on the unpaid pre-judgment interest.

In challenging the administrative law judge's award of interest, employer contends that Section 5(a) of the Act, 33 U.S.C. §905(a),¹ precludes an award of interest. Employer argues that pre-judgment interest was an element of compensatory damages at law or in admiralty and cannot be awarded under the Act. Further, employer maintains that Section 19(d) of the Act, 33 U.S.C. §919(d),² does not vest authority in administrative law judges beyond that contained in the Act itself, and, therefore, the administrative law judge does not have the powers conferred on the district court by 28 U.S.C. §1961 to award interest.³ Moreover, employer contends there is no authority in the Act in general for awarding interest. We disagree with employer's contentions.

¹Section 5(a) states in pertinent part:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

33 U.S.C. §905(a).

²Section 19(d) states:

All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

33 U.S.C. §919(d).

³28 U.S.C. §1961(a) provides in pertinent part:

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

The purpose of Section 5(a) is to make the Act a claimant's exclusive remedy against his employer for a work-related injury. *See generally Texas Employers' Insurance Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1932 (1989). Thus, an injured claimant cannot sue his employer in tort or in admiralty. *Id.* Although interest is not specifically addressed in the Act, the courts and the Board have held that an award of interest on past-due compensation serves the humanitarian purpose of the Act by making a claimant whole for his work-related injury, as the employer had the use of the money until an award was issued. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT) (5th Cir. 1990), *aff'd on reh'g*, 918 F.2d 33, 24 BRBS 55 (CRT), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2012 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 9 BRBS 1089 (4th Cir. 1979); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), *cert. denied*, 406 U.S. 958 (1972);⁴ *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). Moreover, the Board has noted previously that the award of interest is mandatory. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Jones*, 25 BRBS at 359 (1992); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984), *aff'd on recon.*, 17 BRBS 20 (1985). As interest is awarded on compensation payable under the Act, it cannot be said that claimant is seeking recovery "at law or in admiralty" in violation of Section 5(a). Therefore, we reject employer's assertion that Section 5(a) bars an award of interest.

Further, we reject employer's contention that the administrative law judge does not have the authority to award interest pursuant to 28 U.S.C. §1961, as that section is applicable only to awards of interest on judgments of the district courts. Although Section 1961 does not give administrative law judges authority to award interest, the Board has held that it is to be used as guidance in setting the interest rate. *See Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989); *Grant*, 16 BRBS at 270-271. As employer's contentions lack merit, we affirm the administrative law judge's award of interest in this case.

In response to employer's appeal, claimant indicates that employer has not paid the pre-judgment interest awarded by the administrative law judge and asks the Board to assess post-judgment interest on the past-due pre-judgment interest.⁵ Neither employer nor the Director has addressed this issue. The purpose of interest is not to penalize employers but, rather, to make

⁴In the absence of an express decision by the United States Court of Appeals for the Eleventh Circuit, it follows the precedent of the United States Court of Appeals for the Fifth Circuit set prior to October 1, 1981. *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847, 14 BRBS 669 (11th Cir. 1982); *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981). Thus, in the absence of an Eleventh Circuit case on the issue of interest, the decision in *Strachan Shipping*, 452 F.2d at 1225, decided before 1981, is controlling in the Eleventh Circuit.

⁵Pre-judgment interest is "interest accrued on unpaid benefits during the period prior to issuance of the administrative law judge's Decision and Order." *Santos v. General Dynamics Corp.*, 22 BRBS 226, 228 (1989). Post-judgment interest is "interest on amounts not paid after final judgment was entered." *FIGA v. R.V.M.P. Corp.*, 874 F.2d 1528, 1532 (11th Cir. 1989).

claimants whole, *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989), and the issue of whether a claimant is entitled to interest can be raised at any time. *See Jones*, 25 BRBS at 359. It is well-established that, under the Act, claimants are entitled to interest on over-due payments of compensation. *See Canty*, 26 BRBS at 153. It is equally well-established that they are entitled to interest on past-due payments of additional compensation under Section 14(f), 33 U.S.C. §914(f), *Barry v. Sea-Land Services, Inc.*, 27 BRBS 260 (1993), past-due funeral expenses and death benefits, *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989), and past-due reimbursement for medical expenses, *Hunt v. Director, OWCP*, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993). However, interest is not permitted on an award of an attorney's fee, *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988); *cf. Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82 (CRT) (5th Cir. 1990), or on over-due payments of Section 14(e), 33 U.S.C. §914(e), penalties, *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987) (purpose of Section 14(e) is to bring disputes to the attention of the Department of Labor). Thus, the novel question before us is whether post-judgment interest assessed on pre-judgment interest serves the purpose of the Act and makes claimant whole or whether it merely penalizes employer for its failure to pay that portion of the administrative law judge's award.

Section 1961 specifically provides for the assessment of post-judgment interest in civil cases in the federal district courts.⁶ *See* 28 U.S.C. §1961(a), (c)(4). In interpreting this section, the Supreme Court of the United States stated:

[T]he 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.

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835-836 (1990) (quoting *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987)). Moreover, the Board has noted that, because a claimant is entitled to receive his award on the date the final judgment is entered, post-judgment interest serves to reimburse the claimant for his deprivation. *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 155 n.10 (1992) (citing *FIGA v. R.V.M.P. Corp.*, 874 F.2d 1528, 1532 (11th Cir. 1989)). Although no court has addressed this issue in the context of a case arising under the Longshore Act, the United States Courts of Appeals have determined that post-judgment interest assessed on unpaid awards, including any accrued pre-judgment interest, is permissible.

After acknowledging that Section 1961 mandates the payment of post-judgment interest but does not indicate whether pre-judgment interest should be included in the calculation of post-judgment interest, and after quoting the purpose of post-judgment interest as espoused by the Supreme Court in *Kaiser Aluminum*, the United States Court of Appeals for the Fourth Circuit held:

⁶The Board previously has rejected the contention that the interest rate provided for in Section 1961 is not applicable to administrative tribunals. *Santos*, 22 BRBS at 228; *Grant*, 16 BRBS at 271.

We believe that awarding post-judgment interest on the entire amount the court awarded [the plaintiff], including pre-judgment interest, most closely comports with the purpose of post-judgment interest articulated by the Supreme Court.

Quesinberry v. Life Insurance Co. of North America, 987 F.2d 1017, 1031 (4th Cir. 1993). In earlier decisions, the United States Courts of Appeals for the Second and Fifth Circuits came to the same conclusion. The Fifth Circuit stated:

The award of interest on interest is proper in those situations in which a judgment grants interest on an amount resulting from an unsatisfied judgment on which interest has accrued.

Dorey v. Dorey, 609 F.2d 1128, 1133 (5th Cir. 1980). The Second Circuit, favorably citing *Dorey*, concluded:

[W]hen a prior judgment consisting of both principal and accumulated interest is not paid, a court renewing the judgment may award interest on the entire amount due.

United States v. Hannon, 728 F.2d 142, 145 (2d Cir. 1984).

As the courts are in agreement in allowing interest on interest, we conclude that post-judgment interest, assessed on awarded but unpaid pre-judgment interest, serves the purpose of the Act by making claimants whole. See *Kaiser Aluminum*, 494 U.S. at 835-836. Therefore, although interest is not considered "compensation" under Section 2(12) of the Act, 33 U.S.C. §902(12), *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987), we hold that claimant is entitled to post-judgment interest on the unpaid award of pre-judgment interest. Such post-judgment interest is to be calculated from the date the administrative law judge issued his order.⁷ See *Kaiser Aluminum*, 494 U.S. at 835.

Accordingly, the administrative law judge's award is affirmed, and the decision is modified to reflect claimant's entitlement to post-judgment interest on the matured and unpaid pre-judgment interest.

⁷The award of "interest on interest" in this case is not to be confused with "compound interest." Interest on interest occurs when simple interest is allowed on the matured and unpaid installments of interest, whereas compounding "occurs when accrued interest is added to the principal and the whole is treated as new principal for the calculation of future interest[.]" 45 Am. Jur. 2d, Interest & Usury, §83; see also *Santos*, 22 BRBS at 227 n.2. Although we note Section 1961's provision that "[i]nterest shall be computed daily to the date of payment . . . and shall be compounded annually," 28 U.S.C. §1961(b) (1988), and the courts' general agreement concerning the propriety of compounding interest, we need not address that issue in this case because employer paid the awarded benefits, leaving only a fixed amount of pre-judgment interest as yet unpaid on which to calculate the post-judgment interest.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Acting Chief Administrative Appeals Judge, concurring and dissenting:

Although I concur with my colleagues' rejection of employer's position concerning claimant's entitlement to interest on the award of compensation, I respectfully dissent from their decision to award post-judgment interest on this interest award. Given the manner that this issue is presented to the Board in this case, I would deny claimant's request for interest on interest. In response to employer's appeal, claimant specifically stated:

Also, it is requested that interest be assessed on the interest that is presently due since the employer has not complied as of this date with the Administrative Law Judges (sic) order regarding the award of interest. As basis for that award 28 U.S.C. §1961 and *Grant vs. Portland Stevedoring Co.* . . . is submitted.

CI's Brief at 2. Without further briefing or consideration of the issue by the administrative law judge, I believe this statement must be interpreted as a request for enforcement of the administrative law judge's award of interest. In order to enforce an award under the Act, a claimant must apply for a supplementary default order from the district director in accordance with 33 U.S.C. §918 and 20 C.F.R. §702.372. Thereafter, the claimant may file a copy of said order with the Federal district court and seek enforcement thereof. *See generally Shoemaker v. Schiavone and Sons, Inc.*, 20 BRBS 214 (1988); 33 U.S.C. §918; 20 C.F.R. §702.372. Because claimant in this case has not complied with the Act's enforcement procedures, we cannot award interest on the unpaid sum. Therefore, I respectfully dissent and would deny claimant's request for interest upon interest.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge