

BRB No. 99-0305

JAMES HARRIS)
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 Claimant-Petitioner)
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 v.)
)
 MACHINISTS, INCORPORATED) DATE ISSUED: Dec. 7, 1999
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 and)
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 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Compensation Order: Modification of Existing Compensation Order of Charles L. Green, District Director, United States Department of Labor, Office of Workers' Compensation Programs.

Stephen S. Boynton, Vienna, Virginia, for claimant.

Roger S. Mackey (Law Offices of Roger S. Mackey), Chantilly, Virginia, for employer/carrier.

Before: SMITH and BROWN , Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order: Modification of Existing Compensation Order (OWCP No. 40-106737) of District Director Charles L. Green 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.* (1982) (the Longshore Act), as extended by the District of Columbia Workmen's Compensation

Act, 36 D.C. Code §§501, 502 (1973)(the 1928 or the D.C. Act).¹

Claimant injured his back in 1973 when he was working as a union machinist for employer, a District of Columbia corporation no longer in business.² On October 20, 1980, the administrative law judge issued a Decision and Order, awarding claimant weekly compensation benefits of \$216 pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). *In the Matter of James M. Harris v. Machinists, Inc. and Travelers Ins. Co.*, Case No. 79-DCWC-461 (Oct. 20, 1980). Claimant subsequently filed an Application for Correction of Mistake of Fact and Modification of Compensation Award, alleging that the weekly compensation rate should be \$250.61 rather than \$216. The district director conceded a mistake, but denied retroactive payment. Claimant sought a hearing before an administrative law judge regarding his request for modification. Meanwhile, the parties reached agreement on the disputed issues and on September 21, 1998, requested that the case be remanded to the district director for implementation of the parties' agreement.

The district director issued A Compensation Order: Modification of Existing Compensation Order, awarding claimant \$250 per week from June 9, 1978, to the present and continuing. The district director ordered carrier to pay claimant a cumulative deficiency of \$3,599.44, together with interest of \$3,680.68, to date; he ordered the Special Fund to pay claimant a cumulative deficiency of \$33,220.66, together with interest to be calculated by the director. He also awarded weekly compensation at the revised weekly rate of \$250.61. *Harris v. Machinists, Inc.*, OWCP No. 40-106737 (Nov. 13, 1998). On appeal, claimant challenges the district director's award of simple interest on past-due compensation, arguing that it should be compounded. Employer responds, asserting that the award of simple interest is correct and should be affirmed.

¹The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

²Injuries occurring prior to July 26, 1982, the effective date of the current Workers' Compensation Act applicable in the District of Columbia, are covered by the Longshore Act. D.C. Code Ann. §36-301; 33 U.S.C. §901 et seq.

Claimant contends that although the Longshore Act is silent on the issue of interest, the Board has in its cases left open the possibility that based on facts and circumstances of a particular case, pre-judgment interest may be compounded under 28 U.S.C. §1961.³ Claimant maintains that this case is distinguishable from those where compound interest was found not to be appropriate. Claimant asserts that he has been deprived of his money by a judicial error for twenty years, and that the cumulative deficiency plus simple interest do not compensate him sufficiently because they do not render him whole. Citing various cases, claimant requests that the Board issue an order granting him compound interest bi-monthly on accrued payments owed from June 9, 1978, to November 1, 1998.

We reject claimant's contention that he should receive compound interest to compensate him for the length of time which has passed since he was awarded benefits. Consistent with the Congressional purpose of making claimants whole for their injuries, interest has consistently been imposed on awards of compensation to ensure that the claimant is fully compensated for his work-related injury. An award of interest is mandatory. *Vanover v. Foundation Constructors*, 22 BRBS 453 (1989), *aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991). In *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989), the Board followed the general American rule that interest, when allowable, should be calculated on a simple rather than compound basis. *Id.* at 228 (*citing Stovall v. Illinois Cent. Gulf R.R. Co.*, 722 F.2d 190, 192 (5th Cir. 1984)). The Board noted that 28 U.S.C. §1961, which it has utilized for guidance in determining the appropriate interest rate under the Act, is not incorporated into the Act and thus its provision for compounding interest is not expressly applicable.⁴ *Id.* See *Grant v.*

³Compounding occurs when accrued interest is added to the principal and the whole is treated as new principal for the calculation of future interest. *Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 BRBS 160, 165 n.7 (1994), *citing* 45 Am. Jur. 2d Interest & Usury §83. See also *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989).

⁴Section 1961 is actually a post-judgment interest statute, whereas the issue here and under the Act in general involves pre-judgment interest, *i.e.*, interest accrued on unpaid benefits from the date those benefits became due, rather than from the date of the order awarding them. See *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148 (CRT)(9th Cir. 1998); *Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359. The initial decision awarding permanent partial disability benefits in this case was issued in October 1980, and the decision amending the rate was issued in 1998.

Portland Stevedoring Co., 17 BRBS 20, 22 (1985)(decision on recon.).

In *Santos*, the Board acknowledged that under the general rule, compounding an award of pre-judgment interest may be appropriate in a particular case, but held that this result was not warranted on the facts presented. The Board thus rejected the claimant's argument that compound interest was necessary to make him whole and compensate his not having the use of his money during the time when compensation was delayed.

Claimant's argument here is similarly based on the delay in receiving full benefits, and claimant has not justified a departure from the general rule. While a review of the cases cited by claimant indicates a concern with compensating the prevailing party for the delay in use of money of which it should have had use and to prevent unjust enrichment of the opposing party, this rationale is that cited under the Act to support the award of interest despite the lack of an express statutory grant. See, e.g., *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991); see generally *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 107 (1996) (*en banc*). Compound interest in cases has been allowed where the conduct of the party owing the interest has been egregious, *i.e.*, an intentional patent or trademark infringement, and it has been found to be "particularly appropriate where violation was intentional and indeed outrageous." *Gorenstein Enterprises, Inc. v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1989). Thus, while claimant's allegation that, in some cases, federal courts have awarded compound prejudgment interest is correct, claimant has not established that his situation is similar or that he is differently situated from any other claimant to whom past due benefits are owed. Moreover, he concedes that the past-due benefits are the result of a judicial computational error; thus, benefits were not intentionally withheld from him.⁵ Therefore, his argument regarding compound interest is

⁵Claimant cites the statement that "given that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded." *Salpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). *Salpaugh* dealt with sexual harassment and retaliatory discharge under Title VII; thus motivation was taken into consideration. *Clarke v. Frank*, 960 F.2d 1146, 1153-1154 (2d Cir. 1992), cited in *Salpaugh*, states that Title VII authorizes a district court to grant prejudgment interest on back pay awards in order to discourage employer from attempting to enjoy an interest-free loan for as long as it can delay paying back wages. The legislative history of the Federal Courts Improvement Act of 1982 to which claimant refers, in suggesting that interest be compounded, reflects a concern to prevent unjust enrichment by the defendant,

rejected, and the award of interest is affirmed.

Accordingly, the Decision and Compensation Order: Modification of Existing Compensation Order of the district director is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

because “a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.” S. Rep. No. 2275, 97th Cong., 2d Sess. 30 (1981), *reprinted in* 1982 U.S. C.C.A.N. 11, 40.