TOPIC 18 DEFAULT PAYMENTS

18.1 GENERALLY

Essentially, Section 18 offers a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards. Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 16 BRBS 10 (CRT) (**5th Cir.** 1983); Jourdan v. Equitable Equipment Co., 1989 WL 11089 (Civ. A. No. 88-5432)(Feb. 4, 1989)(Unpublished)("Although the procedure for entry of an immediate judgment is unusual, it reflects the apparent intent of Congress to transfer the fact-finding burden from the federal district courts to the [ALJs]."), aff'd at 889 F.2d 637 (**5th Cir.** 1989)(Rule 81(a)(6) of the [FRCP] provides that the Federal Rules "apply to proceedings for enforcement or review of compensation orders under the [LHWCA]...except to the extent that matters of procedure are provided for in that Act.").

A claimant's remedies under Section 18 are also applicable against the Special Fund since the Fund's liability is derivative of an employer's liability. Maria v. Del Monte/Southern Stevedore, 22 BRBS 132 (1989).

Section 18 only applies to the enforcement of compensation awards. Bruce v. Atlantic Marine, 12 BRBS 65 (1980), aff'd on other grounds, 14 BRBS 63 (**5th Cir.** 1981). In the **Fifth Circuit**, "medical benefits" are included in "compensation" for purposes of enforcement proceedings under Section 18(a). Lazarus v. Chevron USA, Inc., 25 BRBS 145 (CRT) (**5th Cir.** 1992).

An attorney's fee award is not enforceable under Section 18. Wells v. Int'l Great Lakes Shipping Corp., 14 BRBS 868 (1982). See also Wells v. Int'l Great Lakes Shipping Co., 693 F.2d 663, 15 BRBS 47 (CRT) (**7th Cir.** 1982). Moreover, attorney's fees awards, unlike compensation orders, are not enforceable during the pendency of an appeal. Wells, 14 BRBS at 868; see also 33 U.S.C. § 921(d).

Supplemental orders issued by the district director pursuant to Section 18 are final when issued and are not subject to review by the Board. Lazarus, 25 BRBS 145 (CRT) (**Fifth Circuit** held that an award was not final order enforceable under Section 18(a) because it did not adequately state the amount of compensation owed to claimant); Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 17 BRBS 135 (CRT) (**9th Cir.** 1985); Tidelands Marine Serv., 719 F.2d 126, 16 BRBS 10 (CRT); Henry v. Gentry Plumbing & Heating Co., 704 F.2d 863, 15 BRBS 149 (CRT) (**5th Cir.** 1983); Snowden v. OWCP, 253 F.3d 725 (**D.C. Cir.** 2001)(Held, Board lacks jurisdiction to review a supplementary compensation order issued as per Section 18 since that order is final when issued, and therefore, unreviewable by the Board). The claimant may take a certified copy of the district director's supplemental order to a United States district court for enforcement. The district court's role is to determine whether the order was issued in accordance with law. Providence Wash. Ins. Co., 765 F.2d at 1384, 17 BRBS at 138. Review of a supplemental order is available only in an enforcement proceeding in federal district court. Snowden.

[ED. NOTE: *It should be noted, however, that though an order is not determined to be final and is transferred back to the administrative law judge pursuant to Section 18(a), the judge does not have the authority to raise new issues sua sponte. See, e.g., Kelley v. Bureau of Nat'l Affairs, 20 BRBS 169 (1988) (where a case was transferred to the ALJ pursuant to Section 18(a) solely for a determination as to whether disputed medical expenses should be paid, which was an issue involving interpretations and findings under a final compensation order, the ALJ had no authority to raise the issue of jurisdiction sua sponte).]*

One court has held that where an employee seeks to enforce a supplemental default order, the employer need pay nothing pending the court's determination of whether the supplemental order is in accordance with law. Leonard v. Walter, 356 F. Supp. 56 (**D.D.C.** 1973). The court in Leonard also indicated that the claimant could not get a supplemental order if the Board or court had issued an order staying payments pending appeal pursuant to Section 21(b)(3) or 21(c).

Enforcement of a default judgment under Section 18 can be stayed by a court of appeals pending its appeal to the circuit court. A general stay of payments, however, cannot be granted by the circuit court under Section 18 pending an administrative appeal of the original award to the Board since Section 21(b)(3) of the LHWCA vests such power exclusively in the Board. Henry, 704 F.2d at 865, 15 BRBS at 150 (CRT).

The **Fifth Circuit** has held that where an order does not explicitly answer a question which emerges during the period of payment, a Section 18 proceeding may be appropriate. Bray v. Director, OWCP, 664 F.2d 1045, 14 BRBS 341 (**5th Cir.** 1981); but see Lazarus, 25 BRBS 145 (CRT) (award was not a final order enforceable under Section 18(a) because it did not adequately state the amount of compensation owed to claimant); Keen v. Exxon Corp., 35 F.3d 226 (**5th Cir.** 1994)(Held, ALJ's compensation order did not become final until such time as the district director furnished computations dictated by the ALJ order); Severin v. Exxon Corp., 910 F.2d 286 (**5th Cir.** 1990)("To constitute a final decision and order of the ALJ, 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 dispute between the parties."); Ledet v. Phillips Petroleum Co., 163 F.3d 1999 (**5th Cir.** 1998), Although the ALJ provided a means of calculating the amount of benefits due, he impermissibly delegated his fact-finding duty to the Director who would have to resort to extra-record facts; such is impermissible.). The **Fifth Circuit** in Bray also held that where error is asserted with regard to a matter of law or fact in the supplementary order finding no default, the Board has jurisdiction to hear the appeal. Bray, 664 F.2d 1045, 14 BRBS 341.

Constitutionality of Section 18

Section 18, as applied is not violative of Article III of the United States Constitution or due process rights. Schmit v. ITT Fed. Elec. Int'l, 26 BRBS 166 (CRT) (**7th Cir.** 1993); Abbott v. Louisiana Ins. Guaranty Ass'n (LIGA) (In re Compensation under Longshore & Harbor Workers' Compensation Act), 889 F.2d 626 (**5th Cir.** 1989), cert. denied, 494 **U.S.** 1082 (1990).

In Abbott, LIGA had been precluded from participating in the pre-deprivation due process rights ALJ hearing. Thus, the issue was whether other procedural protections in the LHWCA were sufficient to protect LIGA's due process rights. The only reason the court discussed post-deprivation review was because LIGA had no opportunity to participate in the pre-deprivation hearing. In Bunol v. George Engine Co., 996 F.2d 67 (**5th Cir.** 1993), the **Fifth Circuit** held that delays involved in obtaining administrative review of a decision awarding compensation did not deny due process. In Bunol, as distinguished from Abbott, LIGA fully participated in the ALJ hearing, and thus the post-deprivation review process was not at issue.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 **U.S.** 319, 333 (1976). In Abbott, the **Fifth Circuit** noted that due process generally means that a party must have the opportunity for a hearing before the government interferes with the party's protected interest. 889 F.2d at 631. In Bunol, the **Fifth Circuit** found that since LIGA had an opportunity to be heard "at a meaningful time and in a meaningful manner" before there was any government interference with its property rights, its rights to due process had been adequately protected. 996 F.2d at 69.

[ED. NOTE: *In arguing a lack of due process, LIGA, in Bunol, had pointed to the* ***Fifth Circuit*** *rule that if a compensation order is reversed neither an employer nor a carrier has a cause of action for reimbursement from the claimant of monies paid but not owed. Instead, there is only a claim for a credit against future compensation. See Ceres Gulf v. Cooper, 957 F.2d 1199, 1209 (**5th Cir.** 1992). If the compensation order in Bunol was eventually overturned in its entirety, LIGA would be unable to recover the compensation erroneously paid to the claimant. In that event, LIGA argues, the LHWCA's post-deprivation review would not be meaningful and a due process violation would result.****]***

[ED. NOTE: *See Schmit and Abbott for a complete analysis of the constitutional aspects of Section 18.****]***

18.2 SECTION 18(a) SUPPLEMENTAL ORDER DECLARING DEFAULT

Section 18(a) of the LHWCA states:

> **In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19, a deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance wit law. Review of the judgement so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ or execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.**

33 U.S.C. § 918(a).

Section 18(a) provides that if an employer fails to pay compensation, including medicals, Ware v. Dresser Offshore Services, 9 BRBS 160 (1978), aff'd, 598 F.2d 618 (**5th Cir.** 1979), due under a final or non-final award for a period of 30 days after the compensation is due, the claimant may, within one year after the default, request that the district director issue a supplemental order declaring the amount due.

Under Section 18(a), an order regarding an employer's default in paying a compensation award may be **enforced only by the Federal District court for the judicial district in which the employer has its principal place of business, or maintains an office, or in which the injury occurred**. Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1219, 18 BRBS 60, 62-63 (CRT) (**5th Cir.** 1985); Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1386, 17 BRBS 135, 139 (CRT) (**9th Cir.** 1985); Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT) (**5th Cir.** 1983).

In Pleasant-El v. Oil Recovery Company, Inc., 148 F.3d 1300 (11th Cir. 1998), the **Eleventh Circuit** found that Section 18(a) of the LHWCA gives the federal district court a general grant of authority to determine whether the imposition and enforcement of a supplemental order is lawful although the federal district court lacks authority to consider the validity of the underlying compensation order.

Section 18(a) makes no provision for district court review of a deputy commissioner's order where no default award was made and no enforcement is required. Durham v. Embassy Dairy, 19 BRBS 105 (1986) (Board retains jurisdiction of cases involving only a question of law regarding the propriety of a Section 14(f) penalty and not requiring Section 18 enforcement of that penalty).

When a final decision and order underlies the district director's supplemental order of default, and the district director has correctly followed the procedures required by Section 18(a), the supplemental order is "in accordance with law," and the district court must enforce it, despite the procedural or substantive errors the administrative law judge may have made in arriving at the underlying compensation order. Abbott v. Louisiana Ins. Guaranty Ass'n, 889 F.2d 626 (**5th Cir.** 1989), cert. denied, 494 **U.S.** 1082 (1990) (district court's scope of review of Section 18(a) enforcement proceedings is limited to the lawfulness of the supplemental order and does not include the procedural or substantive correctness of the underlying compensation orders).

An ALJ does have jurisdiction, pursuant to Section 18(a), to review the language of his Decision and Order on Remand in order to address the ambiguity that arose after the decision was issued. Bray v. Director, OWCP, 664 F.2d 1045, at 1047, 14 BRBS 341, at 343 (**5th Cir.** 1981)(While the most common §18(a) proceeding is based on an employer's failure to pay benefits where a compensation order clearly provides for them, an unusual case may arise where a compensation order is "ambiguous or unclear, or uncertainy arises in its application, which was not reasonably apparent at the time of the entry of the order; use of §18(a) under such circumstances.").

In Severin v. Exxon Corp., 910 F.2d 286, 24 BRBS 21 (CRT) (**5th Cir.** 1990), the **Fifth Circuit** held that a compensation order which does not specify the amount of credit employer was to receive or provide a method for its calculation was not "a final decision and order" which was "due" or "effective," even though it was filed in the office of the deputy commissioner. In Jourdan v. Equitable Equipment Co., 889 F.2d 637, 23 BRBS 9 (CRT) (**5th Cir.** 1989), the court held that a supplemental order of default was "in accordance with law" even though the underlying compensation order did not designate which of the employer's insurance carriers was responsible for paying the claimant's benefits.

In Bunol v. George Engine Co., 996 F.2d 67 (**5th Cir.** 1993), the **Fifth Circuit** held that a compensation order containing a clerical error (it awarded both temporary total disability and permanent partial disability during the same time period) was nevertheless enforceable since the rest of the decision made clear that the overlap was simply a clerical error.

Where the district court issues an enforcement order, the statute is silent as to whether a stay may be granted pending appeal of that order to the circuit court. Bunol, 996 F.2d 67.

***[ED. NOTE:** In Bunol such a stay was granted upon LIGA's posting of a supersedeas bond. The U.S. Department of Labor subsequently filed a motion to vacate, arguing that a stay of the enforcement order would be directly contrary to the LHWCA's purpose of providing "a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards." Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129 (**5th Cir.** 1983). That motion to vacate, however, was withdrawn at oral arguments by the Department of Labor. Thus, the **Fifth Circuit** did not reach the question of whether it was proper for the district court to grant the stay of execution pending appeal.]*

Under Section 21(b)(3), payments are due, despite appeal, unless stayed. McCrady v. Stevedoring Servs. of America, 23 BRBS 106 (1989).

***[ED. NOTE:** As a practical matter, the Board sparingly issues stays of compensation orders.]*

By the terms of Section 18(a), appellate review is in the federal courts. Since the district director's order declaring the amount of compensation defaulted upon is final, it is not appealable to the Board. See Jones & Laughlin Steel Corp. v. Wertz, 720 F.2d 324 (**3d Cir.** 1983); Davis v. Strachan Shipping Co., 5 BRBS 414 (1977). Also, where there is a default order, the assessment of additional compensation on the defaulted amount pursuant to Section 14(f) is not appealable to the Board. Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 17 BRBS 135 (CRT); Patterson, 719 F.2d 126, 16 BRBS 10 (CRT). Where there is no default order to be enforced under Section 18, however, the Board retains jurisdiction over Section 14(f). Rucker v. Lawrence Mangum & Sons, Inc., 18 BRBS 74 (1986).

Under Section 18(a), a claimant can obtain judgment for defaulted payments due under a non-final award, i.e., one which is being appealed, or from a final order. Section 21(d) provides an

alternate method for enforcement of a final order through an action in equity to enjoin an employer's compliance with the award. See 33 U.S.C. § 921(d). For some differences between the two sections, see, e.g., Cassell v. Taylor, 243 F.2d 259 (**D.C. Cir.** 1957); Leonard v. Walter, 356 F. Supp. 56 (**D.D.C.** 1973).

The prime **distinctions between Section 18 orders and Section 21 orders** are: (1) Orders issued under Section 18, unlike Section 21 orders, are not appealable to the Board; (2) Section 18 orders are final when issued, unlike Section 21 orders which do not become final until after 30 days or, if appealable after appeal; and (3) as a result, Section 18 supplementary orders can immediately be filed with the federal district court for enforcement. Snowden.

Section 18(a) specifically provides that the action must be brought within one year after the default. Thus, an employee, who brought suit to enforce the compensation order against his employer 16 years after the award, was barred from procuring a judgment on the filing of the deputy commissioner's supplemental order certifying the amount in default. Cassell v. Taylor, 243 F.2d 259 (**D.C. Cir.** 1957).

18.3 SECTION 18(b) SUBROGATION OF THE SPECIAL FUND TO RIGHTS OF CLAIMANT

Section 18(b) of the LHWCA provides:

> **In cases where judgement cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44, make payment from such fund upon any award made under this Act, and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may bring a proceeding in the name of the Secretary of Labor under section 18 or under subsection (c) of section 21 of this Act, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.**

33 U.S.C. § 918(b).

[ED. NOTE: *For more on bankruptcy, see Topic 19.10 Procedure–Bankruptcy.****]***

Section 18(b) provides that if an employer defaults "by reason of ... insolvency or other circumstances," the Special Fund may make the compensation payments and medical payments due. (See Section 44 of the LHWCP.) Section 18(b) does not mandate that the Special Fund pay the payments awarded where the carrier became insolvent. Meagher v. B.S. Costello, Inc., 20 BRBS 151 (1987).

[ED. NOTE: *However, if both the employer and carrier are bankrupt, the liberal construction of the LHWCA logically makes the Section 44 Trust Fund available to the claimant.* ***(Assuming there is no state guaranty association involved.)*** *Ordinarily, when an employer is discharged from liability, under the bankruptcy laws, the employer's insurer remains fully responsible for the claim pursuant to the provisions of Sections 35 and 36(a) of the LHWCA. When there is no insurer (e.g., the employer is self-insured) recovery must come from the indemnity bond or securities deposited*

by the employer pursuant to Section 32(a)(2). As noted above, there may also be a state guaranty association that may be liable for payment. If none of the preceding resources are available, some benefits may come from the Special Fund pursuant to the provisions of Section 18(b).]

The Secretary of Labor would then have a right to seek reimbursement against the employer under this section or Section 21(d), and is subrogated to the claimant's preferences in bankruptcy proceedings under Section 17. For an explanation of the purpose and problems of Section 18(b), see Director, OWCP v. Peabody Coal Co., 554 F.2d 310, 6 BRBS 1, 22 (**7th Cir.** 1977). In Sicker v. Muni Marine Co., 8 BRBS 268 (1978), the Board suggested that Section 18(b) may be an avenue for the claimant to get compensation from an employer who may be unreachable because of an apparent Department of Labor error in informally processing the claim.

***[ED. NOTE:** For more on bankruptcy, see Topic 19.10.]*

In Stevens v. Tacoma Boatbuilding Co., 22 BRBS 274 (ALJ) (1989), the judge held that where the employer filed for bankruptcy and the carrier was under receivership, the case was not stayed. Where no responsible party is financially sound, payments of benefits may be made from the Special Fund. 33 U.S.C. §§ 918(b), 944. In Stevens, the employer and carrier cited 11 U.S.C. § 362 and contended that the claimant's claim with the bankruptcy court is her exclusive remedy against the employer.

Section 363(b)(4) of the Bankruptcy Act provides that in bankruptcy cases, there shall be no stay of "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."

In re Mansfield Tire & Rubber Co., 660 F.2d 1108 (**6th Cir.** 1981), the **Sixth Circuit** held that a state's workers' compensation act proceeding was exempt under the Bankruptcy Act's Section 362(b)(4). In Mansfield, the court reasoned that such funds are specifically for the payment of compensation claims and not part of the debtor's estate. See also In re McLean Trucking Co., 74 B.R. 820 (**Bankruptcy W.D.N.C.** 1987).

In Stevens, 22 BRBS 274 (ALJ), the ALJ cited Mansfield and stated that he was not convinced that such an exemption applies to a federal agency. The judge further noted that even in cases where no responsible party is financially solvent, payment of benefits may be made from the Special Fund, and therefore, the case would still go forward.

However, see Howell v. Jacksonville Shipyards, Inc., (96-LHC-2217)(J. Levin) (Oct. 6. 1997) (Unpublished) (Section 362 of the Bankruptcy Act was found not to apply to the LHWCA.); see also In Re Western States Drywall, Inc., 150 BR 774 (1993) (Automatic stay did not preclude DOL from determining debtor's liability in Davis-Bacon Act case.); In Re Howell, Bankruptcy, Tenn., 4 BR 102 (1980) (Federal Employees' Compensation Act).

Upon consideration of the procedures set forth in Section 18 of the LHWCA, one can reasonably argue that, where there is no state guaranty association, it is clear that the LHWCA contemplates the entry of an award in cases involving insolvent employers and disabled workers. It is actually the award following the LHWCA proceeding which triggers potential access to the Fund. Given the framework of pertinent statutory provisions, **an award against the employer is entered pro forma**, even if technically unenforceable as such. See generally, In Re Western States Drywall, Inc., 150 BR 774 (1993). In essence, the award following a determination of entitlement is a procedural mechanism which begins the process by which the injured worker may pursue his case against the bonding company or petition the Secretary of Labor for relief from the Special Fund. As such, Section 362 of the Bankruptcy Act does not appear to be applicable to proceedings to determine the nature and extent of disability under the LHWCA

Under another theory, a claim under the LHWCA could still be pursued even after the responsible employer had been discharged in bankruptcy from all such liability. Coleman v. Kaiser Steel Corporation, 22 BRBS 408 (ALJ) (1989) (judge decided claim on its merits and remanded to OWCP so that it could determine the identity of any insurance carrier, or, if the employer was uninsured, the identity of the surety or § 32(a) security deposit provided by employer; if no carrier, surety or security deposit was available for payment, payment should be made by the Special Fund pursuant to § 18(b)).

In Ferrario v. Kaiser Steel Corp., 27 BRBS 166 (ALJ) (1993) (employer dismissed in bankruptcy court is entitled to be dismissed as a party to LHWCA proceeding), the ALJ held that the regulation implementing Section 18(b), 20 C.F.R. § 702.145(f), authorizes the Director to enter an award against the Special Fund and remanded the case to the District Director without a decision on the merits. As a practical matter, however, the Director continues to refer such cases to OALJ for hearing, notwithstanding the ambiguous language of the above regulation. In this manner, the parties are able to have an APA hearing on such issues as fact of employment and injury, employer insolvency, nature and extent of disability, average weekly wage, etc. The decision and order (award) issued by the ALJ may not require payment by the Fund..

[ED. NOTE: *The process noted at Topic 19.10 naming the bankrupt employer/carrier as a nominal party so that an adjudication can take place provides a solution that adheres to the adjudicatory process.**]***

Insurance Aspects

Where an employer and carrier are insolvent, and there is **no "cut through" endorsement** between a surplus line carrier and an insurance company authorized to do business in the state, the state insurance guaranty association was not liable. Deville v. Oilfield Indus., 26 BRBS 123 (1992). In a case such as this, the Secretary has the discretion to satisfy a judgment from the Special Fund. Shaller v. Cramp Shipbuiding & Dry Dock Co., 23 BRBS 140 (1989).