UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT B. REICH,	***)***	
Secretary of Labor,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 92-325-P-C***
	)	
BATH IRON WORKS	***)***	
CORPORATION,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DAMAGES

Summary judgment as to liability having been entered in favor of the Secretary of Labor ("Secretary") (Docket No. 35) in light of the opinion of the First Circuit, *Reich v. Bath Iron Works Corp*., 42 F.3d 74 (1st Cir. 1994), the court must now resolve the parties' dispute over the proper measure of damages. At issue is the amount payable by the defendant as a supplemental assessment to the so-called "special fund" administered by the Secretary pursuant to section 944(c) of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. § 901 *et seq*. The fund has various purposes, the most important of which is to encourage companies to hire employees with disabilities by spreading the risk of loss throughout the maritime industry. *Bath Iron Works*, 42 F.3d at 75; *National Metal & Steel Corp. v. Reich*, 55 F.3d 967, 969 (4th Cir. 1995).

Through written communications with the court, the parties have made clear that their dispute is not a factual one, but rather centers on two legal questions: the proper method for calculating the supplemental assessments pursuant to section 944(c), and whether the Secretary is entitled to recover

pre-judgment interest. *See* Docket Nos. 39 and 40. Pursuant to my order, the parties have filed memoranda of law stating their respective positions. Docket Nos. 42-43. Accordingly, it is appropriate to treat the remaining issues in the case as having been jointly submitted for judgment based upon a stipulated record.

The Secretary brought this suit to recover supplemental assessments for the special fund from Bath Iron Works Corporation ("BIW"), contending that the formula set forth in section 944(c) for calculating the assessment requires the defendant to include payments it made to injured employees pursuant to both the LHWCA and the Maine Workers' Compensation Act ("Maine Act"). Some of BIW's injured employees are covered by both the federal and state statutes; BIW took the position that payments to such workers were made pursuant to the Maine Act and not the LHWCA. This had the effect of reducing BIW's annual assessment pursuant to section 944(c). At issue are BIW's payments for 1989 through 1994.[1]

The court entered summary judgment in favor of BIW, a determination that was vacated by the First Circuit. *Bath Iron Works*, 42 F.3d at 78. The First Circuit held that the Secretary's interpretation of section 944(c) was a reasonable one and was therefore entitled to judicial deference pursuant to the doctrine set forth in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Bath Iron Works*, 42 F.3d at 76. On remand, this court entered summary judgment in favor of the Secretary on the issue of liability.

[1] The Secretary's original complaint sought to recover assessments for 1989 through 1993. Without objection, the court granted the Secretary's motion to amend the complaint to include the assessment for 1994. *See* Docket Nos. 41, 44.

I. The Denominator Problem

The formula set forth in section 944(c) is a complicated one, and is discussed thoroughly in the First Circuit's opinion. BIW is a self-insurer within the meaning of section 944, which also covers insurance carriers that provide workers' compensation coverage pursuant to the LHWCA. At the heart of this case is one aspect of the formula, set forth in the statute as

> the ratio (expressed as a percent) of (i) the carrier's or self-insured's workers' compensation payments under [the LHWCA] during the preceding calendar year, to (ii) the total of such payments by all carriers and self-insureds under [the LHWCA] during such year.

33 U.S.C. § 944(c)(2)(A). The liability phase of the proceeding determined that the numerator of this fraction must be revised upward when computing BIW's assessment for the years in issue. It is the present contention of BIW that the denominator of the fraction must also be upwardly adjusted. The Secretary asks the court to compute BIW's liability without adjusting the denominator to reflect a new total of all workers' compensation payments made pursuant to the LHWCA. The Secretary's position is that its reading of section 944(c)(2)(A) is equitable and consistent with administrative practice, and that to revise the denominator would either be manifestly unfair to others subject to special fund liability or would require the Secretary to embark on the administratively burdensome task of retroactively adjusting all assessments made pursuant to section 944(c) for 1989 through 1994.

BIW relies simply on the text of section 944(c), and its contention that the failure to adjust the denominator would amount to a windfall for the Department of Labor. The Secretary, in turn, also grounds his analysis in the text of the statute and on what he refers to, through counsel, as his

consistent administrative practice to revise only the numerator in instances where it becomes necessary to adjust an assessment made pursuant to section 944(c).

Resolution of the problem requires the court to determine what degree of deference, if any, to accord the Secretary's interpretation of the statute in these circumstances. The first stop is the text of the statute. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843.

The statutory language at issue presents such an ambiguity. Nothing in the plain text of section 944(c) indicates that Congress confronted the question of how the ratio set forth in section 944(c)(2)(A) is to be revised when it becomes necessary to conduct an after-the-fact recalculation of it. As the Secretary notes, the discernable purpose of this statutory mechanism is the equitable apportionment of the estimated requirements of the special fund; to the extent that this estimate proves to be erroneous, the statute provides a correcting mechanism: the fund balance carries forward and section 944(c) payments are adjusted in subsequent years. *See Reich*, 42 F.3d at 75 (noting that section 944(c)(2), by its terms, bases the annual assessment on the Secretary's estimate of the additional sum required to maintain adequate reserves). I have reviewed the legislative history of section 944(c) and find no further guidance from Congress as to how the fund's accounting shall proceed.

Given the lack of an explicit congressional directive, the next question becomes the extent to which the position advanced by the Secretary here is of the sort that is properly accorded *Chevron*

deference. The *Chevron* doctrine squarely and unmistakably applies when the agency's position is stated by rule. *See, e.g., Strickland v. Commissioner, Maine Dept. of Human Servs.*, 48 F.3d 12, 17 (1st Cir. 1995) (an agency "need only write a rule that flows rationally from a permissible construction of the statute"). But the doctrine does not apply "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). This is because Congress has delegated the statutory authority at issue to the administrative official and not to the counsel representing the official in a particular proceeding. *Id*. The First Circuit has made much the same point in another case arising under the LHWCA. *See Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. General Dynamics Corp.*, 980 F.2d 74, 79 (1st Cir. 1992) (noting that, in general, "agency positions raised adversarially for the first time in the course of litigation are not owed deference"). In fact, *General Dynamics* draws an important distinction between a position developed in the course of formal or informal agency proceedings, which are entitled to *Chevron* deference, and actions taken pursuant to the Department of Labor's responsibility to protect the financial health of the special fund, "a narrowly defined, somewhat adversarial role unlike the more formal and neutral policy-making capacity to which courts generally defer." *Id*.

The present case is nevertheless distinguishable from *General Dynamics*. There, the agency position at issue did not involve the "textual interpretation" of the LHWCA or regulations promulgated thereunder, but on the agency's interpretation of "judge-made case law." *Id*. at 80. Here, the problem at hand is purely a statutory one. More importantly, the Secretary's position is a function of the Department of Labor's standing administrative practice and is therefore not a position developed purely as a litigating position. *National Metal & Steel Corp.*, 55 F.3d at 969 n.* (despite

lack of regulations, Secretary's consistent practice pursuant to section 944(c) entitled to deference); *see also Monongahela Power Co. v. Reilly*, 980 F.2d 272, 279 (4th Cir. 1992) (deference due to position consistently taken by agency); *Federal Labor Relations Auth. v. United States Dep't of the Treasury, Fin. Management Serv.*, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (deference appropriate unless position "may not reflect the views of the agency head(s)" and/or may have been developed hastily or under special pressure), *cert. denied*, 493 U.S. 1055 (1990); *Cook v. Espy*, 856 F. Supp. 1095, 1101 (S.D.W.Va. 1994) (position consistently maintained by agency entitled to deference). Accordingly, the Secretary's interpretation of section 944(c) must stand unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

As the First Circuit has recently pointed out in another context, the degree of *Chevron* deference varies with the circumstances. *Strickland*, 48 F.3d at 18. But deference is particularly appropriate "in complex and highly specialized areas where the regulatory net has been intricately woven" and, accordingly, "[m]atters of accounting, unless they be the expression of a whim rather than an exercise of judgment, are for the agency." *Id*. (citations omitted). Concerning the complex and specialized aspect of maritime law at issue in this proceeding, the Secretary's interpretation is anything but whimsical. As he points out, when the denominator of the ratio remains unchanged in these circumstances then the resulting overpayment is shared proportionally by each carrier or self-insurer. BIW characterizes this overpayment as a windfall to the Labor Department, and therefore something the court should not sanction. In fact, the overpayment is carried forward and reflected in calculations for subsequent years; thus, any carrier or self-insurer that continues to contribute to the special fund receives a proportional share of the benefit from a prior year's overpayment. This has the ring of equity, stability and common sense.

Conversely, adjusting the denominator solely for BIW here would have the effect of providing a windfall to BIW as a result of its having improperly calculated its obligations to the special fund. A carrier or self-insurer with obligations to the special fund "should not be allowed to profit at the rest of the industry's expense." *National Metal & Steel Corp.,* 55 F.3d at 970. The Secretary could forestall such a result by recalculating the special fund assessment for each carrier and self-insurer for each of the years at issue. But that would surely breed administrative complexity and unwelcome uncertainty as all assessments would be subject to theoretically unending after-the-fact revision. BIW points to no specific language in the statute, and offers nothing in the way of case law or legislative history, to support its contention that Congress intended the special fund to become such a quagmire for those obligated to finance it.

Although my analysis is grounded in the *Chevron* doctrine, I hasten to add that my conclusion would be the same if no deference were due the Secretary's interpretation of section 944(c) and the more general rules of statutory construction were applicable. "It is . . . an established canon of statutory construction that a legislature's words should never be given a meaning that produces a stunningly counterintuitive result -- at least if those words, read without undue straining, will bear another, less jarring meaning." *United States v. O'Neil,* 11 F.3d 292, 297 (1st Cir. 1993). It seems to me counterintuitive, perhaps even stunningly so, that Congress intended either a windfall to BIW in these circumstances, or that *all* special fund assessments would be subject to after-the-fact revision when it is discovered that one carrier or self-insured had under-reported its obligations. Without undue straining, the words of section 944(c) will bear the less jarring interpretation offered by the Secretary.

II. Prejudgment Interest

The parties are also in disagreement over whether and to what extent the Secretary may recover prejudgment interest on its successful claim against BIW. Federal law, as opposed to the law of the forum state, applies. *WJM, Inc. v. Massachusetts Dep't of Pub. Welfare*, 840 F.2d 996, 1006 n.13 (1st Cir. 1988).

Relying on *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 132 L. Ed. 2d 148 (1995), and *West Virginia v. United States*, 479 U.S. 305 (1987), the Secretary contends that prejudgment interest is appropriate as compensation for the damages done to the special fund by BIW's failure to pay the full amount it owed. BIW contends that it should not be penalized in that manner for defending a good faith, though ultimately erroneous, interpretation of section 944(c).[2]

In the *West Virginia* case, the Supreme Court made the general observation that prejudgment interest is "an element of complete compensation" that "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia*, 479 U.S. at 310 and n.2. Thus, the Court determined that a state may be held liable to a federal agency in contract for prejudgment interest in light of the "longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money." *Id*. at 310, 312. This, obviously, is not a contract case and *West Virginia* is not directly applicable. Wholly inapplicable is the other case cited by the Secretary, *City of Milwaukee*. There, the Supreme Court made explicit a longstanding general rule that "prejudgment

[2] BIW also devotes a great deal of attention to arguing that a provision of the Debt Collection Act, 31 U.S.C. § 3717, which permits a federal agency to collect interest on debts owed to the agency, does not apply. However, the Secretary makes clear in his memorandum that he does not base his request for prejudgment interest on the Debt Collection Act.

interest should be awarded in maritime collision cases, subject to a limited exception for `peculiar' or `exceptional' circumstances." *City of Milwaukee*, 132 L. Ed. 2d at 154 (citations omitted). And the Court held that "neither a good-faith dispute over liability nor the existence of mutual fault justifies the denial of prejudgment interest in an admiralty collision case." *Id.* at 157.

This is not an admiralty collision case. While it is true, as the Secretary notes, that the LHWCA can be characterized as federal maritime law, there is no presumption of entitlement to prejudgment interest in a civil action brought pursuant to section 944(h) of the Act to recover sums owing to the special fund. Rather, whether a suit is brought in admiralty or not, in actions decided under federal law "an award of prejudgment interest rests within the discretion of the trier of facts." *Muratore v. M/S Scotia Prince*, 663 F. Supp. 484, 486 (D. Me. 1987), *aff'd in part and rev'd in part on other grounds*, 845 F.2d 347 (1st Cir. 1988); *see also Conway v. Electro Switch Corp*., 825 F.2d 593, 602 (1st Cir. 1987).

I am convinced, however, that discretion counsels in favor of an award of prejudgment interest in the circumstances of this case, to be awarded on each past-due supplemental assessment from the time it would have been payable if BIW had filed timely and complete reports of its payments under the LHWCA. Because BIW underreported the sums it had paid out in workers' compensation benefits pursuant to the LHWCA, the formula set forth in section 944(c) required the Secretary to meet the special fund's obligations through correspondingly higher assessments on all other carriers or self-insureds. Thus, there was a very real harm -- not to the Secretary or to the employees entitled to payouts from the special fund -- but to the other entities paying into the fund. If the court does not award prejudgment interest, BIW essentially has received an interest-free loan at the expense of these other entities. That BIW's original interpretation of section 944(c) may have

been made in good faith does not, by itself, alter the calculus. "[T]he existence of a legitimate difference of opinion on the issue of liability is merely a characteristic of most ordinary lawsuits." *City of Milwaukee,* 132 L. Ed. 2d at 156.

The Secretary devotes considerable attention in his memorandum to the issue of what interest rate should apply, and how the court should calculate the award. BIW does not address the problem. The objective in general is to "formulate an interest award [that will] make the plaintiff whole," a process in which the court is vested with "considerable discretion." *Conway*, 825 F.2d at 602. Here, of course, the plaintiff has already been made whole in the sense that the Secretary was able through the mechanism set forth in section 944(c) to meet the special fund's requirements. It is therefore the other self-insureds and insurance carriers, which incurred additional assessments as the result of BIW's underpayments, that the court should seek to make whole with an award of prejudgment interest.

To do that, it seems to me appropriate to fashion an interest rate that approximates the cost to the other self-insurers and carriers of either borrowing the sum of their over-assessments or losing available investment income from such a sum. The Secretary proposes the "underpayment rate" rate specified in the Internal Revenue Code, *see* 26 U.S.C. § 6621(a)(2) (three percentage points above the federal short-term rate) for the 1989 deficiency, and the "corporate large underpayment" rate, *see id*. at § 6621(c) (federal short-term rate plus five percentage points), thereafter, compounded daily, *see* 26 U.S.C. § 6622(a) (so providing, as to interest paid pursuant to Internal Revenue Code). The Secretary notes that Congress has made such rates applicable to the trust fund established pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, which in turn adopts the procedural provisions of the LHWCA. Absent an explicit congressional directive to apply the rates from the Internal

Revenue Code here, I do not assume Congress intended such a result. I conclude that the prime rate, as published on the first business day of each month during the relevant period in *The Wall Street Journal* and compounded annually, is the appropriate rate to be applied here given the equities involved.

III. Conclusion

For the foregoing reasons, I recommend (1) that damages be awarded to the Secretary for each year in question without varying the denominator set forth in 33 U.S.C. § 944(c)(2)(A)(ii); (2) that the amount of the judgment include prejudgment interest at the prime rate and for the periods identified above; (3) that the parties be directed to confer and seek agreement on an exact dollar value of the money judgment to which the Secretary is entitled pursuant to the court's decision and (4) that the parties be directed to submit, within 15 days of the court's decision, either a jointly proposed judgment incorporating the agreed-upon amount or separate proposed judgments with supporting written argument.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of August, 1995.

David M. Cohen
United States Magistrate Judge