SECTION 3(b)

Digests

The Board holds that the weight of the evidence supports the administrative law judge's finding that the University of Guam is a subdivision of the government of Guam, and thus, that claimant may not receive benefits, pursuant to Section 3(b) of the Act. The Board reviews federal law to determine whether an entity created under state law is a "political subdivision" of the state, and notes that the vast majority of state universities enjoy sovereign immunity under the 11th Amendment to the Constitution. *Tyndzik v. University of Guam*, 27 BRBS 57 (1993)(Smith, J., dissenting), *rev'd in pert. part sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995).

The Ninth Circuit reverses the Board's holding that the University of Guam was a subdivision of the government of Guam at the time of claimant's injury such that Section 3(b) precluded him from receiving benefits. The territorial statute creating the University set up a "non-membership, non-profit corporation" whose Board of Regents were not employees of the government. The university also cannot perform basic governmental functions. Claimant, an employee of the University, therefore may pursue his claim under the Act. *Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT) (9th Cir. 1995), *rev'g in pert. part Tyndzik v. University of Guam*, 27 BRBS 57 (1993)(Smith, J., dissenting).

The Board affirmed the administrative law judges' determinations that employer, the City of Titusville, is a governmental subdivision of the State of Florida as defined by Section 3(b) of the Act, as the city can, *inter alia*, tax its citizens and enact laws. Moreover, the city is authorized by state law to construct marinas for use by the general populace. Thus, the marina is not akin to a private facility. Consequently, the Board affirmed the administrative law judges' conclusions that claimants, employees of the city marina, are excluded from coverage under the Act by operation of Section 3(b). *Keating v. City of Titusville*, 31 BRBS 187 (1997).

The Board affirmed the administrative law judge's finding that employer is a subdivision of the State of California, and his consequent conclusion that claimant's claim is barred pursuant to Section 3(b) of the Act. The Board rejected claimant's assertions that the doctrine of sovereign immunity is co-extensive with Section 3(b), that Section 3(b) was not intended to cover municipalities, and that there is no "clear-cut interpretative test" for determining whether a lesser public entity, like employer, may be treated as a "subdivision" of a state government under Section 3(b). With regard to this latter contention, the Board held that the decisions in *Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995), and *Keating v. City of Titusville,* 31 BRBS 187 (1997), state that in order for Section 3(b) to apply, the employer in question must perform some "basic governmental functions on its own." In this case, the administrative law judge found that employer performed independent, government functions with the primary purpose of serving the general public, and had the right to take property by eminent domain and to enact ordinances, including traffic regulations, for travel on its facilities, which are enforceable in state courts. Moreover, while it does not have taxing power, it does have the power to issue bonds and a legislatively-derived reliance on local municipalities for some of its financing. *Wheaton v. Golden Gate Bridge, Highway & Transp. Dist*., 41 BRBS 51 (2007).

Claimant, who worked for Georgia Ports Authority (GPA), was injured during his assignment to work for SSA. The Board rejected SSA's contention that Section 3(b) of the Act prevents liability from being shifted from a governmental subdivision to a statutory employer, as the determination as to whether claimant is excluded from coverage under Section 3(b) is dependent on whether the administrative law judge properly determined that SSA was claimant's borrowing employer at the time of injury. In this regard, the Board affirmed the administrative law judge's determination that SSA was claimant's borrowing employer at the time of injury as the administrative law judge conducted a thorough analysis under the nine-factor *Ruiz-Gaudet* test, and his findings were supported by substantial evidence and in accordance with law. *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202 (2001).

SECTION 3(c)

Digests

Willful Intention

Where two employees, Bobby and Charles Williams, repeatedly harassed a third employee, Obregon, over the course of several months, and where Obregon responded to the harassment by shooting Bobby Williams to death, and where Charles Williams injured himself by falling while attempting to escape the shooting, Section 3(b) [3(c) of the amended Act] did not bar the claims of Bobby Williams's widow and Charles Williams because the evidence was not sufficient to rebut the presumption that the Williams's did not intend to injure Obregon at the time of the injuries pursuant to Section 20(d). Williams v. Healy-Ball-Greenfield, 22 BRBS 234 (1989)(Brown, J., dissenting).

Where an employee's death does not stem from a "willful intent" to commit suicide, but is instead caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation. The Board affirms the administrative law judge's finding that the claim was not barred by Section 3(c) as a doctor's opinion that decedent's work injury and its effects prevented him from forming a rational and willful intent to commit suicide provides substantial evidence for that finding. Maddon v. Western Asbestos Co., 23 BRBS 55 (1989).

The Board rejects employer's argument that the administrative law judge erred in failing to conclude that claimant's death benefits claim is barred under Section 3(c). Where, as here, it is uncontested that the employee's death was the result of suicide, the Section 20(d) presumption that the injury was not occasioned by the willful intention of the employee to kill himself applies, but is rebutted. The Board holds that there is substantial evidence to support the administrative law judge's finding that decedent's death was not due to a "willful intent" to commit suicide but rather was due to an irresistible suicidal impulse resulting from severe depression related to the work injury. *Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994).

The "arising out of employment" requirement of Section 2(2) is a separate issue from the Section 3(c) "willful intention to injure inquiry. Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. In order to rebut the Section 20(d) presumption, employer must present substantial countervailing evidence that claimant willfully intended to injure himself; willful intent to injure oneself requires a strict standard of proof. A claimant=s disregard of medical advice does not establish the willful intent to injure oneself. Thus, the Board reversed the administrative law judge=s finding that Section 20(d) presumption was rebutted by evidence that claimant, who had pre-existing epilepsy, willfully engaged in driving, contrary to medical evidence, which led to the motor vehicle accident in which he was injured. The Board noted that the intervening cause case law relied upon by the administrative law judge has no relevance to the inquiry into whether employer presented substantial evidence that claimant willfully intended to injure himself in the work-related motor vehicle accident that cause his injuries. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998)(Smith, J., concurring & dissenting).

Section 3(e)

Digests

The Board rejects claimant/widow's contention that the administrative law judge erred in failing to reduce employer's credit to reflect the son's interest in the settlement of the state claim. As part of the state settlement, claimant agreed to have her son dismissed as a party. In computing the Section 3(e) credit, the administrative law judge concluded that the entire amount of the state settlement was to be credited against employer's liability under the Longshore Act. The Board held the administrative law judge properly determined that because there was no evidence of record establishing the portion of the state settlement which represented the son's interest, employer is entitled to a credit for the entire state settlement. The Board finds a $15,500 medical lien paid to a third party on claimant's behalf as part of the state settlement included within employer's Section 3(e) credit. Board will not apply Section 3(e) "amounts paid to an employee" language literally where a literal interpretation will have the effect of employer receiving less of a credit than it would have been entitled to receive prior to the enactment of Section 3(e) in 1984. Attorney's fees paid at state level of compensation proceedings are not included in employer's Section 3(e) credit. Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988), aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

The Ninth Circuit affirms the Board's determination that employer is entitled to a Section 3(e) credit for the full amount of the state settlement. Claimant had argued that employer should not get a credit for that portion of the state settlement representing the son's interest, but the court stated that the evidence did not establish that the son received or was granted any portion of the state award. The court also affirms the disallowance of a credit for attorney's fees paid in connection with the state settlement. The court, however, reverses the Board's determination that employer is entitled to a credit for a medical lien paid directly to a third party on claimant's behalf. The court noted that the amount of the lien was paid directly to the third party and thus was not an "amount paid to an employee." The court stated it was unclear whether allowing the credit would result in a double recovery to claimant. Lustig v. U.S. Dept. of Labor, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989), aff'g in part and rev'g in part Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988).

Veterans' disability benefits are not included within the scope of the credit doctrine as codified in Section 3(e), since such benefits are not claimed or paid pursuant to the Longshore Act, the Jones Act, or any other workers' compensation law. Todd Shipyards Corp. v. Director, OWCP, 848 F. 2d 125, 21 BRBS 114 (CRT) (9th Cir. 1988), aff'g Clark v. Todd Shipyards Corp., 20 BRBS 30 (1987).

The Fifth Circuit finds Section 3(e) inapplicable in this case where previous $20,000 settlement payment by a prior employer for an unscheduled permanent partial disability was made pursuant to the Act rather than a state act or the Jones Act and the employer is now liable for permanent total disability under the aggravation rule. ITO Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

The Board modified the administrative law judge's award of a Section 3(e) credit, holding that employer is not entitled to a credit for amounts specifically awarded under state law for decedent's lifetime claim against amounts due under the Act to decedent's widow for her survivor's claim. Lustig is distinguished as the state settlement apportioned between the lifetime claim and the death claim. Pigott v. General Dynamics Corp., 23 BRBS 30 (1989).

The administrative law judge's disallowance of a credit for state payments against federal scheduled awards made pursuant to Section 8(c)(2) and (22) because the disabilities are not the same is in error, as the injuries underlying the payments are the same. The administrative law judge had stated that Section 3(e) was inapplicable because there were no schedule awards under the state act. This finding is reversed and the case is remanded to the administrative law judge for a determination of the amount of benefits paid under the state act for each of claimant's injuries. Board notes that employer may not credit excess state payments against its federal liability for different injuries or disabilities. Garcia v. National Steel & Shipbuilding Co., 21 BRBS 314 (1989).

Where it is impossible to apportion claimant's state settlement among his various medical conditions, the Board reverses the administrative law judge's denial of a Section 3(e) credit and allows employer to offset the entire net amount of the settlement against its federal liability since some of that settlement covers the same injury or disability for which federal benefits are sought. Employer's request that it get a credit for Black Lung benefits is denied, since those benefits are neither for the same injury nor the same disability for which claimant received benefits under the Act. *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).

Pneumoconiosis and a back injury are not the "same injury or disability," for which claimant received benefits under the Act and thus the Board did not err in failing to give employer a Section 3(e) credit for claimant's receipt of black lung benefits. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989).

The Board held that the language of Section 44(c)(1) of the Act required the employer to make payment to the Special Fund, irrespective of the fact that the employer had already paid claimant benefits under a state workers' compensation act. Section 3(e) is distinguished; Congress did not amend the Act to provide a credit for payments under Section 44(c)(1) for an employer who already paid under a state act as it did for those liable for federal compensation. Wong v. Help Unlimited of Tampa, Inc., 19 BRBS 255 (1987).

Where state law does not cover workers entitled to Longshore benefits, the Board rejected employer's argument that it is entitled to a Section 3(e) credit for its liability under the state act. The Board concluded that employer's preemption argument was without merit because Section 3(e) was not intended to apply on the facts presented, where concurrent state and federal jurisdiction did not exist and where there was no danger of double recovery because pursuant to state law, the State was entitled to reimbursement for any state benefits paid to claimant. The Board held that the administrative law judge erred in concluding that, in general, medical expenses are not properly the subject of a Section 3(e) credit, but found the error harmless because the administrative law judge correctly recognized that the State's right to reimbursement for claimant's medical expenses is contingent upon claimant's obtaining an award of medical benefits under the Longshore Act. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part and modified in part sub nom. E.P. Paup Co. v. Director, OWCP*, 994 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

The Ninth Circuit affirmed the Board's decision awarding claimant benefits and directing reimbursement to the State for benefits previously paid to claimant under the state act. The court rejected employer's argument that the Board's reimbursement order violated Section 3(e). The court reasoned that Section 3(e) did not apply to the instant case because state law excludes coverage for workers covered under maritime law. The court held that Federal preemption may occur only when Congress has expressly precluded state law, an expression of such intent can be inferred from the structure and purpose of the federal statute, or when state law conflicts with federal law or stands as an obstacle to achieving federal objectives. The court noted that while the plain language of Section 3(e) supported the argument that state law is preempted, a closer review satisfied it that Congress did not intend to expressly preempt the state's reimbursement statute. Finally, the court stated that Section 3(e) applies only if there is concurrent state and federal coverage, and that there was nothing in the Act indicating that a state cannot exclude from its jurisdiction injuries covered by federal law. The court therefore affirmed the Board's conclusion that employer is not entitled to an offset under Section 3(e). *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g and modifying McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988).

The Board holds that the administrative law judge erred in allowing employer a Section 3(e) credit for the children's interest in the settlement of decedent's California claim based on the fact that none of decedent's children would be eligible for death benefits under California law. Board holds that the administrative law judge was bound to honor the contractual agreements regarding apportionment which were approved by a judge of the California Workers' Compensation Appeals Board and that his failure to do so violated the Full Faith and Credit Clause of the Constitution. Moreover, because the children were not claiming death benefits under the Longshore Act, and as non-dependent adults would not be entitled to such, their portion of the state recovery would not be included in employer's credit because under Section 3(e), employer is entitled to a credit for any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under the Longshore Act. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

The Board holds that the administrative law judge erred in allowing employer to offset the entire net amount of the state settlement against its entire liability under the Act. Decedent's disability benefits paid under the state agreement may only be offset against his disability benefits due under the Longshore Act and claimant's death benefits under the California settlement may only be offset against her survivor's benefits. Where the record is unclear as to how the settlement amount is apportioned, employer is entitled to offset the disputed amount under Section 3(e) against its liability under the Longshore Act. Accordingly, Board holds that the administrative law judge properly included $1750 of the state settlement which was not apportioned in employer's Section 3(e) credit. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

The Board rejects employer's argument that it is entitled to an additional credit for money it was required to pay as a penalty for its delay in paying state benefits because such penalties are treated as "compensation" under California law. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

The court held that the administrative law judge correctly did not credit employer with an $8,700 settlement in a claim for penalties under the state act. In doing so, the court deferred to the Director=s position, that the penalty payments were not for the same injury because they were strictly for employer=s failure to perform its obligations on time and not for the employee=s death, as it was supported by the clear language and intent of Section 3(e) providing credit to employers for any amounts paid to an employee for the same injury. The court noted that the Director=s interpretation was supported by the Board in *Ponder* , 24 BRBS 46 (1990) and by the Fifth Circuit in *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 13 BRBS 301 (5th Cir.), *reh=g denied*, 647 F.2d 1121, *cert. denied*, 454 U.S. 1123 (1981). *Transbay Container Terminal v. U.S. Dep=t of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998).

The Board holds that employer is entitled to a credit for the amount claimant received, less attorney's fees, from a state award for the scar resulting from surgery for her work-related elbow injury because both the state award for the scar and the disability award for loss of use of the arm under Section 8(c)(1) of the Act resulted from the same work injury. Shafer v. General Dynamics Corp., 23 BRBS 212 (1990).

The Board noted that, had it affirmed the administrative law judge's denial of benefits to the decedent's daughter, employer would not have been entitled to a credit, under Section 3(e), for the portion of a state compensation settlement specifically apportioned for the daughter. In addition, the Board rejected claimant's argument that a separate settlement was not subject to a Section 3(e) credit since it contained no apportionment. *Lucero v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 261 (1990), *aff=d mem. sub nom. Kaiser Aluminum & Chemical Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991).

The Third Circuit sets forth the legislative and case law history regarding the applicability of concurrent federal and state compensation awards, concluding with the Supreme Court's decision in *Sun Ship* that a landbased longshoreman could receive both a state award and an award under the Longshore Act with the prior state award credited against the longshore award, and the 1984 Amendment addition of Section 3(e). Thus, as claimant was injured on land, the Virgin Islands could provide a workers' compensation remedy; however, due to Section 5(a) and the Supremacy Clause, claimant cannot recover in tort under state law. (Note that Section 3(e) of the Act is mis-cited on page 950 of the court's decision). *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied,* 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

The Board holds that, pursuant to the plain language of Section 3(e) and its legislative history, when employer is paying compensation under a state award, and it is entitled to Section 8(f) relief for its liability under the Act, Section 3(e) allows the Special Fund to credit employer's state payments against the liability of the Special Fund pursuant to Section 8(f). *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

There must be an actual Longshore Act award in effect before Section 3(e) is applicable. Merely because Section 3(e) would apply to offset the longshore award, and claimant so concedes, does not mean than an award should not therefore be entered. *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992).

The Board rejected employer's assertion that the administrative law judge erred in failing to allow him to credit the state payments made to deceased's child from his first marriage under Virginia law against its federal liability to decedent's widow and her two children under Section 3(e). The Board found no error in the administrative law judge's decision despite that employer's overall liability under both the Virginia and Longshore Acts exceeds the 66 2/3 percent maximum imposed by Section 9(b). Decedent's eldest son elected to receive the more generous amount of benefits allowed by Virginia law, and as this amount exceeds the amount this child is entitled to under the Longshore Act, employer's liability is offset for that child and there is no danger of double recovery. Allowing employer to credit the state payments made to the elder son from decedent's first marriage against its liability to the widow and her children under the Longshore Act would deprive them of a portion of the benefits which the Longshore Act was intended to provide. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Where claimant received a smaller compensation award under Connecticut law than under the Longshore Act, the Second Circuit held that the Board properly credited her entire state award minus attorney's fees against the Longshore award pursuant to Section 3(e). Although the Connecticut State Commissioner's order approving the state settlement appeared to indicate that claimant is entitled to the state award in addition to the Longshore award, and Connecticut law arguably allowed for the federal award to be credited against the state award, the court held that allowing employer a Section 3(e) credit was mandated by the plain language of the statute and, pursuant to the Supremacy Clause, the Longshore Act could not be superseded by state law. *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152 (CRT) (2nd Cir. 1992).

Where claimant properly withdrew his Longshore claim to exclusively pursue a claim under state law, the Board held that employer is entitled to a hearing on its request for Section 8(f) relief regardless of whether claimant has withdrawn his claim for benefits under the Act. The Board noted, however, that a finding that employer is entitled to Section 8(f) relief will not affect employer's obligations under the state statute. The Board deferred to the Director's position that, notwithstanding that any liability of the Special Fund would be completely offset pursuant to Section 3(e) by the state benefits paid by employer, a finding of Special Fund liability would benefit employer with respect to the calculation of employer's assessment under Section 44. *Langley v. Kellers' Peoria Harbor Fleeting,* 27 BRBS 140 (1993) (Brown, J., dissenting).

The First Circuit affirms the Board's determination that employer is entitled to a Section 3(e) credit for the full amount of the state consent decree. Claimant had argued that employer should not receive the credit for amounts paid under the state consent decree because the respective awards were not for the same "injury" or "disability." The court, however, stated that although the benefits claimant received under the consent decree may have been awarded to compensate him for one or more effects of, or disabilities arising from that injury, while the benefits he received under the Act may have been awarded to compensate him for others, the physical injury upon which all of those benefits were ultimately based was the same. *D'Errico v. General Dynamics Corp.,* 996 F.2d 503, 27 BRBS 24 (CRT)(1st Cir. 1993).

Employer is entitled to a Section 3(e) credit for amounts claimant received as a result of a settlement of third-party suits that included a Jones Act suit. Where, as here, the record is unclear as to how the settlement amount is apportioned among the various claims being settled, employer is entitled to offset the entire net amount against its liability under the Longshore Act. *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd and modified*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

The Third Circuit holds that employer is entitled to a credit for the entire net proceeds of settlements of third-party suits, including a Jones Act suit, by virtue of the combination of Sections 3(e) and 33(f), and not by either alone, as the Board held, as the settlements are not apportioned by type of claim. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995), *aff'g and modifying* 28 BRBS 20 (1994).

The First Circuit holds that the Secretary's interpretation of Section 44 in dual liability cases is entitled to deference. When employer is liable for the same amount under both the Maine Act and the Longshore Act, employer's payment of compensation under the state act, which is credited against employer's federal liability under Section 3(e), is considered to be payment under the Longshore Act for purposes of employer's assessment under Section 44. *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 29 BRBS 11 (CRT) (1st Cir. 1994).

The Board held that the net proceeds of a third-party settlement under the Federal Employer's Liability Act (FELA), 45 U.S.C. ' 51, may provide the basis for a credit against an employer's compensation liability. The Board notes that while the FELA settlement recovery does not fall within the enumerated provisions of the Act which pertain to third-party settlements and advance payments of compensation, a credit from the net amount of the FELA recovery is based on an independent credit doctrine which exists in case law to provide employers with an offset to prevent double recovery. Applying the credit in this case consistently with that obtained pursuant to Sections 3(e) and 33(f) of the Act, the Board also rules that employer is entitled to a credit only in the net amount of the FELA settlement, which figure was reached after subtracting claimant's obligation to pay contingent attorneys' fees to counsel in the FELA action. *Jenkins v. Norfolk & Western Ry. Co.*, 30 BRBS 109 (1996).

For the reasons stated in *Jenkins*, 30 BRBS 109 (1996), the Board affirmed the administrative law judge=s granting of an offset for the net amount claimant received in a prior FELA settlement, a figure reached after subtracting claimant=s attorney=s fee in the FELA action. The Board rejected employer=s contention that it is entitled to a credit for payments claimant received from the Railroad Retirement Board. The Board held that these payments are retirement benefits, not workers= compensation benefits, and thus are not subject to a credit under Section 3(e) of the Act. *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev=d mem.,* 7 Fed. Appx. 156 (4th Cir. 2001).

In *dicta*, the Fourth Circuit holds that employer is not entitled to a credit under Section 3(e) of the Act for the FELA settlement in this case as that award is not being paid under a workers= compensation law. *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000)**.**

The Board holds that employer is not entitled to a credit, pursuant to Section 3(e), for unemployment benefits claimant received during his period of temporary total disability as such benefits are not other workers' compensation benefits. *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986).

Where claimant filed a state claim against his nominal employer, a temporary employment agency, and a claim under the Act against his borrowing longshore employer, and then settled his state claim without the prior approval of the borrowing employer, the Board held that the administrative law judge erred in considering the nominal employer to be a "third-party" and in applying the Section 33(g) bar to deny longshore benefits. As there was neither a third-party nor a suit for civil tort damages involved in this case, the Board held that Section 33 is not applicable. Rather, employer, as the parties agree, is entitled to a Section 3(e) credit against the state settlement. Consequently, the Board held that the administrative law judge erred in applying Section 33(g) instead of Section 3(e), and it remanded the case for resolution of this and any remaining issues. *Redmond v. Sea Ray Boats*, 32 BRBS 1 (1998), *vacated in part on other grounds on recon*., 32 BRBS 195 (1998).

The district court holds that Section 3(e) of the Act is incorporated into the Defense Base Act, and that the Saudi Social Insurance Law is a "workers compensation law" within the meaning of Section 3(e) as it more closely resembles a worker's compensation law than a public social insurance program based on a weighing of the relevant factors. Employer therefore is entitled to a Section 3(e) credit for payments claimant received pursuant to the Saudi Social Insurance Law. *Lee v. Boeing Co., Inc.*, 7 F.Supp.2d 617 (D.Md. 1998).

Payments made by a carrier, Chubb, under Pennsylvania law pursuant to its Voluntary Foreign Workers' Compensation policy with employer are to be credited against employer's liability under the Act pursuant to Section 3(e). As Chubb remains liable to claimant for benefits under Pennsylvania law, Chubb is not entitled to credit or reimbursement from either employer or the Special Fund for benefits it incorrectly paid under the Act. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Second Circuit reversed the Board's holding that the entire net proceeds of an unapportioned state workers' compensation settlement covering both disability and death benefits may be credited against an award of death benefits under the Longshore Act. The basis for the Board's holding was that both the state and Longshore Act cases were related to the same injury--decedent's asbestosis that resulted in disability and death; the Board stated that the state settlement had resolved all claims for disability and future claims for death and that decedent had previously claimed and been awarded disability benefits and that his widow was currently claiming death benefits under the Longshore Act. The court rejected the Board's reasoning, and interpreted Section 3(e) to limit the allowable credit to amounts paid for the same injury, death or disability *currently* being claimed under the Longshore Act. The court further held that, consistent with Section 7(c) of the APA, the party claiming a Section 3(e) credit bears the burden of proof on allocation of the state settlement. The case was remanded for a determination of the amounts paid to settle the state disability claim and the future death claim, with employer bearing the burden of proof on the allocation of the state settlement. *Barscz v. Director, OWCP,* 486 F.3d 744, 41 BRBS 17(CRT) (2^{d} Cir. 2007).

The Ninth Circuit reverses the Board's holding that the credit doctrine supports the last

responsible employer's entitlement to a credit for the Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court deferred to the Director's interpretation that Section 3(e) does not apply to this situation; economically, it does not make sense for the injured employee to settle claims to the benefit of the responsible employer. Thus, application of Section 3(e) would discourage settlements. *Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002), *rev'g in pert. part Alexander v. Triple A Machine Shop,* 32 BRBS 40 (1999) and 34 BRBS 34 (2000).

Citing *Alexander,* 32 BRBS 40 (1998), the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples,* 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores,* 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied,* 540 U.S.1141 (2004).

The Fifth Circuit reverses the Board's holding that the employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The court defers to the Director's position that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003) (Jones, J., dissenting on the basis that there is no reason not to apply the *Nash* credit doctrine, applicable in "aggravation rule" cases, to cases involving a single occupational injury), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied,* 540 U.S.1141 (2004).