

JAMES F. CASEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES,	)	DATE ISSUED: _____
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision on Stipulations of the Parties Following Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Michael G. Gerson (Boxer, Elkind & Gerson), Oakland, California, for claimant.

Frank B. Hugg (Law Offices of Frank B. Hugg), San Francisco, California, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision on Stipulations of the Parties Following Remand (89-LHC-739, 89-LHC-740) of Administrative Law Judge Vivian Schreter-Murray 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.* (the Longshore Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time that this case has been before the Board. The facts are not in dispute. On May 5, 1983, claimant sustained a work-related injury to his lower back while employed as a container mechanic for employer. Claimant received temporary total disability compensation from May 6, 1983, through June 13, 1983, as well as medical expenses. He subsequently returned to work. On May 3, 1987, claimant sustained injuries to his back, wrist and ankles while lifting a sledgehammer during the course of his employment. Claimant stopped working on May 5, 1987, allegedly due to cumulative stress on his back associated with his work duties, but he returned to his usual job on June 23, 1988. Claimant sought temporary total disability compensation under the Act from May 5, 1987 through June 23, 1988, and permanent partial disability benefits based on a loss in

his wage-earning capacity thereafter. In the alternative, claimant argued that he was entitled to a *de minimis* award.

In her initial Decision and Order, the administrative law judge denied the claim, finding that the alleged May 1987 accident did not occur and that claimant sustained no permanent disability due to any work-related injury or aggravation. Claimant appealed the denial of benefits. In its decision, the Board found that the administrative law judge acted within her discretion in rejecting claimant's testimony regarding the occurrence of a work-related accident on May 1987. *Casey v. Sea-Land Services, Inc.*, BRB No. 89-3766 (Apr. 30, 1991)(unpublished). The Board agreed with claimant, however, that the administrative law judge erred in failing to consider whether claimant was entitled to compensation on a cumulative trauma theory, and remanded for her to do so, noting that this theory had been raised in claimant's pre-trial brief and that there was medical evidence in the record to support it. The Board also vacated the administrative law judge's finding that claimant was not disabled and remanded for her to consider claimant's entitlement to disability benefits subsequent to May 5, 1987. The Board rejected claimant's argument that he was entitled to a *de minimis* award, as well as the contention that under Section 3(e), 33 U.S.C. §903(e)(1988), employer is precluded from crediting the permanent partial disability benefits it paid under the California workers' compensation statute against its liability for temporary total disability under the Longshore Act. The Board held that if benefits were awarded on remand, employer was entitled to credit both the temporary total and permanent partial disability benefits paid under the state act against the benefits owed under the Longshore Act based on the Section 3(e) credit for benefits resulting from the same injury.

On remand, the parties entered into joint stipulations which were accepted by the administrative law judge in her Decision and Order. The parties agreed that claimant was entitled to temporary total disability compensation under the Act due to cumulative injury from May 5, 1987 through June 23, 1988, at a compensation rate of \$483.29, for a total of \$28,514.00. The parties also stipulated that the California Workers' Compensation Appeals Board awarded temporary total disability for the same 59 weeks in the amount of \$13,216.00, and that employer was entitled to a Section 3(e) credit for these payments. In addition, the parties stipulated that claimant had been awarded permanent partial disability in the amount of \$10,770.00 for a 24 percent permanent partial disability under the permanent disability rating system of the California Labor Code. The only remaining issue before the administrative law judge was whether employer was entitled to offset the permanent partial disability benefits awarded by the State against the temporary total disability benefits owed under the Longshore Act under Section 3(e). The administrative law judge determined that employer was entitled to a Section 3(e) credit for the state permanent partial disability compensation inasmuch as the disability arose from the same injury which formed the basis for the Longshore claim. Claimant appeals the administrative law judge's determination that employer is entitled to a Section 3(e) credit for the state permanent partial disability award. Employer responds, urging affirmance.

The administrative law judge's finding that the state award of permanent partial disability is subject to employer's Section 3(e) credit is affirmed. Section 3(e) provides that employer is entitled to a credit for any amounts paid for the same injury, disability or death for which benefits are claimed under any other workers' compensation law or the Jones Act, 46 U.S.C. §688. Although claimant argues that the administrative law judge erred in allowing this credit because the state award of permanent partial disability, which commenced on June 26, 1988, did not overlap the

temporary total disability benefits awarded under the Longshore Act, the administrative law judge correctly recognized that this fact was not determinative. While employer may receive a credit where the state payments are for the same disability being claimed under the Longshore Act, it may also receive a credit for state payments where, as here, such payments are for the same injury; Section 3(e) is written in the disjunctive. *See Shafer v. General Dynamics Corp.*, 23 BRBS 212, 213-214 (1990); *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988). In any event, the Board fully considered and rejected this argument in rendering its initial decision in this case and the Board's prior determination that employer is entitled to a Section 3(e) credit for both the temporary total and permanent partial disability benefits paid under the California workers' compensation statute is the law of the case. *See Wayland v. Moore Dry Dock*, 25 BRBS 43 (1991); *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).<sup>1</sup>

Accordingly, the administrative law judge's Decision on Stipulations of the Parties Following Remand is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>1</sup>The rule of "law of the case" is a discretionary rule of practice based upon sound policy that when a case is on its second appeal, an appellate body will adhere to its original decision, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first decision was clearly erroneous and allowing it to stand would result in manifest injustice. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355, 359 (1992).