

BRB No. 00-0393

RONNIE E. SIMMONS)	
)	
)	Claimant-Respondent
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>Dec. 28, 2000</u>
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration (94-LHC-1212, 98-LHC-2975, 99-LHC-791, 792, 793, 794) of Administrative Law Judge David W. Di Nardi 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 Act). We must affirm the findings of fact and conclusions of law

of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began working for employer as a welder on November 19, 1974. Over the course of his employment, claimant sustained several work-related injuries to his back for which he received compensation. Of particular importance in the instant case are work-related injuries to his back, arms and right knee sustained on October 29, 1992, and a work-related head/neck injury sustained on January 13, 1997.

Claimant did not return to work following the January 13, 1997, injury and was fired in March 1997. Claimant thereafter filed a grievance over the firing, which resulted in his reinstatement with back pay on March 6, 1998. Pursuant to the agreement, claimant grossed \$31,878, which, after employer's repayment of the unemployment agency for the amount claimant received in unemployment compensation and withholding of taxes, amounted to a net of \$13,585.95. Prior to his reinstatement, however, claimant was laid off on March 27, 1998, as his security clearance lapsed at the time of his firing.

Claimant was recalled by employer on July 24, 1998, but was unable to work because his security clearance form was not ready. Employer did not receive claimant's interim clearance approval until March 17, 1999, and as a result, claimant did not return to his light duty work until March 29, 1999. Claimant ultimately filed a claim seeking periods of temporary total disability benefits based on his January 13, 1997, head/neck injury, and permanent total disability benefits, thereafter, based on his October 29, 1992, back injury.

In his decision, the administrative law judge initially determined that claimant's back injury sustained on October 29, 1992, and head/neck injury sustained on January 13, 1997, are work-related. He then determined that claimant cannot return to his full duties as a welder and further found that employer did not show the availability of suitable alternate employment until March 29, 1999. The administrative law judge therefore concluded that claimant is entitled to periods of temporary and permanent total disability from January 1, 1997, through March 28, 1999. The administrative law judge also

¹The October 29, 1992, accident occurred while claimant was working off-site at Cocoa Beach, Florida.

²Claimant specifically sought temporary total disability benefits from January 15, 1997, to May 15, 1997, and permanent total disability benefits from May 16, 1997, to March 29, 1999. Employer voluntarily paid temporary total disability benefits from January 13, 1997, through April 3, 1997.

³The administrative law judge determined that based on his back injury, claimant is

awarded: medical benefits; claimant's counsel an attorney's fee; and employer a credit, pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), for the net amount of back pay paid to claimant as a result of the illegal termination. On claimant's motion for reconsideration, the administrative law judge altered his decision to reflect that employer is not entitled to any credit for the back wages. On appeal, employer challenges the administrative law judge's award of benefits, and denial of a credit for the net amount of back pay received by claimant, \$13,585.06. Claimant responds, urging affirmance.

Employer first argues that, contrary to the administrative law judge's determination, claimant has not established that he was totally disabled. Specifically, employer argues that barring the termination and/or layoff, claimant would have returned to work for employer for the same period for which he is claiming benefits. Employer maintains that this is evidenced by the fact that claimant filed for and received unemployment benefits during those periods.

The administrative law judge first determined, "based on the totality of the record," that claimant established that he cannot return to his full duties as a welder. He then acknowledged that employer's only evidence of suitable alternate employment consisted of its recall of claimant to light duty work on July 24, 1998. The administrative law judge observed that through the recall, employer attempted to show that it was ready, willing and able to employ claimant but for the fact that his security file had been destroyed and claimant's application for a new security clearance was delayed by his own actions and that of United States Department of Defense (DOD).

The administrative law judge determined, after an extensive review of the relevant evidence of record, that as claimant's security clearance was necessary to his employment with employer, and that since claimant's clearance, through no fault of his own, had not

entitled to temporary total disability benefits from March 17, 1997, through March 31, 1998, and permanent total disability benefits from April 1, 1998, through March 28, 1999. In addition, he found, based on the head/neck injury, that claimant is entitled to temporary total disability benefits from January 15, 1997, through May 15, 1997. The administrative law judge found that claimant reached maximum medical improvement on March 31, 1998, based on Dr. Selden's "well-reasoned" opinion. Decision and Order at 31. The administrative law judge's finding regarding the nature of claimant's disability is not raised on appeal.

⁴Specifically, the administrative law judge considered the testimony of John Swidrak, who was employer's Chief of Security, Charles Ballato, a Human Resources Specialist for employer, and claimant's affidavit regarding the events of his return to employer.

⁵Claimant, at the time of his lay-off, had a "green badge" clearance originally issued by employer. Upon claimant's initial return to employer on March 6, 1998, DOD had retracted employer's ability to issue "green badges," and now required employer to submit to DOD the personal security questionnaire (PSQ) and application of all new and/or recalled employees.

been approved during the pertinent time period, claimant was unable to return to work for employer from January 15, 1997, through March 28, 1999. Consequently, the administrative law judge concluded that employer did not provide claimant with an actual job opportunity, noting that the pertinent fact is that it was not possible for claimant to begin performing a job with employer until he received the requisite clearance. Alternatively, the administrative law judge added that even if the job in question were deemed to be suitable, claimant nevertheless is entitled to total disability benefits as the record establishes that he did everything within his power to secure the job offered by employer, and thus diligently tried but was unable to secure that suitable alternate employment.

In the instant case, the administrative law judge's findings that claimant was not capable of returning to his full duties as a welder and that employer, via its recall and job offer on July 28, 1998, did not establish the availability of suitable alternate employment at that time are supported by substantial evidence. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). First, following the 1997 injury, Dr. Rodgers opined that claimant could not perform his job as a light duty welder due to this work-related injury until May 15, 1997. Following May 15, 1997, when Dr. Rodgers cleared claimant to return to light duty work, claimant remained totally disabled as he still suffered from a work-related impairment, as evidenced by Dr. Sedden's opinion, and remained unable, through no fault of his own, to perform the suitable alternate employment relied upon by employer as it was not realistically available to him. *See generally Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 179-180 (1996); *Mendez v. National Steel &*

DOD also provided for a "Navy Interim Badge" through a local agency between August 1991 and August 1998, and then again from February 16, 1999. Mr. Swidrak further stated that he received claimant's electronic PSQ on November 10, 1998, requested some additional information from claimant, and then resubmitted the form on November 18, 1998. Mr. Swidrak gave no reason as to why claimant, in March 1998, was not cleared through the local agency. EX 23. Crediting claimant's affidavit testimony, the administrative law judge determined that any delay in securing the requisite clearance due to claimant's actions was not untimely or unreasonable.

⁶Dr. Rodgers' explicitly opined that from January 15, 1997, to April 15, 1997, claimant was unable to work due to a back injury, that between April 15, 1997, through May 15, 1997, that he was only capable of restricted duty, unable to crawl into small spaces and bend over, and that after May 15, 1997, claimant was able to go back to full duty. This conclusion is further supported by the medical opinion of Dr. D'Angelo, who as of March 10, 1997, opined that he did not believe that claimant could do the work required as a welder because of his continued limitation of motion of his cervical spine.

Shipbuilding, 21 BRBS 22 (1988). Specifically, Dr. Sedden's letter dated October 15, 1998, wherein he noted that claimant has a chronic back problem and that claimant is capable of work but should avoid repetitive bending, squatting, lifting (occasional lifting to 25-30 pounds would be appropriate), and climbing, supports the determination that claimant continues to have a work-related impairment. CX 18. Additionally, as the administrative law judge found, the record clearly establishes that claimant could not realistically obtain the suitable alternate employment provided by employer without a security clearance and that claimant, through no fault of his own, was unable to receive this clearance until March 1999, at which time he returned to light duty work with employer. Ultimately, the evidence clearly indicates, as the administrative law judge found, that claimant's work-related injuries were the precipitating factor that rendered his job unavailable as of January 13, 1997 and continuing until March 1999. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 798, 21 BRBS 45, 47 (CRT)(D.C. Cir. 1988)(D. C. Circuit held that where the administrative law judge found that claimant could carry out his duties as a sales representative, he applied an incorrect legal standard in neglecting the other crucial issue--whether claimant's former job was still open to him). Thus, claimant, in the instant case, has demonstrated that his work-related injuries resulted in an inability to return to his usual employment. *Id.* We therefore affirm the administrative law judge's finding that claimant is entitled to periods of temporary and permanent total disability benefits from January 15, 1997, through March 29, 1999, when employer established suitable alternate employment by way of claimant's return to work in a light duty capacity at its facility.

Employer also argues that the administrative law judge erred by denying the credit it sought for benefits received by claimant as a result of his grievance award. Citing *Jenkins v. Norfolk & Western Ry.*, 30 BRBS 109 (1996), employer asserts that as it is the payer of this money, it is entitled to a credit against any liability it has under the Act for the same period of time, otherwise, it posits that claimant will inappropriately receive a double recovery. Employer thus seeks a credit in the amount of its net payment to claimant, \$13,585.06, pursuant to the grievance settlement agreement.

⁷Moreover, given that claimant's usual employment at the time of injury apparently involved bending, squatting and lifting, it may have remained beyond the scope of the limitations set out by Dr. Sedden subsequent to Dr. Rodgers' opinion that claimant was capable of returning to work after May 15, 1997.

⁸Furthermore, it is noted that at the time of his most recent injury on January 13, 1997, claimant was already working in a light duty capacity for employer as a result of prior work-related injuries. When that job became no longer available to claimant, through no fault of his own, as it was lost first as a result of his illegal termination and then as a result of a lapse in his security clearance, employer's burden to rebut claimant's *prima facie* case of total disability by demonstrating the availability of suitable alternate employment was renewed. *Hord*, 193 F.3d at 797, 33 BRBS at 170 (CRT).

On reconsideration, the administrative law judge determined that employer is not entitled to a credit for the amount claimant received as back wages for his illegal termination. Specifically, the administrative law judge, after considering at length the relevant law, determined that the credit provisions of Sections 3(e) and 14(j) of the Act, 33 U.S.C. §§903(e), 914(j), are not applicable in the instant case.

The Act contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§903(e), 914(j), 933(f). Section 3(e) provides employer with a credit for payments under other workers' compensation laws or the Jones Act, *see* 33 U.S.C. §903(e), and Section 33(f) provides an offset against amounts due under the Act for any recovery from a third party who is liable in damages for the same disability or death. 33 U.S.C. §933(f). Section 14(j) provides a credit for the advance payment of benefits pursuant to the Act. 33 U.S.C. §914(j). *See, e.g., Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). The Act, however, contains no provision which entitles an employer to a credit for income a claimant has earned in the form of back pay.

In the instant case, the administrative law judge found that employer's back pay to claimant did not constitute an advanced payment of compensation. This conclusion is consistent with law. In *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999), the Board reversed the administrative law judge's finding that employer is entitled to a credit for income claimant earned from other employers during a period of disability, holding, in part, that the Act contains no provision which entitles employer to a credit for income earned from other employers. The Board has similarly held that employer is not entitled to a credit under the Act for unemployment compensation that claimant may have received during a period of disability, *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986), or veterans' disability benefits received during a period of disability, *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). Section 14(j)

⁹Section 3(e) provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e)(1994).

¹⁰Section 14(j) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j).

also does not permit a credit for employer's continued payment of claimant's regular salary during claimant's period of disability, unless employer can prove the payments were intended as advance payments of compensation. *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd* 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978). In this case, claimant received back pay to make him whole following his wrongful termination, and there is no evidence the payments were intended to compensate his disability.

Ultimately, the fact that the payments were not paid to compensate claimant's disability defeats employer's claim to a credit under any available section. As previously noted, the plain language of the statute does not allow for a credit for the amount claimant received as back wages for his wrongful termination. 33 U.S.C. §§903(e), 914(j), 933(f). In *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5 (CRT)(1997), the Supreme Court stated that the prohibition against double recovery is not absolute, particularly where the possibility of such recovery is not so absurd or glaringly unjust as to warrant a departure from the plain language of the statute. In this case, the statutory credit provisions cannot apply because the money received by claimant through the grievance settlement procedure did not result from claimant's need to be compensated because of his work-related injury. Rather, from an economic standpoint, the grievance settlement sought to provide claimant redress for his wrongful termination. Moreover, the facts of the instant case do not fall within the independent credit doctrine, *i.e.*, to allow employer a credit for prior *disability payments* under certain circumstances to avoid *a double recovery of compensation for the same disability*, as the money which claimant received as a result of the grievance settlement is not tantamount to disability payments. Thus, the administrative law judge's denial of the credit sought in this case is affirmed. *Cooper*, 33 BRBS at 46.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

¹¹Employer reliance on *Jenkins v. Norfolk & Western Ry.*, 30 BRBS 109 (1996) is thus misplaced. In *Jenkins*, the Board held that the net proceeds of a third-party settlement under FELA may provide the basis for a credit against an employer's compensation liability. The Board observed that while the FELA settlement recovery does not fall within the enumerated credit provisions of the Act, 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. *But see Artis v. Norfolk & Western Railway Co.*, 204 F.3d 131, 34 BRBS 6 (CRT)(4th Cir. 2000)(Employer not entitled to a credit for FELA settlement under the Act as the payments were not advance payments of compensation and FELA is not a workers' compensation statute). In contrast to the instant case, the FELA settlement in *Jenkins* was intended to compensate the same disability as under the Act.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge