

A.B.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GENERAL DYNAMICS)	DATE ISSUED: 09/23/2009
CORPORATION/ELECTRIC BOAT)	
DIVISION)	
)	
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants’ National Law Center), Washington, D.C., and Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Mark K. Eckels and Blake J. Hood (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2008-LHC-01569) of Administrative Law Judge Alan L. Bergstrom 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 administrative law judge’s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a shipyard welder and shipfitter, suffered a work-related lung injury on September 1, 2007. The parties agreed that he reached maximum medical improvement on June 4, 2008, and that claimant has not returned to his usual employment. Claimant filed concurrent claims for compensation benefits for the period from September 1, 2007 to June 4, 2008, under the Georgia Workers’ Compensation Act and the Longshore Act. In the state claim, a judge found that claimant was temporarily totally disabled from a work-related respiratory injury from September 1, 2007 to June 4, 2008, and thus entitled to benefits of \$500 per week for that period, for a total of \$20,000. Joint Ex. 3. The state judge denied claimant’s request for an assessment of attorney’s fees against employer and ordered claimant to pay his counsel 25 percent of income benefits received to date and directed employer to deduct 25 percent of any benefits due thereafter to be paid directly to claimant’s counsel. *Id.* Thus, the total amount of fees paid from compensation benefits to counsel was \$5,000.

Subsequently, claimant’s claim under the Longshore Act came before Administrative Law Judge Bergstrom (the administrative law judge). The parties stipulated to claimant’s entitlement to benefits on the merits, but disputed the amount of the credit due to employer pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e).¹ The administrative law judge found that employer is entitled to credit the entire amount paid to claimant under the Georgia workers’ compensation statute, including the \$5,000 claimant paid in attorney’s fees.

On appeal, claimant contends that the administrative law judge erred in finding employer entitled to a credit for the \$5,000 he paid in attorney’s fees under the state statute, as this amount was not part of his net recovery for the same injury or disability. Employer responds, urging affirmance of the administrative law judge’s decision. Claimant has filed a reply brief.

Section 3(e) of the Longshore Act 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 ... shall be credited against any liability imposed by this chapter.” 33 U.S.C. §903(e). The administrative law judge found that the total amount, \$20,000, paid by employer under the Georgia Act was for disability compensation for the same work-related injury and disability as that for which claimant is

¹ The parties agreed that claimant is entitled to benefits under the Longshore Act in the amount of \$608.05 per week from September 1, 2007 through June 4, 2008.

entitled to compensation under the Longshore Act, and thus found employer entitled to a credit for the full \$20,000. The administrative law judge found that, as the state judge specifically denied an employer-paid attorney's fee, employer is entitled to a Section 3(e) credit for the portion of the state award that claimant had to pay as his attorney's fee. The administrative law judge found that to disallow a credit for the amount of the fee would violate the Full Faith and Credit provision, 28 U.S.C. §1738.

We agree with claimant that the administrative law judge erred in awarding employer a credit for the state award apportioned to an attorney's fee. It is settled law that employer's credit under Section 3(e) is limited to the *net* amount paid to claimant for the same injury or disability. *See, e.g., Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 304 n.24, 29 BRBS 52, 69 n.24(CRT) (3^d Cir. 1995); *Jenkins v. Norfolk & Western Ry. Co.*, 30 BRBS 109 (1996); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990). The Board and those circuit courts that have addressed this issue have uniformly held that attorney's fees paid as part of a state workers' compensation award are not included in an employer's Section 3(e) credit as such fees do not serve as compensation for the employee's injury, but rather as reimbursement for the expenses incurred in bringing the state claim. *See Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 595-596, 22 BRBS 159, 161(CRT) (9th Cir. 1989), *aff'g in part and rev'g on other grounds Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988); *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 1088, 13 BRBS 301, 307 (5th Cir. 1981), *cert. denied*, 454 U.S. 1123 (1983); *Shafer*, 23 BRBS at 214; *Hoey v. General Dynamics Corp.*, 17 BRBS 229, 231 n.3 (1985). Specifically, in *Lustig*, the Ninth Circuit quoted with approval the following reasoning of the Fifth Circuit in a case issued prior to the enactment of Section 3(e):

The amount of [claimant's] state award which has been allocated to his attorney did not serve as compensation for his injury, but rather as reimbursement for the expenses he incurred by having to resort to the courts for compensation. To credit that sum against an LHWCA *compensation* award is to mix apples and oranges; such a crediting procedure would not obviate double recovery, as the LHWCA award does not duplicate [claimant's] *de facto* recovery of litigation expenses under state law. Rather, the LHWCA award should be diminished only by state compensation the plaintiff actually receives.

Lustig, 881 F.2d at 595-596, 22 BRBS at 161-162(CRT), *quoting Landry*, 643 F.2d at 1088, 13 BRBS at 307.² In *Landry*, the court noted that under the Texas compensation

² In *Landry*, the last word of the sentence is "realizes." *Landry*, 643 F.2d at 1088, 13 BRBS at 307.

statute in question, an attorney's fee was a judicially approved percentage of the claimant's recovery, just as it was in the case presently before the Board. Similarly, in *Shafer*, 23 BRBS at 214, the Board, citing *Lustig*, stated, "that portion of the state award allocated to attorney's fees is not properly included within employer's Section 3(e) credit."

It is not disputed that claimant is entitled to compensation under the Act for the same injury as was the subject of the Georgia claim, and that claimant was awarded \$20,000 under the Georgia Act. However, the Georgia award also ordered claimant to pay his attorney a fee of \$5,000. As claimant correctly contends, this fee lessened claimant's recovery of compensation by \$5,000. *Landry*, 643 F.3d at 1088, 13 BRBS at 307. As claimant is entitled to receive all the benefits due him under the Longshore Act subject to employer's Section 3(e) credit for only the net amount of the Georgia state compensation benefits he ultimately received for his work injury, we reverse the administrative law judge's finding that employer is entitled to a Section 3(e) credit for the \$5,000 allocated to the attorney's fee.³ *Lustig*, 881 F.2d at 595-596, 22 BRBS at 161-162(CRT); *Landry*, 643 F.2d at 1088, 13 BRBS at 307; *Shafer*, 23 BRBS at 214; *Hoey*, 17 BRBS at 231 n.3.

³ We reject employer's contention that denying it a credit for the full amount awarded to claimant without a deduction for the fee effectively denies full faith and credit to the state award. The Supreme Court held in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980), that state and Longshore Act remedies may co-exist, subject to a credit of one recovery against the other. A determination of whether employer is entitled to a credit for amounts subject to a state lien for an attorney's fee is controlled by the language of and case law decided under the Longshore Act. Section 3(e) entitles employer to a credit for any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act, "notwithstanding any other provision of law." See *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46, 56 (1990). Moreover, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Longshore Act cannot be superseded by state law. *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2^d Cir. 1992) (holding that a credit provision of state law cannot supersede Section 3(e)). Our holding that employer may receive a credit only for the net amount of benefits claimant received under the state award does not address the parties' rights and obligations under Georgia law, but rather adjudicates the applicability of a provision of the Longshore Act.

Accordingly, the Decision and Order of the administrative law judge is modified to reflect employer's entitlement to a total credit pursuant to Section 3(e) of \$15,000.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge