

BRB Nos. 03-0213
and 03-0213A

RICHARD CARPENTER)
)
Claimant-Respondent)
Cross-Respondent)
)
v.)
)
CALIFORNIA UNITED TERMINALS)
)
and)
)
AMERICAN HOME INSURANCE)
)
Employer/Carrier-)
Petitioners)
Cross-Respondents)
)
STEVEDORING SERVICES OF)
AMERICA)
)
and)
)
HOMEPORTR INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent)

DATE ISSUED: July 15, 2004

DECISION and ORDER
on RECONSIDERATION

Appeals of the Decision and Order Awarding Benefits and the Decision and Order Partly Granting and Partly Denying Motion for Reconsideration of

Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Wm. Patrick Muldoon (Law Offices of Prandin & Muldoon), Wilmington, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for California United Terminals and American Home Insurance.

James P. Aleccia and Lisa M. Conner (Aleccia & Conner), Long Beach, California, for Stevedoring Services of America and Homeport Insurance Company.

Peter B. Silvain, Jr. (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

California United Terminals (CUT) has filed a timely motion for reconsideration of that part of the Board's decision in this case, *Carpenter v. Stevedoring Services of America*, 37 BRBS 149 (2003), pertaining to its entitlement to a credit, against its liability for payment of total disability benefits related to claimant's July 29, 2000, work injury, for the payment of permanent partial disability benefits made by Stevedoring Services of America (SSA) as a result of injuries claimant sustained on March 10, 1998. SSA has responded, urging denial of the motion and affirmance of the decision. We hereby grant reconsideration of our prior decision; however, we deny the relief requested by CUT.

To recapitulate, claimant sustained separate injuries while working as a marine clerk for two different employers. The first accident, which occurred while he was employed as a floor-runner clerk for SSA on March 10, 1998, resulted in injuries to his back, cervical spine, left arm, and right thumb. Claimant subsequently returned to work as a marine clerk on December 12, 1998, with certain physical restrictions.¹ On July 29, 2000, claimant, while working for as a gate clerk for CUT, experienced immediate and excruciating pain in his back and right leg that Dr. O'Hara subsequently attributed to a probable herniated disc at L4-5 or L5-S1. Dr. O'Hara opined that claimant's present

¹ Dr. O'Hara also opined that as a result of the March 10, 1998, injury, claimant had permanent impairments of his neck and back.

symptoms were “reasonably associated” with his July 29, 2000, work injury, and that claimant’s condition precluded him from performing “any meaningful work activity.” Claimant’s Exhibit 54. Claimant did not return to work following the July 29, 2000, incident and retired in December 2000.

In his decision, the administrative law judge determined that claimant sustained injuries to his back, right thumb, left elbow and neck while working for SSA on March 10, 1998, and that he subsequently aggravated, accelerated, or otherwise permanently worsened his back condition while working for CUT on July 29, 2000. The administrative law judge thus concluded that as for the injuries sustained on March 10, 1998, claimant is entitled to, and SSA is liable for, temporary total disability benefits from March 10, 1998, until December 11, 1998, temporary partial disability benefits from December 12, 1998, through June 30, 1999, and permanent partial disability benefits thereafter from July 1, 1999, as well as all medical benefits associated with those injuries. As for the July 29, 2000, back injury, the administrative law judge found that claimant is entitled to, and CUT is liable for, temporary total disability benefits from July 29, 2000, until November 20, 2000, and permanent total disability benefits from November 21, 2000, as well as medical benefits associated with that injury. The administrative law judge determined that these awards were to run concurrently, and he rejected CUT’s assertion that it was entitled to a credit for the amount paid by SSA. The administrative law judge held that the statutory maximum of Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), applied separately to each award and thus did not limit the total amount of benefits payable to claimant.

In its decision, the Board initially affirmed the awards of benefits to claimant payable by SSA and CUT, including the administrative law judge’s conclusion that claimant’s combined awards did not exceed the statutory limits of Section 8(a), 33 U.S.C. §908(a). Pertinent to the credit issue raised on reconsideration, the Board held that claimant is limited to the maximum compensation rate in effect on July 29, 2000, pursuant to Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), on the combined concurrent awards. Thus, the Board concluded that CUT may be entitled to a credit for permanent partial disability benefits paid by SSA for the amount exceeding the statutory maximum. However, as CUT is fully liable for the aggravation of claimant’s prior back injury, the Board deemed it necessary to remand the case for the administrative law judge to determine the extent, if any, claimant’s cervical spine injury with SSA contributed to the permanent partial disability award payable by SSA. *Carpenter*, 37 BRBS at 156. The Board stated that if, on remand, the administrative law judge determines that the cervical spine injury contributed to claimant’s permanent partial disability, SSA remains liable for those benefits and CUT is entitled to an offset in the payment of the total disability award

with regard to that amount.² Alternatively, the Board directed that if the administrative law judge determines that claimant's cervical spine injury does not contribute to the permanent partial disability award payable by SSA then CUT, as the last employer, is liable for the entire award of total disability benefits, less any necessary reduction for purposes of Section 6(b)(1). *Id.*

On reconsideration, CUT asserts that the Board's decision regarding its entitlement to a credit is ambiguous. CUT requests that the Board hold that it is entitled to a partial credit for SSA's payments under any circumstance as to hold otherwise would be inconsistent with the established case law of the Board, such as *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in part and rev'd in part*, 366 F.3d 1045, 38 BRBS ___(CRT) (9th Cir. 2004); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990), and *Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), and the federal Courts of Appeals, *see Brady-Hamilton Stevedore Co. v. Director, OWCP [Anderson]*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). CUT maintains that these cases establish that a permanent partial disability award for an initial injury can run concurrently with a permanent total disability award for a second injury and that the last responsible employer in such instances is entitled to a credit for the payment of permanent partial disability benefits related to the initial injury.

The recent decision of the United States Court of Appeals for the Ninth Circuit in *Stevedoring Services of America v. Price*, 366 F.3d 1045, 38 BRBS ___(CRT) (9th Cir. 2004), *rev'g in part* 36 BRBS 56 (2002), is dispositive of CUT's motion for reconsideration. In *Price*, the Ninth Circuit held that when an increase in an employee's average weekly wage between the time of a prior permanent partial disability and subsequent permanent total disability is not caused by a change in his wage-earning capacity, permitting him to retain the full amount of both awards does not result in any "double dipping." *Price*, 366 F.3d at 1054. In the instant case, the administrative law judge determined, as recognized by the Board, "that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits (\$1,465.23) did not exceed two-thirds of claimant's average weekly wage at the time of the March 10, 1998, injury, *i.e.*, \$2,643.10." *Carpenter*, 37 BRBS at 154. The Board therefore affirmed, as supported by substantial evidence, the administrative law judge's finding that the instant case presented no danger of "double dipping," and his consequent

² Under this theory, SSA's liability for the continued payment of permanent partial disability benefits after July 29, 2000, would result because claimant did not injure his neck or cervical spine in the subsequent injury sustained by claimant while working with CUT on July 29, 2000.

determination that claimant is entitled to receive concurrent awards of permanent partial and total disability benefits for purposes of Section 8(a). *Id.*

The Ninth Circuit additionally held in *Price* that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, rather than from all awards combined. *Price*, 366 F.3d at 1055, 1057-58. In this regard, the Ninth Circuit reversed the Board's holding that the combined amount of the awards could not exceed the maximum compensation rate under Section 6(b)(1). *Id.* The Ninth Circuit held that this interpretation of Section 6(b)(1) is consistent with the plain language of the Act.³ The Ninth Circuit's decision in *Price* thus rejects the Board's interpretation of Section 6(b)(1). As the present case arises in the Ninth Circuit the court's opinion is controlling.

In the prior decision, the Board reversed the ALJ's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held that claimant's total award of benefits is limited to this applicable maximum. *Id.* The Board then held, based on the reversal of the administrative law judge's aforementioned determination, that "[s]ince claimant is limited to the maximum award permissible under Section 6(b)(1), CUT, arguably, is entitled to a credit for permanent partial disability benefits paid by SSA." *Carpenter*, 37 BRBS at 156. Pursuant to *Price*, we vacate our prior decision regarding Section 6(b)(1) and reinstate the administrative law judge's holding that Section 6(b)(1) is inapplicable to limit the combined awards. It follows that, since Section 6(b)(1) is inapplicable to the combined concurrent awards,⁴ there can be no credit due to CUT for any payments made by SSA. As such, we must reject CUT's assertions regarding its entitlement to a credit in this case.

³ The court observed that Section 8, 33 U.S.C. §908, delineates the amount of "compensation for disability" that shall be paid under an award for each type of disability and thus it construed the same phrase in Section 6(b)(1) to refer to the maximum compensation allowed from each award rather than from the combined awards to an employee. *Price*, 366 F.3d at 1056.

⁴ Section 6(b)(1), however, would apply separately to CUT's liability for the award of permanent total disability benefits.

Accordingly, CUT's motion for reconsideration is granted, but its request for a holding that it is entitled to a credit is denied. The Board's holding that the statutory maximum of Section 6(b)(1) applies to the case at hand is vacated, and the administrative law judge's findings to the contrary are reinstated in light of the Ninth Circuit's decision in *Price*, 366 F.3d 1045, 38 BRBS ____ (CRT). In all other regards, the Board's decision is affirmed; thus, the administrative law judge's awards of disability benefits payable by SSA and CUT, respectively, are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge