



BRB Nos. 14-0221
and 14-0221A

GLENN ROUSH)	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS)	
)	
and)	
)	
CHARTIS/AIG)	
)	DATE ISSUED: <u>Mar. 24, 2015</u>
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order Granting Special Fund Relief and the Order Granting Motion for Reconsideration of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Nelson J. Larkins (Preti, Flaherty, Beliveau & Pachios), Portland, Maine, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order Granting Special Fund Relief and the Order Granting Motion for Reconsideration (2012-LHC-00878) of Administrative Law Judge Jonathan C. Calianos 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, rational, and 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, as a result of a traumatic head injury sustained while working for employer as a welder on January 20, 1988,¹ filed a claim for benefits under the State of Maine Workers' Compensation Act (the Maine Act). Employer began paying compensation under the Maine Act. Meanwhile, claimant filed a "protective" claim for compensation under the Act on June 13, 1995, but did not pursue that claim until January 13, 2012. In response, employer sought Section 8(f) relief, 33 U.S.C. §908(f), alleging that claimant suffered from pre-existing diabetes that contributed to his total disability. The district director denied employer's request for Section 8(f) relief, and employer sought a formal hearing, which resulted in the issuance of four separate orders by the administrative law judge. After finding claimant entitled to, and employer liable for, medical and permanent total disability benefits, respectively, in orders issued in 2012 and 2013,² the administrative law judge, in a decision dated January 28, 2014, granted

¹Claimant was struck in the back of the head by a 20-pound tool that fell approximately two stories, causing a three-inch laceration, a fractured jaw, a concussion and a cervical strain. Claimant subsequently suffered a grand mal seizure and thereafter from significant ongoing psychological conditions, including post-traumatic seizures, memory deficit, depression and a significant behavioral disorder, all of which have been attributed to his work-related accident. Claimant never returned to work. Employer determined on September 18, 1988, that claimant was no longer capable of working as a welder.

²On August 23, 2012, the administrative law judge issued a Decision and Order Awarding Medical Benefits finding claimant entitled to, and employer liable for, home health care costs. In his Decision and Order Awarding Benefits dated March 13, 2013, the administrative law judge found claimant entitled to, and employer liable for, permanent total disability benefits from September 19, 1988, the date claimant reached maximum medical improvement, as stipulated by the private parties. Employer was implicitly awarded a Section 3(e) credit, 33 U.S.C. §903(e), for benefits it paid under the

employer's request for Section 8(f) relief. The administrative law judge ordered the Special Fund to reimburse employer for any payments it made to claimant after 104 weeks following September 20, 1988.

The Director filed a motion for reconsideration, wherein he argued that the administrative law judge erred by not addressing whether the Special Fund is entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for payments made by employer pursuant to the Maine Act. The administrative law judge granted the Director's motion, finding employer and the Special Fund entitled to a Section 3(e) credit for payments made by employer to claimant under the Maine Act. Specifically, the administrative law judge found that employer is entitled to a credit against its 104 weeks of liability, and the Special Fund is entitled to a credit thereafter for benefits paid by employer under the Maine Act.

On appeal, the Director challenges the administrative law judge's finding that employer is entitled to Section 8(f) relief. BRB No. 14-0221. Employer responds, urging affirmance of the administrative law judge's Section 8(f) finding. Employer, in its cross-appeal, argues that the administrative law judge erred by awarding a credit to the Special Fund pursuant to Section 3(e); employer contends it is entitled to be reimbursed by the Special Fund for the amount of its payments to claimant under the Maine Act, because payments under the Maine Act apply to its liability for Special Fund assessments. BRB No. 14-0221A. In response, the Director urges affirmance of the administrative law judge's finding that the Special Fund is entitled to the Section 3(e) credit for payments employer made under the Maine Act to claimant after September 18, 1990.

The Director contends that the administrative law judge utilized an erroneous legal standard in evaluating the contribution element under Section 8(f). The Director maintains that the administrative law judge did not address whether employer established that claimant's total disability is not due solely to the work injury.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not solely due to the subsequent work-related injury. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997). It is not sufficient for

Maine Act, because the administrative law judge ordered employer to pay to claimant the difference between the two awards.

employer to show merely that claimant's existing permanent partial disability combined with the work injury to result in a greater degree of disability; employer must specifically establish that the work injury *alone* did not cause claimant's total disability. *Id.*

We agree with the Director that the administrative law judge's analysis of the Section 8(f) contribution element is flawed.³ While the administrative law judge set forth the proper contribution standard, and concluded that claimant's present permanent total disability "is not the sole result of the 1988 work-related injury alone," Decision and Order at 8, he did not adequately address the evidence of record under this standard. In this regard, the administrative law judge found that "the vast majority of the documentation supports the conclusion that [claimant's] diabetic unawareness and diabetes/hypoglycemia are the primary reasons for his permanent and total disability since September 18, 1988." *Id.* In reaching this conclusion, the administrative law judge summarily observed that "the medical records provided by Doctors Jiminez, Chattha, and Kettler, demonstrate the unstable nature of [claimant's] diabetic condition."⁴ *Id.* He then summarily concluded that those opinions, in conjunction with those authored by Drs. Wade, Payne and Govinian, demonstrate that claimant's permanent total disability is caused by his pre-existing diabetes in conjunction with his work injuries and that therefore the disability is not the result of the 1988 work-related injury alone.

The evidence cited by the administrative law judge establishes that claimant's diabetic condition likely plays some role in disabling him; the diabetic condition is not stable and claimant is prone to hypoglycemic episodes. *See, e.g.*, JX 22 at 429. However, the evidence cited by the administrative law judge does not establish that claimant is not totally disabled by the work injury alone, irrespective of the diabetic condition. *See generally Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990) (rejecting a "common sense test" for the contribution element). Moreover, the administrative law judge did not support with specific evidence his finding that claimant's "diabetic unawareness and diabetes/hypoglycemia are the primary reasons for his permanent and total disability since September 18, 1988." Decision and Order at 8.

³The administrative law judge found that claimant's diabetes constitutes a pre-existing permanent partial disability that was manifest to employer for purposes of satisfying the requirements of Section 8(f). Decision and Order at 6-7.

⁴The administrative law judge found that this position was bolstered by the testimony of claimant and his home healthcare worker, Sheila Rogers. The administrative law judge interpreted their statements as establishing that claimant's main health concerns, on a day-by-day basis, relate entirely to his diabetic condition. This begs the question of whether claimant's work injury alone is sufficient to render him disabled.

Indeed, there is evidence that claimant's seizure disorder and psychological instability due to the head injury are the bases for claimant's total disability. *See, e.g.*, JX 23. We, therefore, vacate the award of Section 8(f) relief and remand the case for further findings.⁵ *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). On remand, the administrative law judge must first determine whether employer established that claimant's work injuries alone are not the cause of his total disability; if they are not, the relevant inquiry then is whether the diabetes contributes to claimant's total disability.

In its cross-appeal, employer contends the administrative law judge erred in finding on reconsideration that the Special Fund is entitled to a Section 3(e) credit for the payments employer made under the Maine Act. Employer contends that, instead, the Special Fund should have to reimburse employer for the payments it made under the Maine Act. Employer contends that the administrative law judge's finding is premised on "a foundation of outdated case law," specifically, the Board's decision in *Stewart v. Bath Iron Works*, 25 BRBS 151 (1991). Employer avers that this decision, in which the Board held that the Special Fund is entitled to a credit against benefits paid by an employer under a state workers' compensation system, was rendered prior to the First Circuit's ruling in *Reich v. Bath Iron Works*, 42 F.3d 74, 29 BRBS 11(CRT) (1st Cir. 1994), that an employer's assessment to the Special Fund is to take into account payments made to a claimant under state law in concurrent jurisdiction states. Employer thus argues that since it has to pay an assessment to the Special Fund, even though it was paying claimant under the Maine Act, it must have the ability to obtain reimbursement from the Special Fund for the amount of the credit due under Section 3(e).

Pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e),⁶ employer and/or the Special Fund are entitled to a credit for amounts paid to claimant under a state workers' compensation law for the same injury or disability. *D'Errico v. General Dynamics*

⁵We decline to hold, as the Director urges, that the contribution element is not satisfied as a matter of law. In this case, the administrative law judge must fully address the evidence under the proper standard in the first instance, as it is not a foregone conclusion that employer's evidence is legally insufficient to establish the contribution element.

⁶Section 3(e) of the Act states:

Notwithstanding any other provision of law, 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 [the Jones Act], shall be credited against any liability imposed by this chapter.

Corp., 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2^d Cir. 1992); *Stewart*, 25 BRBS 151. In *Stewart*, the Board held that when an employer is paying compensation under a state statute and is thereafter found to be entitled to Section 8(f) relief under the Longshore Act, the Special Fund is entitled to credit employer's state payments pursuant to Section 3(e) against the Fund's liability to claimant pursuant to Section 8(f). *Stewart*, 25 BRBS at 155-156; *see also Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting on other grounds). Section 44(c)(2) of the Act, 33 U.S.C. §944(c)(2), provides for funding the Special Fund through assessments on self-insured employers and carriers; each carrier's or self-insured employer's assessment to the Special Fund is based on the proportion of its total payments under the Act in relation to the total of such payments made by all carriers and self-insured employers and the proportion of Section 8(f) payments attributable to such carrier or self-insured employer in relation to all payments made by the Special Fund. *See Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). In *Reich*, the First Circuit held, consistent with the Secretary's interpretation of Section 44 in concurrent jurisdiction cases, that an employer's payment of compensation under a state act is considered to be payment under the Longshore Act for purposes of the employer's assessment under Section 44. *Reich*, 42 F.3d at 77-78, 29 BRBS at 15-17(CRT).

In his January 2014 decision, the administrative law judge summarily ordered the Special Fund to reimburse employer for any benefits it paid to claimant under the Act beyond the statutory 104-week period that commenced September 20, 1988. The administrative law judge did not address Section 3(e). The Director filed a motion for reconsideration, contending the Special Fund is entitled to a credit under Section 3(e) for the amount employer paid to claimant under the Maine Act. On reconsideration, the administrative law judge, citing the Board's decision in *Stewart*, 25 BRBS 151, modified his earlier Order to reflect the Special Fund's entitlement to the Section 3(e) credit beyond the 104-week period for all payments made by employer under the state compensation statute and found that employer is not entitled to reimbursement from the Special Fund for such payments. In reaching this conclusion, the administrative law judge found, contrary to employer's contention, that the First Circuit's decision in *Reich*, 42 F.3d 74, 29 BRBS 11(CRT), did not alter the Board's decision in *Stewart*.

It is axiomatic that, when interpreting a statute, the starting point is the language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). Words of a statute are to be given their plain meaning whenever possible. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). If Congressional intent is clear from the plain meaning of the words, then the language is regarded as conclusive and the application of other means of construction is unnecessary and unwarranted. *North Dakota v. United States*, 460 U.S.

300 (1983). In this event, the court may look to legislative history only to see if there is a clear intent contrary to the language that would require questioning the language. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

The Board's construction of Section 3(e) of the Act in *Stewart* is consistent with the rules of statutory construction. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). Specifically, the Board's holding, that when an employer has paid claimant compensation under a state act, and it is entitled to Section 8(f) relief for its liability under the Act, Section 3(e) allows the Special Fund to credit the employer's state payments against the liability of the Special Fund pursuant to Section 8(f), accurately reflects the plain language of the statute, as well as its legislative history. *See* 33 U.S.C. §903(e); 130 CONG. REC. H9733 (daily ed. Sept. 18, 1984).⁷ In this regard, Section 3(e) states that "any amounts" paid to an employee "shall be credited against any liability imposed" under the Act. 33 U.S.C. §903(e). Thus, amounts paid by an employer under the state act ("any amounts paid") are to be credited against the liability of both the employer and the Special Fund under the Longshore Act ("any liability imposed"). While the Board's additional rationale for its interpretation of Section 3(e) in *Stewart*, i.e., that every state has a second injury fund such that the financial burden on the employer "may not be as great as" it fears, is no longer a reality,⁸ this fact alone is insufficient to mandate a change in the interpretation of Section 3(e). Regardless of the availability of second injury fund relief at the state level, the Board's interpretation of Section 3(e) in *Stewart* continues to correctly reflect the plain language of the statute, as well as its legislative history.⁹

Moreover, contrary to employer's position, the First Circuit's decision in *Reich* does not undermine the Board's holding in *Stewart*. *Reich* does not involve any specific interpretation of Section 3(e). In fact, the First Circuit explicitly stated that "nothing in *Stewart* is literally inconsistent with the government's reading of the assessment formula" of Section 44(c)(2), adding that *Stewart*, at worst, "produces an apparent possible

⁷Congressman Erlenborn stated, "[t]he offset applies, as well, to cases paid by the special fund for any purpose for which the fund is authorized to make payment under the Act."

⁸Second injury funds have been abolished by 19 states, including Maine. *See* <https://www.ncci.com/documents/Issues-Rpt-2008-Injury-Funds.pdf>. In particular, Maine repealed its second injury fund provision on October 17, 1991, with an effective date of April 6, 1992. *See* 39 M.R.S.A. §57-E Repealed Laws 1991, c. 825, § 5, eff. April 6, 1992.

⁹We note that employer has not set forth a specific analysis of the statutory language which supports the result it seeks.

inequity of a kind that is not unknown in complex statutory arrangements.” *Reich*, 42 F.3d at 78, 29 BRBS at 20-21(CRT). Thus, employer’s assertion that the Special Fund’s entitlement to a credit is “unfair” in view of *Reich* is insufficient to carry the day. Consequently, as it is in accordance with law, we affirm the administrative law judge’s finding on reconsideration that employer is entitled to a Section 3(e) credit for the first 104 weeks of permanent total disability compensation payments due claimant under the Longshore Act commencing September 19, 1988, and that the Special Fund is entitled to a credit thereafter for payments made by employer pursuant to the Maine Act.¹⁰ *See* 33 U.S.C. §903(e); *Stewart*, 25 BRBS 151.

Accordingly, the administrative law judge’s award of Section 8(f) relief is vacated, and the case is remanded for further consideration of this issue. In all other respects, the administrative law judge’s Decision and Order Granting Special Fund Relief and Order Granting Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

¹⁰Should the administrative law judge find on remand that employer is not entitled to Section 8(f) relief, the Section 3(e) credit would accrue entirely to employer.