

SAMUEL L. JENKINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NORFOLK & WESTERN RAILWAY)	DATE ISSUED: _____
COMPANY)	
)	
Employer-Respondent)	DECISION AND ORDER

Appeal of the Decision and Order of Theodor P. von Brand, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

John Y. Richardson, Jr. (Williams, Kelley & Greer), Norfolk, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2211) of Administrative Law Judge Theodor P. von Brand awarding benefits 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).

Claimant began working for employer in 1969, and at the time of his injury was employed in the "maintenance of way" department laying and replacing track. He functioned as the operator of a machine that positioned ties and rails, and operated a bolt machine. On July 26, 1984, claimant suffered a back injury while lifting a bolt machine. He continued to work and the next day aggravated the injury while lifting a railroad tie.

Claimant filed an action against employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51.¹ This suit was settled on April 29, 1986. Er. Ex. 1. Pursuant to this accord, claimant received a gross settlement in the amount of \$150,000, minus \$9,750 to satisfy a lien in favor of the Railroad Retirement Board and \$9,260.27 to pay for Supplemental Sickness Benefits. *Id.* At the formal hearing, claimant testified that counsel in the FELA action received a contingency fee of one-third of the recovery.² Tr. at 46; *see* Decision and Order at 2. Subsequently, the administrative law judge found that claimant's employment is covered under the Longshore Act, 33 U.S.C. §§902(3), 903(a), and he awarded claimant benefits under the Longshore Act for a permanent total disability. He also granted employer a credit for the gross amount of claimant's FELA settlement pursuant to Section 14(j) of the Longshore Act, 33 U.S.C. §914(j). Decision and Order at 11. Claimant and employer both appealed; the latter's cross-appeal was withdrawn and dismissed by the Board on August 27, 1992.

On appeal, claimant asserts that the administrative law judge incorrectly provided employer with an offset against its Longshore Act liability for the gross amount of claimant's settlement of the FELA action. Claimant avers that the administrative law judge erred by including in the offset the amount of attorney's fees he paid to counsel in that suit, which were alleged to be \$50,000. Employer responds that the full FELA settlement constituted an advance payment of compensation, and further asserts that the propriety of any counsel fee should be judged under Section 28, 33 U.S.C. §928. Employer emphasizes that, while legal fees are not considered "compensation" under other workers' compensation laws, the uncertainty of the fees paid in this case, and their contingent nature, entail the conclusion that the fees awarded under the FELA should not be deducted from the amount of the offset to be applied against its Longshore Act compensation liability. Employer further contends that because there is no proof of the actual amount recovered by claimant's FELA

¹Section 51 reads in pertinent part that

Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. §51. The FELA and Longshore Act provide mutually exclusive remedies. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). The FELA is not a workers' compensation statute, *see Consolidated Rail Corp. v. Gottshall*, 114 S.Ct. 2396, 2404 (1994), but it is incorporated into the Jones Act, *see* 46 U.S.C. §688; *American Dredging Co. v. Miller*, 114 S.Ct. 981, 989 (1994); *Nelson v. Research Corp. of the University of Hawaii*, 805 F.Supp. 837, 848 (D.Haw. 1992).

²This testimony was not clear. When asked about what percentage "of the settlement" his attorney received, claimant responded "[w]hat was it, a third? He was to get a third." Tr. at 46.

attorney, the administrative law judge properly declined to "assess this [speculative] expense against employer."

The administrative law judge, in granting employer a credit of the gross amount of its settlement of the FELA action with claimant pursuant to Section 14(j), 33 U.S.C. §914(j),³ reasoned that the FELA settlement constituted an advance payment of compensation under Section 14(j). Decision and Order at 9-10. While recognizing that attorney's fees are not "compensation" under usual workers' compensation statutes, the administrative law judge nevertheless concluded that the contingent nature of such fees in this instance distinguished them so that the gross amount of the settlement should be applied to offset employer's liability under the Longshore Act. *Id.*

For the reasons that follow, we vacate the Decision and Order to the extent it directs that employer receive an offset based on the gross amount of claimant's settlement recovery, and remand this case to the administrative law judge for a determination of the amount of fees received pursuant to the FELA settlement, and then provide employer a credit based on claimant's net recovery.⁴

The Longshore Act contains various offset or 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); *see also* *Lawson v. Standard Dredging Co.*, 134 F.2d 771 (5th Cir. 1943). Although the settlement recovery under the FELA in this case does not fall within the explicit terms of any of these sections, they nonetheless provide guidance in this case. Section 3(e) provides employer with a credit for payments under other workers' compensation laws or the Jones Act, and Section 33(f) provides an offset for recovery from a third party who is liable in damages for an employment-related disability or death. Section 14(j) covers the advance payment of benefits pursuant to the Longshore Act. *See, e.g.,* *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). In addition, an independent credit doctrine exists in case law that 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 Longshore Act provides for compensation for loss of wage-earning capacity, thus ensuring that an injured employee will be made whole in the event such injury affects his wages. The application of the credit doctrine eliminates a double recovery, *i.e.*, the actual receipt by an injured employee of duplicate payments for the same injury, disability or death. Regardless of the uncertainty which may attach to contingent attorney's fees in a tort action under the FELA, Jones

³Section 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).

⁴No party contends in this case that employer is not entitled to some credit for the FELA recovery. The only issue is whether the credit should be for the net amount or the gross amount of the recovery.

Act or other damage suits, a claimant's actual disbursement of such fees reduces his settlement recovery, and, *a fortiori*, reduces to the same extent the amount of credit against employer's compensation liability under the Longshore Act.

Under both Sections 3(e) and 33(f), 33 U.S.C. §§903(e), 933(f), the statutory language provides that an employer's offset is limited to the net amount of the recovery from a settlement for the same injury, disability or death which is the subject of the claim under the Longshore Act.⁵ *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). Prior to the enactment of Section 3(e) and amendment to Section 33(f) in 1984, case law provided a net credit to employers. *See Ochoa v. Employers National Ins. Co.*, 724 F.2d 1171 (5th Cir. 1984), *reaff'd following remand*, 754 F.2d 1196, 17 BRBS 49 (CRT)(5th Cir. 1985); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F.Supp. 260 (D.C.Wash. 1966); *Luke v. Petroweld*, 17 BRBS 269 (1981); *Adams*, 2 BRBS at 303. Similarly, Section 14(j) refers to a credit for advance payments of compensation, which contemplates amounts paid to claimant, and the credit doctrine allows a credit for the actual amount of benefits paid. *See Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989).

There is no distinction, moreover, for credit purposes between fees awarded from actions that are subject to Sections 3(e) and 33(f), which either by construction or specific language authorize only a net offset, and the contingent fees disbursed pursuant to the FELA settlement in this instance. We note that attorney's fees awarded in claims arising under the Jones Act may be contingent in nature, as they are under the FELA. *See Rufolo v. Midwest Marine Contractor, Inc.*, 912 F.Supp. 344 (N.D.Ill. 1995); *see generally Bundens*, 46 F.3d at 304 n.24, 29 BRBS at 69 n.24 (CRT). Attorney's fees are excluded in calculating the amount of the offset pursuant to Sections 3(e) and 33(f) because, as claimant was never in receipt of the funds designated as attorney's fees, there is no danger of a double recovery for the disability in question. *See Lustig*, 881 F.2d at 595-596, 22 BRBS at 161 (CRT). We therefore hold that the administrative law judge's application of a distinction based on the contingent nature of the attorney's fee to grant a credit to employer based on claimant's gross settlement recovery under the FELA does not accord with applicable law. As the FELA attorney's fee was not paid to claimant, this amount cannot be deemed a recovery for the same disability for which claimant is entitled to benefits under the Longshore Act. We therefore vacate the administrative law judge's Decision and Order to the extent that it bases the credit on the gross settlement amount, and remand this case to the administrative law judge for a calculation of the net recovery. Employer is entitled to a credit against its liability under the Longshore Act for this net amount.

Accordingly, the administrative law judge's Decision and Order is reversed insofar as it

⁵Section 3(e) provides a credit for "amounts paid to an employee." *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). Section 33(f) provides for a credit based on the "net amount," which is "equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees)." *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

awards employer a credit in the gross amount of the FELA settlement. The case is remanded for the administrative law judge to determine claimant's net recovery from the FELA settlement and to apply that amount as an offset against employer's compensation liability under the Longshore Act consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge