

BRB No. 92-1670

PAULINE PERRY)
(Widow of JEROME PERRY))
)
 Claimant)
)
 v.)
)
 BATH IRON WORKS CORPORATION) DATE ISSUED:
)
 and)
)
 COMMERCIAL UNION INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

Stephen Hessert and Patricia E. Donahue (Norman, Hanson & DeTroy), Portland, Maine, for employer/carrier.

LuAnn Kressley (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Program (the Director), appeals the Decision and Order - Awarding Benefits (91-LHC-2355/2414) of Anthony J. Iacobo 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

While working for employer, decedent developed asbestosis. Decedent stopped working for employer on April 6, 1980, due to his lung condition, and died on June 7, 1990, due to metastatic lung cancer. In a Decision and Order dated May 11, 1982, the administrative law judge found that decedent was permanently totally disabled due to his asbestosis, and that his asbestosis was work-related. The administrative law judge therefore awarded decedent permanent total disability benefits commencing April 6, 1980, based on an average weekly wage of \$298.06. 33 U.S.C. §908(a). He also found that decedent had a significant, pre-existing obstructive lung disease which contributed to decedent's disability, and awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing compensation liability. On June 15, 1990, claimant filed a claim for death benefits, including reimbursement for funeral expenses. Claimant also sought reimbursement for medical expenses for treatment of decedent's lung cancer.

In a decision issued April 7, 1992, the administrative law judge found that decedent's death from cancer was work-related, resulting in part from his exposure to asbestos. The administrative law judge therefore found that claimant was entitled to death benefits and that decedent's estate was entitled to medical expenses. 33 U.S.C. §§907, 909. The administrative law judge also awarded employer Section 8(f) relief, finding that employer paid decedent for his disability for 104 weeks and the payments were continued by the Special Fund in accordance with Section 8(f). The administrative law judge then stated that payments by the Special Fund were to continue to the widow, and that employer was not liable for a new period of 104 weeks. Decision and Order at 4.

The administrative law judge further found that claimant and decedent received third-party settlements totalling \$125,900 in 1985. All parties, including the Special Fund, agreed that the lien on the third-party settlement proceeds would be limited to 40 percent of the gross, or \$50,360. In 1985, decedent paid employer's carrier \$25,225.63 which covered all payments carrier made for the first 104 weeks of decedent's permanent disability. The balance was transferred to the Special Fund in the amount of \$20,734.37 to cover the benefits it had paid. This left a credit of \$4,400 (\$50,360 - \$45,960) to be applied against future benefits. The administrative law judge found that employer is liable for medical and funeral expenses in the amount of \$21,930.50, and deducting the \$4,400 credit from \$21,930.50, obtained a balance of \$17,530.50. Relying on *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206, 211 (1989), the administrative law judge found that the \$17,530.50 should be returned by the Special Fund to the carrier on the ground that the Special Fund's lien is to be satisfied only after the liability of employer and carrier is satisfied. The administrative law judge therefore

ordered the Special Fund to reimburse the carrier in the amount of \$17,530.50 from the \$20,734.37 it had received as its share of the lien on the third-party settlement proceeds.

On appeal, the Director challenges the administrative law judge's award of Section 8(f), 33 U.S.C. §908(f), relief, and contends that the administrative law judge erroneously ordered the Special Fund to pay \$17,530.50 to employer. Employer responds, urging affirmance. Claimant has not responded to this appeal.

The Director first contends that the administrative law judge erred in summarily extending the award of Section 8(f) relief to the claim for death benefits without analyzing the issue separately from the disability claim. The Director contends that in awarding Section 8(f) relief for death benefits, the administrative law judge must apply the relevant law, citing the evidence on which he relies, in order to determine if employer is liable for a new period of 104 weeks.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. Section 8(f) is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury or death; 2) the disability was manifest prior to the employment injury or death; and 3) the current disability or death is not due solely to the most recent injury. *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992). As the Director contends, where there are two claims, one for permanent total disability benefits and one for death benefits, employer must raise and show entitlement to Section 8(f) relief for each claim. *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983); *see generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT) (4th Cir. 1990); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). If Section 8(f) applies to both claims, and if both the disability and death arose from the same work-related condition, employer is liable for only one 104-week period. *Bingham v. General Dynamics Corp.*, 20 BRBS 284 (1986). Inasmuch as the administrative law judge failed to consider the applicability of Section 8(f) to the death benefits claim separately from its applicability to the disability claim, we must vacate the award of Section 8(f) relief on the death claim. The case is remanded for the administrative law judge to make the appropriate findings on the death benefits claim and to determine if employer is liable for 104 weeks of death benefits. *See Fineman*, 27 BRBS at 110.

The Director next contends that the administrative law judge erred in authorizing the Special Fund to reimburse the carrier, arguing that the Fund's lien rights should be satisfied before employer's credit rights are satisfied. The Director contends that the administrative law judge erred in failing to distinguish between the meaning of the words "lien" and "credit," and accordingly erred in applying *Lindsay*, 22 BRBS at 206, to the facts of this case. The Director states that a lien right allows employer or the Fund to recoup payments it has made up to the time of the tort recovery, and the credit right entitles it to suspend payments from that time forward until the aggregate amount of

the tort recovery is reached. While the Director admits that Section 33(f), 33 U.S.C. §933(f)(1988),¹ does not distinguish between lien and credit rights, the Director states the terms of Section 33(f) better describe the credit remedy, whereas Section 33(g)(3), 33 U.S.C. §933(g)(3)(1988), specifically refers to the Fund's lien rights.² Specifically, the Director states that employer's "lien" right was satisfied when decedent paid back the 104 weeks of disability compensation, and the \$4,400 which remained after the Fund was paid back existed as an amount subject to a "credit" against compensation unpaid at the time of the third-party settlement.

In its response brief, employer contends that precisely because Section 33(f) does not distinguish between credit and lien rights, it necessarily encompasses both rights, or in effect addresses the same right regarding benefits already paid and benefits to be paid. Employer therefore contends that the Special Fund is not entitled to satisfy its lien until the offset rights of employer and carrier provided by Section 33(f), whether in the form of a lien or credit, are satisfied. Employer contends that, contrary to the Director's assertion, the implication of the Board's holding in *Lindsay*, 22 BRBS at 206, that employer's lien must be satisfied before the Special Fund's lien, supports its contention that it should be entitled to satisfy future payments prior to satisfaction of the Special Fund's lien.

This issue presented in this appeal is one of first impression and initially requires a review of related case law. A "lien" is defined as "a claim of charge on property for payment of some debt, obligation or duty." *Black's Law Dictionary* 832 (5th ed. 1979). "Credit" is defined as "the

¹Section 33(f) provides:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

²Section 33(g)(3) provides:

Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

correlative of a debt; that is, a debt considered from the creditor's standpoint, or that which is incoming or due to one." *Id.* at 331. The Director is correct that Section 33(f) of the Act does not define the terms "lien" and "credit." Nonetheless, the concept of a "lien" as addressed in cases arising under Section 33(f) of the Act is as a claim to reimbursement for payments made, while credit rights under Section 33(f) address liability for future compensation. *See generally Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980); *Treto v. Great Lakes Dredge & Dry Dock Co.*, 26 BRBS 193 (1993). Absent a waiver of subrogation, employer's lien right may not be defeated. *See Peters v. North River Insurance Co.*, 764 F.2d 306, 17 BRBS 114 (CRT)(5th Cir. 1985); *The Etna*, 138 F.2d 37 (3d Cir. 1943). Section 33(g)(3), added to the Act by the 1984 Amendments, specifically states that the Special Fund has a lien on the proceeds of a third-party settlement or judgment if it has made payments.³ 33 U.S.C. §933(g)(3)(1988); *see also Ruggiero v. Rederiet*, 308 F.Supp. 798 (S.D.N.Y. 1970).

In *Lindsay*, 22 BRBS at 211, the Board held that where both employer and the Special Fund had made payments to claimant, employer, as the primary obligor for payment of benefits, is entitled to primary satisfaction of its lien on a third-party recovery, and the Special Fund, as the secondary obligor, is entitled to satisfy its lien after employer's lien was satisfied. Thus, under Section 33(f), employer or the Fund is entitled to offset benefits due under the Act against the net amount of the third-party recovery. If employer or the Fund has paid benefits, it is entitled to a lien equal to the amount it paid, and if it has not paid benefits, compensation and medical benefits are suspended until the net recovery is exhausted. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994); *Maples v. Texports Stevedores Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT)(5th Cir. 1991). The issue in this case is whether employer's credit right takes precedence over the Fund's lien right.

We hold that the Special Fund's lien right is to be satisfied prior to employer's credit right. Contrary to employer's assertion, *Lindsay*, relied on by the administrative law judge, addresses only the lien rights of the payors, and does not imply that employer's credit right is primary over the Fund's lien right. *Lindsay*, 22 BRBS at 211. To the contrary, common sense dictates that lien rights, representing amounts already paid, should take priority against the settlement proceeds as a lien represents a statutory "debt" to employer and the Special Fund.⁴ To hold otherwise would render the

³In *Carter v. Director, OWCP*, 751 F.2d 1398, 17 BRBS 18 (CRT) (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia Circuit held that in the absence of express authority in the pre-1984 Act, the Special Fund is not entitled to a lien on third-party recoveries.

⁴We reject employer's contention that *Armand v. American Marine Corp.*, 21 BRBS 305 (1988), establishes that employer's credit right takes precedence over the Fund's lien right. In *Armand*, employer had made no payments to claimant and the Board affirmed the administrative law judge's finding that Section 33(g) does not bar the claim, but reversed the finding that employer was not entitled to a credit against the net proceeds of the third-party settlement. The Board then reversed the denial of Section 8(f) relief. Although the Board stated that employer was entitled to a credit for the entire net proceeds of over \$79,000, the Board did not address the Fund's entitlement to a credit.

Special Fund's lien rights under Section 33(g)(3) virtually meaningless, as employer's continued liability for medical and funeral expenses could create future obligations subject to offset at any time.

After the lien rights of employer and the Special Fund are satisfied, the credit rights of the employer are to be satisfied prior to the credit rights of the Special Fund. Employer's liability for medical and funeral expenses for \$21,930.50 which accrued after the third-party recovery in this case, is to be regarded as a credit right as it is for payments that became due after the third-party settlement. See *Peters*, 764 F.2d at 319, 17 BRBS at 124 (CRT); *Ruby v. Dresser Offshore Services, Inc.*, 8 BRBS 433, 436 (1978); *Webb v. Santa Fe Drilling Co.*, 2 BRBS 367, 370-371 (1975). Inasmuch as the Special Fund is entitled to have its lien right satisfied prior to the satisfaction of employer's offset rights, we vacate the administrative law judge's order that the Special Fund reimburse employer in the amount of \$17,530.50.

In its response brief, however, employer also contends that the terms of the settlement agreement, to which carrier and the Special Fund agreed, define carrier's "lien" as the sum of all amounts paid *and to be paid* by the carrier in indemnity and medical expenses pursuant to the Act. Emp. Br. at 17. Employer further contends that all parties agreed that employer would be entitled to the full 40 percent of the gross, if necessary to extinguish its liability. Specifically, employer avers that the following language evidences this intent:

If, at any time, [Commercial Union] has a continuing obligation to make periodic payments or to pay medical expenses to Plaintiff(s) under the Act, and amounts distributed in satisfaction of the Lien are less than 40 percent of the sum of all Settlement Funds and Anticipated Funds distributed, [Commercial Union] may withhold payments thereafter due to Plaintiff(s) until the sum of all amounts distributed in satisfaction of the Lien and all amounts so withheld is equal to 40 percent of the sum of all Settlement Funds and Anticipated Funds distributed.

In effect, employer asserts that by agreeing to this language, the Director waived the lien rights of the Special Fund. The settlement agreement was not admitted into evidence, and the administrative law judge was not asked to consider its significance.

The Board and the courts have narrowly construed language in which the employer is waiving its lien as part of the third-party settlement. In *Treto*, 26 BRBS at 197, the "waiver of lien" was an agreement by employer to waive "past and future" liens. The Board held that this phrase encompassed only a true "lien," that is payments already made, and did not encompass a waiver of employer's right to a credit against the proceeds for future payments due. See also *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir. 1992), *vacated in part on other grounds*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir. 1992); *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163 (CRT) (5th Cir. 1988); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986); *Kaye v. California Stevedore & Ballast*, 28 BRBS 240 (1994). Given that the administrative law judge summarily concluded that the holding in

Moreover, there was no lien right involved in that case, as no benefits had been paid.

Lindsay applies in this case, we remand the case for admission of the settlement agreement in question and a determination as to whether it evidences the parties' intent that carrier is entitled to the entire 40 percent of the gross settlement in satisfaction of its lien and credit rights.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated with regard to the award of Section 8(f) relief and the order that the Special Fund repay carrier. The case is remanded for further consideration in a manner consistent with this opinion. In all other respects the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge