

BRB Nos. 99-0960
and 99-0960A

BRAD VALDEZ)	
JOSHUA VALDEZ)	
(Children of MANUEL VALDEZ, JR.))	
)	
Claimants-Petitioners)	
Cross-Respondents)	
)	
v.)	
)	
CROSBY & OVERTON)	DATE ISSUED: <u>Dec. 28, 2000</u>
)	
and)	
)	
CIGNA COMPANIES)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	ORDER on RECONSIDERATION

Claimants have filed a motion for reconsideration seeking review of that part of the Board's decision in the captioned case wherein it noted that employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez in this case. *See Valdez v. Crosby & Overton*, 34 BRBS 69, at 76 n. 10 (2000). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Employer responds, urging the rejection of this motion. For the reasons which follow, claimants' motion for reconsideration is denied.

In its decision, the Board stated, in a footnote, that the district director is responsible for calculating the additional benefits due Josh Valdez and that employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez, citing *Hawkins v. Harbert International, Inc.*, 33 BRBS 198 (1999); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986); 33 U.S.C. §§909(b), 914(j). *Valdez*, 34 BRBS at 76 n. 10.

Citing the Board's decision in *Gilliland v. E.J. Bartells Co., Inc.*, 34 BRBS 21 (2000), claimants argue that employer is not entitled to seek reimbursement of its overpayment to Brad Valdez retroactively out of the benefits due Josh Valdez, particularly since employer, in

this case, made no effort to recover those amounts prior to Brad Valdez's 23rd birthday.

Claimants' reliance on *Gilliland* is misplaced, as the holding in that case pertains to credits taken pursuant to Section 33(f), as opposed to the credit in the instant case which occurs as a result of Section 14(j). Specifically, in *Gilliland*, the Board held that if an employer fails to take its Section 33(f) credit during a period when it is liable for compensation to one "person entitled to compensation," it may not seek reimbursement of its credit retroactively out of benefits due another "person entitled to compensation." *Gilliland*, 34 BRBS at 26. In *Gilliland*, two children were "persons entitled to compensation" until their 23rd birthdays. Employer did not seek a credit out of settlement proceeds apportioned to them while they were "persons entitled to compensation," *i.e.*, before their 23rd birthdays. Employer later sought to recoup its credit against benefits due the widow. Under *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), *aff'g in part and rev'g in part Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), the Board stated that employer is still liable for compensation related to decedent's death, that the sole person entitled to compensation is the widow and not decedent's daughters, as their right to compensation had expired, and thus held that the administrative law judge correctly excluded the \$30,000 settlement recovery received by decedent's daughters from the calculation of employer's offset under Section 33(f). *Gilliland*, 34 BRBS at 26.

In the instant case, the credit provision at Section 33(f), and thus the holding in *Gilliland*, are inapplicable as the credit to which the Board refers is not in any way related to the third-party settlement executed by Ms. Valdez, Sea-Land and the *S.S. Newark*. Rather, it is related to the overpayment of disability compensation to Brad Valdez and thus is governed, as the Board acknowledged in its decision, by Section 14(j) of the Act, 33 U.S.C. §914(j).

Section 14(j) allows employer to receive a credit for its prior payments of compensation against any compensation subsequently found due. 33 U.S.C. §914(j); *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998). In addition, Section 9(b) of the Act, 33 U.S.C. §909(b), provides for the payment of one death benefit where a decedent is survived by a spouse, including additional compensation for surviving children. *See generally Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986). In *Lewis*, the Board held that where a widow filed a death benefits claim while the employer was making death benefits payments to the deceased employee's two surviving children, the claim was timely filed under Section 13(a), 33 U.S.C. §913(a). The Board therefore affirmed the administrative law judge's interpretation of Section 9 as providing for one death benefit. *Lewis*, 19 BRBS at 91-92. Thus, contrary to claimants' contention, the Board's notation that "employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez in this case," *Valdez*, 34 BRBS at 76 n. 10, is a proper statement and application of the law based on the specific facts of this case. 33 U.S.C. §§914(j), 909(b); *Hawkins*, 33 BRBS at 198; *Lewis*, 19 BRBS at 92. Moreover, in *Hawkins*,

employer paid death benefits to the employee's widow on her own behalf and on behalf of her son, who was the deceased employee's stepson/child. Employer continued to make payments on behalf of claimant's son until his 21st birthday, but it was later determined that claimant's son was, pursuant to Section 2(18), 33 U.S.C. §902(18), not a student after his 18th birthday. Thus, employer sought, and was awarded by an administrative law judge, a credit for its overpayment against future compensation owed the widow. The Board held that under Sections 14(j) and 9(b) employer was entitled to a credit for any overpayments made to the stepson against its future compensation liability to claimant, and thus affirmed the administrative law judge's finding. In light of Sections 14(j) and 9(b), and the Board's decisions in *Lewis* and *Hawkins*, claimants' contentions on reconsideration are rejected.

Accordingly, claimants' motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's prior Decision and Order is affirmed in all respects.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge