

BRB No. 03-0438

HORACE W. PARKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>Aug. 12, 2004</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	ORDER on MOTIONS
Employer-Respondent)	for RECONSIDERATION

Employer and claimant have filed timely motions for reconsideration of the Board's Decision and Order in the captioned case, *Parker v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0438 (Mar. 17, 2004). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. For the reasons that follow, we deny claimant's motion for reconsideration in part and grant it in part, and we grant employer's motion for reconsideration. 20 C.F.R. §802.409.

To recapitulate the facts relevant to the instant motions, claimant sustained a work-related left wrist injury on October 25, 1996. On May 2, 2000, Dr. McCue stated that claimant had a permanent impairment to his arm of 25 to 30 percent. Employer sought clarification of the impairment rating. Dr. McCue responded that claimant had a 30 percent impairment. Employer received the doctor's letter on May 22, 2000, and employer filed an LS-207 form, notice of controversion, on May 31, 2000. EX 18.

Before the administrative law judge, claimant contended he was entitled to a Section 14(e) assessment on the unpaid permanent partial schedule award. 33 U.S.C. §914(e). Employer countered that it had controverted the claim timely so that no Section 14(e) assessment is due. The administrative law judge awarded claimant permanent partial disability benefits under the schedule for a 30 percent arm impairment, pursuant to the parties' stipulations. 33 U.S.C. §908(c)(2). He further found that employer is not liable for a Section 14(e) assessment, as employer timely controverted the claim relative to its gaining knowledge of claimant's permanent impairment on May 22, 2000, and that employer's good faith in controverting, or lack thereof, is not a relevant consideration.

On appeal, claimant contended, *inter alia*, that the administrative law judge erred in finding that employer is not liable for a Section 14(e) penalty. The Board first held that the administrative law judge correctly stated that regardless of whether employer controverted the claim in good faith, a Section 14(e) penalty is not owed once employer

controverts the claim. *Parker*, slip op. at 4-5. The Board then addressed claimant's contention that the administrative law judge erred in finding that employer's notice of controversion was timely filed. The Board held that the controversy between the parties first arose on May 9, 2000, rather than on May 22, 2000, as the former date is when employer first gained knowledge of claimant's permanent impairment and became obligated to controvert the claim within 14 days or to pay benefits. *Id.* at 6. The Board modified the administrative law judge's decision to hold employer liable for a Section 14(e) assessment on benefits due and unpaid from May 9 until May 31, 2000. *Id.* at 7.

In his motion for reconsideration, claimant contends that the Board erred in holding that the validity of employer's reasons for controverting the claim is irrelevant to the issue of employer's liability for a Section 14(e) assessment. Employer responds that claimant's motion should be denied on this point. Claimant also contends that he is entitled to interest on the compensation awarded by the administrative law judge. Employer responds that an overpayment of state workers' compensation benefits exists that would subsume any award of interest. In its motion for reconsideration, employer similarly contends that it is not liable for a Section 14(e) assessment because it paid state workers' compensation benefits in an amount greater than that due under the Act for the time period at issue and is entitled to a credit pursuant to Section 3(e), 33 U.S.C. §903(e). Claimant responds that employer cannot raise the issue of its entitlement to a credit for the first time at this stage of the proceedings.

For the reasons stated in *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, BRB No. 03-0711 (July 7, 2004), we reject claimant's contention that the Board erred in refusing to inquire into the validity of employer's notice of controversion. In this case, employer's notice of controversion conforms to Section 14(d), 33 U.S.C. §914(d), and therefore we affirm the Board's holding that employer validly controverted the claim on May 31, 2000. *Hitt*, slip op. at 4-8.

We next address employer's contention that it is not liable for a Section 14(e) assessment because it paid claimant temporary total disability benefits under the Virginia workers' compensation law for the period between May 9 and May 31, 2000, at the same average weekly wage as the scheduled partial disability benefits awarded pursuant to the Act. Employer asserts that the state payment prevents the imposition of a Section 14(e) assessment because it was paying claimant benefits when it gained knowledge of claimant's permanent impairment on May 9, 2000; thus benefits were not "unpaid." Claimant responds that employer cannot now raise the issue of any credit to which it is entitled. Employer replies that a Section 3(e) credit operates as a matter of a law, and it affixes an affidavit from an employee of employer attesting to the benefits employer paid claimant under state law.

It is clear that pursuant to Section 3(e) of the Act employer is entitled to credit any payments claimant receives under a state workers' compensation law for the same injury or disability against its liability under the Act. *See, e.g., D'Errico v. General Dynamics*

Corp., 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); *see also Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000). This credit operates as a matter of law and employer, therefore, can raise its entitlement to such at any time. *See generally Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989) (Section 14(e) issue can be raised at any time). Moreover, case law supports employer's contention that payments made under a state workers' compensation act may prevent the imposition of a Section 14(e) assessment under the Act. In *Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036 (1979), the Board held that if an employer has made payments under a state act but in an amount smaller than the amount due under the Act, then absent a timely notice of controversy, the Section 14(e) assessment attaches to the difference. *See also Barton v. Kaiser Steel Corp.*, 2 BRBS 210 (1975). Similarly, in *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991), the Board affirmed the administrative law judge's finding that the employer was liable for a Section 14(e) assessment on the difference between what employer paid under the state act and what was due under the Act until the date employer filed its notice of controversy. As the "evidence" of employer's payments under the state act, *i.e.*, the affidavit of Jeffrey Carawan, was not previously admitted into the record before the administrative law judge, we must remand this case to the administrative law judge for him to address the issue of whether employer's payment under the state act prevents its liability for a Section 14(e) assessment. *See, e.g., Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998); *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981) (remanding to administrative law judge for findings of fact on applicability of Section 14(e)). We thus grant employer's motion for reconsideration and vacate the Board's holding that employer is liable for a Section 14(e) assessment.

Lastly, we grant claimant's motion to remand this case for the administrative law judge to consider his entitlement to an award of interest on the permanent partial disability benefits awarded. The issue of entitlement to interest may be raised at any time, *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992), and it, too, requires that the administrative law judge consider employer's evidence of payments under the state act. 33 U.S.C. §903(e).

Accordingly, employer's motion for reconsideration is granted. We vacate that portion of the Board's decision modifying the administrative law judge's award to hold employer liable for a Section 14(e) assessment, and the case is remanded for further consideration consistent with this decision. The administrative law judge also should consider if claimant is entitled to an award of interest. We deny claimant's motion for reconsideration challenging the validity of employer's notice of controversion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge