

BRB No. 02-0587

RICHARD L. MANEN)
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 Claimant-Petitioner)
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 v.)
)
 EXXON CORPORATION) DATE ISSUED: May 8, 2003
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 and)
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)
 RISK MANAGEMENT,)
 INCORPORATED)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order and Order Granting Employer's Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Ira J. Rosenweig (Smith Rosenberg, L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Granting Employer's Motion for Reconsideration (01-LHC-2799) of Administrative Law Judge Larry W. Price 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, are rational, and are 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 injured his knee and back on March 6, 1995, during the course of his employment for employer. He filed a claim under the Act, a claim for state workers' compensation in California, and a disability claim with the California Employment Development Department (EDD). Employer voluntarily paid compensation under the Act for temporary total disability, 33 U.S.C. §908(b), from March 19 to June 24, 1995, totaling \$9,830.80. Claimant also received benefits totaling \$17,472 from EDD. On June 17, 1997, the parties settled the California workers' compensation claim in a stipulated agreement. Pursuant to this agreement, employer paid claimant temporary total disability benefits from March 7 to September 7, 1995, as well as permanent disability benefits. Employer took a credit for its prior payment of temporary total disability benefits under the Act. The parties also agreed that \$750 otherwise payable to claimant would be paid by employer to claimant's attorney in satisfaction of the attorney's lien for an advance payment to claimant of travel expenses. JX 5.

Claimant's claim under the Act was contested on the issues of the nature and extent of his disability and entitlement to medical expenses. In a decision issued on October 14, 1998, Administrative Law Judge Kerr awarded claimant medical expenses and compensation totaling \$118,222.80 for temporary total disability from March 7, 1995, to July 24, 1997, permanent total disability, 33 U.S.C. §908(a), from July 25, 1997, to May 13, 1998, and continuing permanent partial disability benefits, 33 U.S.C. §908(c)(21), from May 14, 1998, based on a weekly loss of wage-earning capacity of \$783.30. JX 1. Judge Kerr found employer entitled to a credit for its prior payments of compensation pursuant to 33 U.S.C. §914(j); JX 12. Subsequently, employer began withholding \$300 from claimant's weekly compensation under the Act, ultimately deducting a total of \$31,744.50, representing \$17,472 claimant received from EDD, \$13,522.50 claimant received from employer in permanent disability compensation pursuant to the California Act, and \$750 claimant would have received in California workers' compensation benefits that was paid instead by employer to claimant's attorney in satisfaction of the lien. JX 12. Claimant challenged employer's taking a credit for the \$17,472 claimant received from EDD, \$750 employer paid directly to claimant's attorney, and \$9,830.80, representing its prior voluntary payments under the Act for temporary total disability.

In his decision, Administrative Law Judge Price (the administrative law judge) found that payments to claimant by EDD are not workers' compensation benefits under California law; therefore, employer is not entitled to a Section 3(e) credit, 33 U.S.C. §903(e), for \$17,472 paid by EDD to claimant. The administrative law judge found that employer is entitled to credit its voluntary temporary total disability payments to claimant totaling \$9,830.80 from the benefits due under both the Longshore Act and the California Act. The administrative law judge further found that employer is entitled to a Section 3(e) credit under the Act for \$750 paid to claimant's attorney in satisfaction of the lien for the advance to claimant. On employer's motion for reconsideration, the administrative law judge found that

employer also is entitled to credit \$1,104, representing the sum employer paid to EDD to settle a lien filed by EDD in claimant's California workers' compensation claim.

On appeal, claimant challenges the administrative law judge's finding that employer is entitled to credit, from the sums owed to claimant under the terms of Judge's Kerr's award, the amount of its voluntary payments of temporary total disability compensation and its \$750 payment to claimant's attorney. Claimant argues that employer improperly received credit for these amounts twice, as employer also deducted these sums from the compensation due claimant under the California Act. Claimant also challenges the administrative law judge's finding on reconsideration that employer is entitled to a credit for \$1,104 employer paid EDD to satisfy its lien against claimant's state compensation benefits.¹

We initially address claimant's contention that the administrative law judge erred by allowing employer a credit for its prior payments under the Act of temporary total disability benefits from March 19 to June 24, 1995, totaling \$9,830.80. Claimant contends that employer improperly took this credit twice -- once against the benefits awarded by Judge Kerr and once against its liability to claimant under the California Act. Section 14(j) of the Act 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). Claimant actually received from employer \$9,830.80 in compensation for temporary total disability for the period from March 19 to June 24, 1995, prior to the issuance of Judge Kerr's compensation award, in which claimant was awarded compensation for temporary total disability from March 7, 1995, to July 24, 1997. Pursuant to Section 14(j), Judge Kerr properly awarded employer a credit for its prior compensation payments to claimant. *Manen v. Exxon Corp.*, 97-LHC-964, slip op. at 26 (Oct. 14, 1998). Employer's withholding of \$9,830.80 from the compensation awarded by Judge Kerr therefore was proper. See *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). In addition, the administrative law judge herein found that employer is entitled to a credit for this sum from the amount due claimant under the California Act. Contrary to claimant's contention, this credit is proper and does not result in a "double credit" to employer. The administrative law judge properly found that claimant is entitled to be paid only once for the period from March 19 to June 24, 1995. Employer paid these benefits voluntarily, and the administrative law judge properly rejected claimant's contention that employer improperly deducted \$9,830.80 from the compensation it paid claimant for temporary total disability pursuant to the California Act.

¹The administrative law judge's award of a credit, pursuant to Section 3(e), for the remaining state workers' compensation benefits paid to claimant is not challenged on appeal.

Claimant also contends the administrative law judge erred in awarding employer a credit for its \$750 payment to claimant's attorney in satisfaction of the attorney's lien for an advance payment to claimant of travel expenses, pursuant to the parties' settlement of claimant's California workers' compensation claim. Section 3(e) of the Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this Act." 33 U.S.C. §903(e). Thus, Section 3(e) specifically provides an employer liable for benefits under the Act with a credit against amounts the claimant receives under another workers' compensation scheme for the same injury or disability. See, e.g., *D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); see also *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). In this case, the parties' California workers' compensation stipulated agreement provides that \$750 shall be paid to claimant's attorney in satisfaction of a lien for his payment in this amount to claimant for claimant's travel expenses. JX 5. Thus, employer would have paid an additional \$750 in compensation directly to claimant but for this lien. Accordingly, we hold that the administrative law judge properly construed the \$750 advance as an amount claimant actually received in state workers' compensation benefits. See *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990). Pursuant to Section 3(e), employer is therefore entitled to credit this amount against its liability under the Act, and we affirm the administrative law judge's finding to this effect. See generally *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990).

Lastly, we address the administrative law judge's finding that employer is entitled to a credit pursuant to Section 3(e) for its \$1,104 payment to EDD to satisfy the lien EDD asserted against claimant's California workers' compensation benefits.

The administrative law judge discussed California state court decisions characterizing EDD benefits as unemployment benefits available to disabled employees, which enable workers to receive prompt cash assistance until it can be determined whether the employee is entitled to workers' compensation benefits. Decision and Order at 6-7, citing *Garcia v. Industrial Acc. Commission*, 263 P.2d 8 (Cal. 1953); *State of California Employment Development Department v. Workers' Compensation Appeals Board*, 61 Cal. App. 3d 470, 131 Cal. Repr. 204 (Cal. Ct. App. 1976). In *Garcia*, the California Supreme Court stated that the California Labor Code provides EDD a lien against workers' compensation payments for unemployment compensation disability benefits paid under the California Unemployment Insurance Act. *Garcia*, 263 P.2d at 10, citing *Bryant v. Industrial Accident Commission*, 231 P.2d 32 (Cal. 1951). In addition, the administrative law judge found that EDD benefits are not employer subsidized. Cf. *Lee v. Boeing Co., Inc.*, 7 F.Supp.2d 617 (D. Md. 1998) (Saudi Arabian Insurance Law is a workers' compensation law for purposes of Section 3(e), as it has some characteristics of such a law, i.e., no fault, payments based on wages, employer-paid fund, even though it also has some social insurance characteristics). The administrative law judge credited stipulations in the record to find that EDD benefits are funded, at least

in part, through employee payroll deductions. Decision and Order at 8; see JX 12 at 2, #12. Thus, the administrative law judge found that EDD benefits are not to be characterized as workers' compensation benefits.

In denying employer a credit pursuant to Section 3(e) for the EDD benefits claimant received, the administrative law judge found this case analogous to *Todd Shipyards Corp. v. Director, OWCP [Clark]*, 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988), *aff'g Clark v. Todd Shipyards Corp.*, 20 BRBS 30 (1987), in which the United States Court of Appeals for the Ninth Circuit affirmed the denial of a credit to the employer for disability payments the claimant received from the Veterans Administration. Analyzing the legislative history of Section 3(e) with regard to the phrase "workers' compensation law," the circuit court noted the House Committee's statement "that the offset applies not only in instances in which the employee receives state workers' compensation, but also in those in which he receives benefits under the Federal Employees' Compensation Act (FECA)." *Id.*, 848 F.2d at 128, 21 BRBS at 116(CRT). The Ninth Circuit reasoned that since the legislative history referenced FECA but not other federal disability acts, the congressional intent was to limit the credit doctrine under Section 3(e) to payments received under state and federal workers' compensation laws, as well as Jones Act benefits, and not to include other forms of state or federal benefits. *Clark*, 848 F.2d at 128, 21 BRBS at 116(CRT); see also *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000) (no credit for settlement under Federal Employer's Liability Act); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986) (no credit for unemployment compensation). The administrative law judge, having concluded that EDD benefits are not California workers' compensation benefits, found that employer is therefore not allowed a Section 3(e) credit for the \$17,472 claimant received from EDD.² On employer's motion for reconsideration, however, the administrative law judge found employer entitled to credit its \$1,104 payment to EDD in full satisfaction of the \$17,472 lien EDD asserted against claimant's state workers' compensation benefits. The administrative law judge reasoned that employer was entitled to a credit because the lien paid by employer to EDD was paid out of and deducted from amounts employer owed claimant in settlement of his state workers' compensation claim. See JX 6.

We reverse the administrative law judge's award of this credit. In *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit held that the employer was not entitled to a Section 3(e) credit for the amount of a medical lien which it paid directly to the lien holder and deducted from the state settlement amount paid to claimant. The court stated that, "[A]bsent evidence of a double recovery [to claimant] we are bound by the language of 33 U.S.C. §903(e) which allows credits only for amounts 'paid to an employee.'" *Lustig*, 881 F.2d at 595, 22 BRBS at 161(CRT). In this

²Employer does not challenge this finding.

case, employer paid \$1,104 to EDD to satisfy its lien and not to claimant. Moreover, claimant did not receive a double recovery of workers' compensation benefits. The administrative law judge rationally found that the payments to claimant from EDD are not workers' compensation benefits, but were received by claimant pursuant to an employee-funded state unemployment disability insurance scheme. Accordingly, as the \$1,104 payment was not made directly to claimant, but to EDD, and as claimant did not receive a double payment of workers' compensation benefits, we hold that employer is not allowed a credit pursuant to Section 3(e) for this payment.

Accordingly, the administrative law judge's Decision and Order is affirmed. The administrative law judge's Order Granting Employer's Motion for Reconsideration allowing employer a Section 3(e) credit against claimant's compensation in the amount of the \$1,104 payment made directly to EDD is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge