

BRB No. 06-0764

SHEILAH D. HUNTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 05/24/2007
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	DECISION and ORDER
Employer-Respondent	)	

Appeal of the Supplemental Decision and Order on Attorney's Fee and the Order Granting Motion for Reconsideration and Denying Attorney's Fee Reimbursement and Denying Section 3(e) Credit of Daniel A. Sarno, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order on Attorney's Fee and the Order Granting Motion for Reconsideration and Denying Attorney's Fee Reimbursement and Denying Section 3(e) Credit (2006-LHC-00764) of Administrative Law Judge Daniel A. Sarno 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 Longshore 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 her right knee on July 6, 2004, during the course of her employment for employer as a security guard. Claimant filed claims for compensation under both the Virginia Workers' Compensation Act (the Virginia Act) and the Longshore Act. While the federal claim was pending, the Virginia Workers' Compensation Commission issued an award, pursuant to the parties' agreement, whereby employer was ordered to pay claimant eight weeks of temporary total disability compensation and medical benefits. The commission also awarded claimant's counsel an attorney's fee of \$400 to be paid to counsel by claimant. In his decision on the claim under the Longshore Act, Administrative Law Judge Huddleston found that claimant's injury is within the coverage of the Longshore Act. He awarded claimant benefits identical to those she received pursuant to the Virginia order, with employer receiving a credit for compensation already paid. In a supplemental decision, Judge Huddleston awarded claimant's counsel an attorney's fee of \$4,000 payable by employer, pursuant to the parties' agreement.

Subsequently, claimant sought an order requiring employer to pay claimant an additional \$400 in compensation on the basis that the amount claimant paid her attorney pursuant to the Virginia award may not be offset against employer's compensation liability under the Longshore Act. Claimant further sought a 20 percent penalty for the late payment of \$400 in compensation under the Longshore Act. *See* 33 U.S.C. §914(f). In his Supplemental Decision and Order on Attorney's Fee, Administrative Law Judge Sarno denied claimant reimbursement of the \$400 she paid as an attorney's fee under the Virginia award. In his order on claimant's motion for reconsideration, the administrative law judge again declined to order employer to reimburse claimant based on his lack of familiarity with the Virginia Act, which he stated may require a claimant in certain instances to pay her own attorney's fee. The administrative law judge also found, however, that employer is not entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for the \$400 attorney's fee paid by claimant.

On appeal, claimant contends that the administrative law judge erred as a matter of law in finding that she is not entitled to an additional \$400 in compensation, despite his denial of a credit to employer. Claimant contends that the administrative law judge's finding is inconsistent with longstanding circuit court and Board precedent. Claimant also contends that, due to employer's failure to pay her \$400, *i.e.*, its payment of \$400 less than the full amount of compensation awarded her under the Longshore Act, she is entitled to a penalty of \$80 pursuant to Section 14(f). Employer responds, urging affirmance of the administrative law judge's finding that it is not liable to claimant for an additional \$400 because the sum was "compensation" under the Virginia Act.

Section 3(e) of the Longshore Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law ... shall be credited against any liability

imposed by this chapter.” 33 U.S.C. §903(e). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has not addressed the issue of an employer’s entitlement to a Section 3(e) credit for an attorney’s fee paid as part of a state workers’ compensation award. The Board and those circuit courts that have addressed this issue, however, have uniformly held that attorney’s fees paid as part of a state workers’ compensation award are not included in an employer’s Section 3(e) credit as such fees do not serve as compensation for the employee’s injury, but rather as reimbursement for the expenses incurred in bringing the state claim. *See Lustig v. U.S. Department of Labor*, 881 F.2d 593, 595-596, 22 BRBS 159, 161(CRT) (9<sup>th</sup> Cir. 1989), *aff’g in pertinent part and rev’g on other grounds Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988); *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 1088, 13 BRBS 301, 307 (5<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 1123 (1983); *Shafer v. General Dynamics Corp.*, 23 BRBS 212, 214 (1990); *Hoey v. General Dynamics Corp.*, 17 BRBS 229, 231 n.3 (1985). Specifically, in *Lustig*, the Ninth Circuit cited with approval the following reasoning of the Fifth Circuit in a case issued prior to the enactment of Section 3(e):

The amount of [claimant’s] state award which has been allocated to his attorney did not serve as compensation for his injury, but rather as reimbursement for the expenses he incurred by having to resort to the courts for compensation. To credit that sum against an LHWCA compensation award is to mix apples and oranges; such a crediting procedure would not obviate double recovery, as the LHWCA award does not duplicate [claimant’s] *de facto* recovery of litigation expenses under state law. Rather, the LHWCA award should be diminished only by state compensation the plaintiff actually receives.

*Lustig*, 881 F.2d at 595-596, 22 BRBS at 161-162(CRT), *citing Landry*, 643 F.2d at 1088, 13 BRBS at 307.

Claimant received identical compensation awards under the Virginia Act and the Longshore Act. The Virginia award also ordered claimant to pay her attorney a fee of \$400. As claimant’s counsel correctly argued below, this fee lessened claimant’s recovery of compensation by \$400. *Landry*, 643 F.3d at 1088, 13 BRBS at 307. As claimant is entitled to receive all the benefits due her under the Longshore Act subject to employer’s Section 3(e) credit for only those Virginia state compensation benefits she ultimately received for her work injury, the administrative law judge properly found on reconsideration that employer is not entitled to a Section 3(e) credit for this \$400. *See Lustig*, 881 F.2d at 595-596, 22 BRBS at 161-162 (CRT); *Landry*, 643 F.2d at 1088, 13 BRBS at 307; *Shafer*, 23 BRBS at 214; *Hoey*, 17 BRBS at 231 n.3. The administrative law judge erred, however, in not also stating that, therefore, employer is liable to claimant for an additional \$400 in compensation benefits so that she receives her full recovery

under the Longshore Act. We so hold, and the administrative law judge's orders are modified accordingly. *Shafer*, 23 BRBS at 214.

We reject employer's contention in its response brief that this case is distinguishable from the above-cited cases because an attorney's fee paid under the Virginia Act is "compensation." In support of its contention, employer relies on *Roman v. Ondeo Degremont, Inc.*, 627 S.E.2d 539 (Va. App. 2006), in which the Virginia Court of Appeals held that, where the Virginia Workers' Compensation Commission orders the attorney's fee paid out of the claimant's accrued compensation, the fee remains compensation for purposes of the assessment of a penalty on late-paid compensation. Contrary to employer's assertion, the question of whether the attorney's fee awarded by the Virginia Workers' Compensation Commission in this case is "compensation" under Virginia law is irrelevant because Section 3(e) entitles employer to a credit for any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act, "notwithstanding any other provision of law." See *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46, 56 (1990). Moreover, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Longshore Act cannot be superseded by state law. *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2<sup>d</sup> Cir. 1992)(holding that a credit provision of state law cannot supersede Section 3(e)). The definition of "compensation" provided by the Virginia Court of Appeals in *Roman*, therefore, cannot alter the crediting directed by Section 3(e) of the Longshore Act.

Employer also argues there is no evidence that claimant actually paid the \$400 attorney's fee awarded on January 12, 2005, by the Virginia Workers' Compensation Commission until August 4, 2005, after Judge Huddleston's June 1, 2005, decision became final. On reconsideration, the administrative law judge specifically found that claimant paid her attorney the \$400 fee. Order on Reconsideration at 2. The purpose of the Section 3(e) credit is to prevent double recoveries by claimant. *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 911, 32 BRBS 35, 38(CRT) (9<sup>th</sup> Cir. 1998); *Lustig*, 881 F.2d at 595, 22 BRBS at 161(CRT); *Landry*, 643 F.2d at 1088, 13 BRBS at 307. Thus, employer is not entitled to a Section 3(e) credit for the attorney's fee paid by claimant from her Virginia award as she did not ultimately retain the \$400, notwithstanding the timing of her payment of the fee.

Claimant also requests that a 20 percent penalty be assessed against employer pursuant to Section 14(f) due to employer's failure to pay her the full amount of compensation owed her under the Longshore Act, as ordered by Judge Huddleston. The Board, however, lacks jurisdiction to address requests for the assessment of a Section 14(f) penalty where, as here, the district director has not yet considered the issue. *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Von Lindenberg v. I.T.O. Corp. of Baltimore*, 19 BRBS 233 (1987). We therefore decline to address this issue.

Accordingly, the administrative law judge's determination on reconsideration that employer is not entitled to a Section 3(e) credit for the \$400 claimant paid her attorney in fees out of her state compensation award is affirmed. Employer is liable to claimant for an additional \$400 in compensation, pursuant to her award under the Longshore Act, and the administrative law judge's decisions are modified to so provide.

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge