

ROBERT WILMOT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CRESCENT CITY MARINE WAYS)	DATE ISSUED: 05/24/2007
)	
and)	
)	
SEABRIGHT INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Request for Credit of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn and Gregory A. Bunnell (Preston, Bunnell & Flynn, L.L.P.), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Request for Credit (2005-LHC-1177) of Administrative Law Judge Alexander Karst 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 right knee in 1984. In 1987, claimant and a former employer, Stevedoring Services of America (SSA), entered into a settlement agreement, and

claimant received a net total of \$37,500 for the injury to the right knee. 33 U.S.C. §908(i). Claimant re-injured his right knee in 1994, and that claim was settled in 1998 with claimant receiving a total of \$20,000 (\$12,555.18 as compensation for temporary total disability benefits and \$7,744.82 as compensation for permanent partial disability). While working for Crescent City Marine Ways (employer), claimant again injured his right knee, and in 2005, the administrative law judge approved the parties' stipulations and application for settlement. The settlement resolved all issues except whether employer is entitled to a credit for the \$37,500 claimant received under the 1987 settlement.¹ Decision and Order Approving Stip. & Applic. for Settlement (December 20, 2005).

The administrative law judge found that the \$37,500 settlement represented payment for permanent partial disability to claimant's right knee; therefore, he awarded employer a credit in the amount of \$37,500 against the permanent partial disability benefits due under the 2005 settlement. Claimant appeals, arguing that employer did not establish that the \$37,500 was for permanent partial disability benefits. Claimant specifically argues that temporary disability and permanent disability were in dispute prior to the 1987 settlement and that the settlement application did not designate the \$37,500 as permanent partial disability benefits. Rather, claimant contends that the \$37,500 lump sum payment was paid to claimant in return for his agreement to not seek modification to obtain future permanent total disability benefits in the event his condition worsened, to not seek any benefits for later natural progression of the condition, and to not seek rehabilitation services in the event he could not return to work. Employer responds, urging affirmance of the administrative law judge's decision.

The 1987 settlement application states that claimant's knee condition became medically stationary on December 17, 1986, that he was working the night shift, and that between April 13, 1986, and February 27, 1987, his post-injury earnings exceeded his pre-injury earnings. The parties noted that an award under the schedule for 10 percent impairment to the right leg would result in a total entitlement to claimant of \$14,781.60, but that the extent of claimant's impairment remained in dispute. Thus, they declared a desire to settle the disputed claim. Specifically, SSA agreed to pay claimant a \$40,000-lump-sum payment, less an attorney's fee. Exh. 1 at 8-10. The parties also agreed that "[a]ll temporary benefits in the amount of \$21,849.58 . . . are in addition to the lump sum and have been paid in full." Exh. 1 at 10 (emphasis in original). Claimant accepted the lump sum and agreed to discharge SSA from compensation for any and all disability claims related to the 1984 injury; however, SSA remained liable for medical care, as the settlement did not discharge its liability therefor. Exh. 1 at 11. Employer's notice of final payment form, dated April 13, 1987, identified the \$37,500 as "permanent partial

¹Claimant does not dispute employer's entitlement to a credit for the \$7,744.82 paid for permanent partial disability benefits under the 1998 settlement. Cl. Brief at 2 n.1.

(Non-schedule)” with the remaining \$2,500 designated as an attorney’s fee. A notice of final payment dated April 15, 1986, reported the payment of \$21,849.58 in temporary total disability benefits. The district director approved the parties’ settlement agreement. Exh. 1 at 1-2.²

The Longshore Act contains various offset or credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. See 33 U.S.C. §§903(e), 914(j), 933(f);³ see also *Lawson v. Standard Dredging Co.*, 134 F.2d 771 (5th Cir. 1943); *Taylor v. Plant Shipyard Corp.*, 32 BRBS 155 (1998). In addition, an independent credit doctrine exists in case law that provides an employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Specifically, in cases involving an injury under the schedule, 33 U.S.C. §908(c)(1)-(20), which increases a prior disability to the same member, the independent credit doctrine provides that an employer is not liable for compensating the claimant for the prior disability if the claimant has already received compensation for that disability pursuant to the schedule.⁴ *Nash*, 782 F.2d 513, 18 BRBS

²The district director’s order states:

The parties have agreed on the pertinent issues and desire to settle the claim on the following basis:

Compensation for temporary total disability	\$21,849.58
Compensation for permanent partial disability/other	\$-----
Medical benefits paid by employer or carrier	\$-----
Lump sum payment	\$40,000.00
Total compensation awarded	\$61,849.58
Net compensation payable (less approved attorney’s fee of \$2,500.00)	\$37,500.00

³Section 3(e) provides employer with a credit for payments under other workers’ compensation laws or the Jones Act, Section 14(j) covers the advance payment of benefits made by an employer pursuant to the Longshore Act, and Section 33(f) provides an offset for recovery from a third party liable in damages for an employment-related disability or death.

⁴The credit doctrine was developed as a limit on the aggravation rule, which provides that an employer is liable for the entirety of a disability if a work injury exacerbates a pre-existing disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Nash*, 782 F.2d 513, 18 BRBS 45(CRT). The United States Court of Appeals for the Ninth Circuit, wherein this case arises, has cited *Nash* with approval. *Todd Shipyards Corp. v. Director, OWCP [Clark]*, 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988); see also *Alexander v. Director*,

45(CRT); *see also* *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.*, 20 BRBS 26 (1987), *aff'd in part, part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989). The employer bears the burden of establishing that it is entitled to the credit. *See generally* *Nash*, 782 F.2d 513, 18 BRBS 45(CRT); *see also* *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The credit the employer receives is limited to the actual dollar amount of the claimant's net recovery.⁵ *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

The administrative law judge found it undisputed that claimant received \$37,500 from the 1987 settlement. He then reasoned that there are three types of benefits a living worker may receive: compensation for temporary disability, compensation for permanent disability and payments for medical care. Because the 1987 settlement application provided that all temporary disability benefits had been paid in full and that medical care was not being discharged, he reasoned that the only type of benefit the \$37,500 could be was compensation for claimant's permanent disability.⁶ Order Granting Request for Credit at 1-2. Therefore, the administrative law judge concluded that the \$37,500 represented compensation for permanent partial disability to claimant's right knee. As the 2005 settlement provides compensation for additional permanent impairment to claimant's right knee, the administrative law judge found that employer is entitled to a credit in the amount of \$37,500. *Id.* at 2.

In this case, claimant's injury and re-injury were to his right knee; thus, his benefits are compensable under the schedule, 33 U.S.C. §908(c)(1)-(20). The 1987 settlement application stated that claimant had returned to work following his 1984 knee injury, his condition had reached maximum medical improvement, temporary total disability benefits had been paid in full, and employer was not discharged from paying medical benefits. While claimant is correct that the settlement application does not specifically categorize the \$37,500 as payment for permanent partial disability, the administrative law judge rationally inferred from the facts that temporary disability and medical benefits were not in issue in the 1987 settlement and that the \$37,500 lump sum payment must have been compensation for claimant's permanent partial disability of his right knee. His inference also is supported by the parties' statement that they were

OWCP, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

⁵For example, attorneys' fees are excluded when calculating the amount of the offset. *See generally* *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Jenkins v. Norfolk & Western Ry. Co.*, 30 BRBS 109 (1996).

⁶Claimant had returned to work and was not found to be totally disabled, so only partial disability benefits were available to him.

settling for more than a 10 percent scheduled award because the extent of claimant's impairment was in dispute. Although claimant argues that employer has not definitively established that the \$37,500 was for permanent partial disability benefits, it is for the administrative law judge to weigh the evidence and draw inferences therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As the administrative law judge's conclusion is rational, we affirm his decision to award employer a credit of \$37,500 against its liability under the 2005 settlement. *Nash*, 782 F.2d 513, 18 BRBS 45(CRT).

Accordingly, the administrative law judge's Order Granting Request for Credit is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge