BRB No. 06-0346

GARLAND L. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 11/27/2006
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-1512) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a machinist, suffered a work-related injury to his left hand and wrist on January 19, 2004, while tightening a wrench. Dr. Stiles performed decompression surgery on April 29, 2004. On June 14, 2004, claimant was released to return to work without restrictions. Dr. Stiles diagnosed residual tenosynovitis on August 19, 2004, and assigned claimant an impairment rating of two percent of the upper left extremity. Employer did not dispute this rating but sought a credit against this award for amounts employer paid claimant in 1990 pursuant to a five percent disfigurement award by the Virginia Workers' Compensation Commission resulting from a work-related burn

claimant sustained to his left hand in January 1990.[1] Emp. Ex. 2. The parties stipulated that claimant's 2004 injury was to a different body part than the burn injury.

The administrative law judge found that employer is not entitled to a credit, pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e), for the amount employer paid pursuant to the 1990 award, $1,124.52. In this regard the administrative law judge found that 1990 payment was not for the "same injury or disability" for which claimant now claimed benefits. The administrative law judge further found that employer is not entitled to a credit pursuant to the "credit doctrine" of *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*), because that doctrine is premised on the aggravation rule, which is inapplicable here because the disfigurement award was not for permanent partial disability of the left upper extremity.

Employer appeals, contending that the administrative law judge erred in failing to grant its request for a credit pursuant to the *Nash* credit doctrine. Claimant has not responded to this appeal.

We reject employer's contention of error and we affirm the administrative law judge's denial of a credit. Initially, we note that employer has not referenced the provisions of Section 3(e) of the Act, or the administrative law judge's findings thereunder. This section states:

> Notwithstanding any other provision of law, 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 or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e). This section provides the only statutory basis for a credit for amounts claimant receives in state workers' compensation benefits for the same injury. *See, e.g., D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992).

In contrast, the "credit doctrine" is an extra-statutory creation intended to prevent a double recovery to a claimant that potentially occurs due to application of the

[1] On January 24, 1990, claimant hit his hand against a steam pipe causing burns to his left thumb. Employer paid claimant for a five percent disfigurement impairment awarded by the Virginia Workers' Compensation Commission. Claimant received no further treatment for this injury and the scar is no longer visible. Decision and Order at 2.

aggravation rule. The aggravation rule provides that an employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). The credit doctrine provides employer a dollar-for-dollar credit for previous benefits paid for a scheduled injury to the same body part, so that employer is not liable for the portion of an employee's disability for which the employee has previously received compensation. *Nash*, 782 F.2d at 521, 18 BRBS at 54(CRT); *see also Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989).

As the administrative law judge found, neither Section 3(e) nor the credit doctrine applies in this case. The administrative law judge found that Section 3(e) is inapplicable because the compensation claimant received for the burn injury was not for the same injury or disability as that for which claimant sought compensation in 2004, and employer does not challenge this conclusion. Employer's argument regarding the credit doctrine fails for similar reasons, as the administrative law judge properly found that the aggravation rule is not applicable and claimant's previous benefits thus did not compensate any part of his current disability.

That the administrative law judge properly concluded that the credit doctrine does not apply is evident from a comparison between the facts in *Nash* and those in the instant case. In *Nash*, claimant suffered three injuries to his knee: a 20 percent impairment due to an injury he sustained in high school in 1969; a 10 percent impairment due to a work injury in 1974 for which he received compensation under the Act from Chapparal; and a 4 percent impairment in 1978 due to an injury with Strachan Shipping. Claimant sought compensation for the entire 34 percent impairment to his knee following the 1978 injury. On appeal, the Board held that claimant could recover compensation only for the 24 percent impairment for which he had not been previously compensated. The Court of Appeals affirmed the Board's decision, holding that the Board's interpretation of the aggravation rule and the credit doctrine was supported by the Act's goals of ensuring a single complete recovery to the claimant while avoiding a double recovery. *Nash*, 782 F.2d at 522, 18 BRBS at 54(CRT).

In the instant case, the parties stipulated that claimant suffered injuries to two distinct parts of the hand and wrist. Moreover, the recoveries to which claimant is entitled for each injury demonstrate the unrelated nature of the injuries. For the 1990 burn injury, claimant received a five percent award for disfigurement and scarring; no functional disability resulted from this injury. CXs 9-12; Stip. 18. The 2004 injury resulted in a physical impairment to the function of claimant's hand and wrist leaving him with permanent numbness in his sensory nerve distribution and stiffness. CX 1. Dr. Stiles assigned an impairment rating of two percent of the arm for this injury.

The administrative law judge properly found that the aggravation rule does not apply in this case as claimant's recovery is not for a cumulative impairment to his hand or arm, as was the case in *Nash*. The second injury did not aggravate or combine with the first injury, as the first injury did not result in residual impairment; the award was for a cosmetic defect caused by a burn. The second recovery was for a functional impairment to the arm. 33 U.S.C. §908(c)(1). As the disability for which claimant is now entitled to recover is not due to the combined effects of the prior injury and the 2004 injury, neither Section 3(e) nor the credit doctrine applies. Therefore, we affirm the administrative law judge's finding that employer is not entitled to a credit for the disfigurement award as it is rational, supported by substantial evidence, and in accordance with law. *See Clark v. Todd Shipyards Corp.*, 20 BRBS 30 (1987), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP,* 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge