U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0296

MATTHEW B. HARWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SSA COOPER, LLC	)	
	)	DATE ISSUED: Oct. 12, 2017
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Claimant's Request for Payment of Credit Taken by Employer/Carrier of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Brian P. McElreath (Lueder, Larkin & Hunter, LLC), Mount Pleasant, South Carolina, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Claimant's Request for Payment of Credit Taken by Employer/Carrier (2016-LHC-00798) of Administrative Law Judge Paul C. Johnson, Jr., 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case involves two claims filed by claimant for his work-related binaural hearing loss. On March 3, 2012, claimant retained the services of attorney Gregory Camden and signed an agreement that he would be liable for Mr. Camden's attorney's fee in the event employer was not liable for attorney fees under the Act. EX F. On March 8, 2012, claimant filed his first hearing loss claim against employer. EX B. Employer received notice of the claim on or about March 26, 2012. EX C. Employer accepted the claim as compensable on March 29, 2012, and, on April 16, 2012, paid claimant $3,679.61 under the schedule for a 5.63 percent binaural hearing loss. EXs D, E; *see* 33 U.S.C. §908(c)(13). On May 11, 2012, employer paid claimant an additional $21,709.16 under the schedule, such that claimant was compensated for a 10.10 percent binaural hearing loss. EX E. Thus, employer paid claimant a total of $25,388.77 for his work-related hearing loss. *Id*.

Mr. Camden submitted the fee agreement between him and claimant to the district director and sought a fee payable by claimant pursuant to 33 U.S.C. §928(c) for $1,500 for services rendered.[1] EX G. On February 12, 2013, the district director issued a Compensation Order Award of Attorney's Fees, approving a fee of $1,500 for Mr. Camden, payable by claimant. EX G. Claimant paid this fee.

Claimant continued to work for employer and suffered additional hearing loss, for which he filed a second claim. Employer received notice of the claim on or about December 8, 2015, and accepted the claim as compensable. EXs I, J. The parties agreed that claimant suffered a 17.5 percent binaural impairment, for which he was entitled to $48,195.70 in permanent partial disability benefits under the schedule. 33 U.S.C. §908(c)(13). Employer took a credit for the $25,388.77 in permanent partial disability benefits it previously paid claimant and paid claimant the difference of $22,806.93 in disability compensation. Claimant disputed employer's credit calculation, asserting that the credit doctrine limits its credit to the amount of claimant's "net recovery" under the Act. Claimant contended that because he was liable for $1,500 in attorney's fees, his "net recovery" in the first claim was $23,888.77 ($25,388.77-$1,500 = $23,888.77), and, therefore, employer's credit should have been limited to this sum. Thus, claimant argued before the administrative law judge that he was entitled to an additional $1,500 in

[1] Employer paid claimant compensation within 30 days of its receipt of the claim, and no informal conference was held nor was a written recommendation issued by the district director. EX D. Thus, employer could not be held liable for the attorney's fee pursuant to Section 28(a), (b), 33 U.S.C. §928(a), (b).

permanent partial disability compensation, plus interest and a Section 14(e) assessment on the underpayment.

The administrative law judge rejected claimant's contention. The administrative law judge stated that, although claimant may have used a portion of his recovery to pay his attorney's fee, such payment was a distinct transaction that had no bearing on the amount of disability compensation he recovered. The administrative law judge explained that claimant's position would undermine the incentive for employers to promptly pay meritorious claims. The administrative law judge therefore found that employer was correct in taking a credit for the full $25,388.77 in permanent partial disability compensation paid on the first claim. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

The Act contains several statutory provisions which permit an employer to receive a credit for payments made against its liability for benefits under the Act. *See* 33 U.S.C. §§903(e), 914(j), 922, 933(f). An independent credit doctrine exists in case law that provides an employer with a dollar-for-dollar credit for permanent partial disability compensation previously paid under the schedule for an injury to the same body part.[2] *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). The parties agree that only this independent credit doctrine is applicable in this case.

Claimant concedes employer is entitled to a credit for prior disability compensation claimant received for his binaural hearing loss, but contends the administrative law judge erred in determining the amount of employer's credit. Citing the Board's decision in *Wilmot v. Crescent City Marine Ways*, BRB No. 06-0803 (May 24, 2007) (unpub.), claimant asserts that employer's credit is limited to the "net recovery" of the injured worker after subtracting attorney's fees. As claimant previously received $25,388.77 in disability compensation under the schedule and was liable for $1,500 in attorney's fees, he asserts his "net recovery" was only $23,888.77. Therefore, claimant asserts the administrative law judge erred in failing to hold employer liable for an additional $1,500 in permanent partial disability benefits on the second claim.

[2] The 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 aggravates a pre-existing disability. *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Application of this credit doctrine prevents a double recovery to claimant. *Id.*

We reject claimant's assertion of error. Claimant attempts to enlarge the Board's decision in *Wilmot* based on a sentence of boilerplate law. In *Wilmot*, the Board recited the tenet of the independent credit doctrine that "[t]he credit employer receives is limited to the actual dollar amount of the claimant's net recovery," and noted that attorney's fees are excluded from the calculation of employer's credit. *Wilmot*, slip op. at 4 and n.5. However, *Wilmot* does not broadly advocate deducting claimant-paid attorney's fees from the amount of disability compensation recovered on the earlier claim.[3] Rather, the Board merely recited established law that an employer cannot *increase* its credit by the amount of the attorney's fees for which employer is liable, as such a result would undercompensate a claimant. *Wilmot*, slip op. at 4 n.5 (citing *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989) (no credit under Section 3(e) for amount employer paid in attorney's fees under state settlement because such was not an "amount paid" to claimant; no credit under Section 3(e) for medical benefits paid to provider)); *see also Hoey v. General Dynamics Corp.*, 17 BRBS 229 (1985).

Case precedent addressing the independent credit doctrine and other credits under the Act do not directly address the factual scenario presented in this case.[4] However, we agree with the administrative law judge that the fact claimant had to pay his own attorney's fee pursuant to Section 28(c) cannot reduce employer's credit for the disability compensation it previously paid. Denying a credit to employer for the amount claimant

[3] In *Wilmot*, the claimant's earlier claims for a knee injury had resulted in settlements. In discerning the amount of employer's credit for the last knee injury, it was necessary for the administrative law judge to interpret a prior settlement document to ascertain the amount of permanent partial disability benefits paid to claimant so that employer's credit was limited to that amount. The Board rejected claimant's challenge to the administrative law judge's decision in this regard. *Wilmot*, BRB No. 06-0803, slip op. at 4-5. The case did not present an issue concerning any credit for employer-paid attorney's fees, which the administrative law judge had not awarded.

[4] Older case law, now invalidated, *see Brown*, 868 F.2d 759, 22 BRBS 47(CRT), awarded the employer a credit for the *percentage* of scheduled disability benefits previously paid. *See, e.g., Bracey v. John T. Clark & Son of Maryland*, 12 BRBS 110 (1980). The issue in this case would not have arisen under that iteration of the law. In *Hunter v. Huntington Ingalls, Inc.*, 48 BRBS 55 (2015), the claimant sought to hold the employer liable under the Act for $500, the amount of the attorney's fee she paid under state law, on the ground that employer is not entitled to a credit of that amount pursuant to Section 3(e). The Board affirmed the administrative law judge's finding that Section 3(e) was wholly inapplicable as all benefits were paid under the Longshore Act and employer had merely accepted the compensability of the claim under the state act. Thus, no credit applied against employer's liability under the Longshore Act.

paid in attorney's fees after the resolution of the first claim has the effect of making employer liable for the attorney's fee when the fee-shifting provisions of Section 28(a) or (b) are not applicable. As the administrative law judge stated, such a result penalizes employer for promptly paying benefits, by which action it also avoided liability for claimant's attorney's fee, and causes claimant to recover twice for a portion of the same disability. Therefore, the administrative law judge properly found that claimant's liability for and payment of Mr. Camden's fee has no bearing on the amount of scheduled disability compensation he received for his prior permanent partial disability. Thus, the administrative law judge properly denied claimant's assertion that employer is liable for an additional $1,500 in permanent partial disability benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of Claimant's Request for Payment of Credit Taken by Employer/Carrier is affirmed.

SO ORDERED.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge