BRB No. 04-0974

ANNA BARSCZ (widow of CHARLES BARSCZ)	)	
Claimant-Respondent	)	
v.	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 09/29/2005
Self-Insured Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order Granting Reconsideration and Modifying Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Peter D. Quay (Murphy & Beane), New London, Connecticut, for self-insured employer.

Andrew J. Schultz and Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

DOLDER, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Granting Reconsideration and Modifying Decision and Order Awarding Benefits (2003-LHC-1701) of Administrative Law Judge Colleen A. Geraghty 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).

Decedent commenced work for employer in 1950 and continued until he reached the mandatory retirement age in 1978. He worked as a painter, and as a pipefitter for one year, and he was exposed to asbestos during the course of his employment. He began having respiratory difficulties in 1974. In November 1978, decedent was diagnosed with asbestosis. In June 1984, decedent and claimant, decedent's widow, settled a claim filed under the Connecticut Workers' Compensation Act by stipulation and were awarded $35,000, $5,000 of which was for attorney's fees. In December 1984, decedent was awarded permanent total disability benefits under the Act commencing November 24, 1978, for work-related asbestosis and possible mesothelioma.[1] Cl. Ex. 1. By 1990, decedent was diagnosed with additional ailments, including congestive heart failure, chronic obstructive pulmonary disease and carcinoma of the bladder. Decedent died on September 18, 1992, due to ureter cancer with contributing factors of carcinoma of the bladder and congestive heart failure. Decision and Order at 2-3, 5. Claimant filed this claim for death benefits under Section 9 of the Act, 33 U.S.C. §909.

The administrative law judge found that decedent had work-related asbestosis, decedent had been receiving benefits under the Act for permanent total disability, and the Special Fund had been paying those benefits. Decision and Order at 7. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was work-related, found that employer did not rebut the presumption, and, therefore, concluded that decedent's asbestosis contributed to his congestive heart failure which contributed to his death, or that decedent's pulmonary problems due to the asbestosis contributed to the decision not to perform surgery to treat the ureter cancer that ultimately took his life. Decision and Order at 8-12. Due to the prior award of Section 8(f) relief, the administrative law judge found that the Special Fund is liable for claimant's death benefits. Decision and Order at 12-13.

[1]Administrative Law Judge Shatz also granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Cl. Ex. 1. The Special Fund paid benefits from November 21, 1980, and continuing. Cl. Ex. 2.

Employer moved for reconsideration of the decision, and for the first time argued that the Special Fund is entitled to a credit under Section 3(e), 33 U.S.C. §903(e), for the $30,000 that decedent and claimant received in the 1984 settlement. The administrative law judge concluded that the Connecticut settlement resolved all past, present and future claims for illness, disability or death due to decedent's asbestos exposure and that the injury covered therein was the same injury for which death benefits are claimed under the Act. Order on Recon. at 2-3. While the administrative law judge found that the settlement resolved decedent's claim for disability benefits and claimant's claim for survivor's benefits, she also found that there was no apportionment of that recovery. Additionally, she found that although claims for disability and death are separate and distinct, in this case claimant signed a state settlement agreement which resolved her entitlement to survivor's benefits. Consequently, she deemed it appropriate to credit the survivor's benefits under the settlement against the survivor's benefits due under the Act. She further relied on the Board's decisions in *Bundens v. J.E. Brenneman*, 28 BRBS 20 (1994), *aff'd, modified and rev'd*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Pigott v. General Dynamics Corp.*, 23 BRBS 30 (1989), and *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989),[2] to find that, because the record is unclear as to how the state settlement proceeds were allocated between the claims of claimant and decedent, the Special Fund is entitled to a credit for the full amount of $30,000 against claimant's award of death benefits.[3] Order on Recon. at 4-5.

The Director appeals the order on reconsideration and argues that the administrative law judge erred in allocating the burden of proof to claimant rather than to employer to demonstrate the apportionment of the settlement for purposes of determining the amount of the credit.[4] Specifically, the Director argues that this result is at odds with the Supreme Court's holding in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267,

[2]The administrative law judge did not address the Ninth Circuit's decision in *Lustig* or cite or address the decision of the Third Circuit in *Bundens*.

[3]The administrative law judge found that the "evidence shows that the Connecticut benefits were never credited against the disability benefits [decedent] received under the Act." Order on Recon. at 4.

[4]In this case, the Director is appealing in his capacity as the administrator of the Act and not as a representative of the Special Fund because the Special Fund was not "adversely affected or aggrieved" by the administrative law judge's decision. 33 U.S.C. §921; *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (*en banc*).

28 BRBS 43(CRT) (1994), that the proponent of a rule bears the burden of proof. The Director argues that, as Section 3(e) is an affirmative defense against liability, and like Section 33(f), 33 U.S.C. §933(f), serves to prevent double recovery to claimant, employer should bear the burden of proving what payments claimant actually received from the 1984 settlement so as to determine what the credit should be. The Director cites *I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *aff'd in part, vacated in part on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993), and *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), in support of this argument and contends the Board should reverse the Special Fund's entitlement to a credit. Claimant summarily agrees with the Director's position. Employer responds, urging affirmance and arguing that the cases cited by the Director in support of his position are inapposite, as the language of Section 33(f) is significantly different from that of Section 3(e). Finally, employer argues that because of the way the Special Fund is currently paying claimant and allocating its credit, affirmance of the administrative law judge's decision would not harshly affect claimant.[5] Alternatively, employer asks the Board to remand the case to the administrative law judge for the submission of additional evidence to establish how the state settlement was allocated. Based on our interpretation of the language of Section 3(e), we affirm the administrative law judge's award of a credit in this case.

When interpreting a statute, it is proper to begin with the words of the statute, *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). At issue before us is the interpretation of the Act's provision providing a credit for state compensation payments. 33 U.S.C. §903(e). The Director argues that the Section 3(e) credit provision must be applied in the same manner as the Section 33(f) setoff provision, that is, employer must establish how much was paid to claimant for death benefits under the state settlement in order for any credit to be taken.

Section 3(e) of the Act 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

[5]The Director acknowledges that claimant's benefits have been reduced by only $50 per week and have not been suspended as a result of the administrative law judge's Order. Dir. Brief at 3 n.1. No party challenges the Special Fund's decision to take the credit in small weekly increments, but employer illustrates its conclusion by stating that claimant, who was born in 1918, would have to survive for 600 weeks beyond September 9, 2004, for the credit to be recovered in full. Emp. Brief at 2-3.

> law or [the Jones Act], shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e). Thus, Section 3(e) provides a statutory credit for the net amount of state workers' compensation benefits or Jones Act benefits paid for the same injury, disability, or death against employer's liability under the Act. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46, 56 (1990); *Pigott*, 23 BRBS at 32. Section 33(f), on the other hand, provides an offset against benefits for net amounts recovered in third-party litigation. That section states:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

In *Force*, 938 F.2d at 981, 25 BRBS 13(CRT), the United States Court of Appeals for the Ninth Circuit initially held that since the offset applies to the third-party recovery of the "person entitled to compensation" (PETC), the employer is entitled to offset its liability to a particular claimant under the Act against only the third-party recovery received by that person for the covered injury or death. Moreover, the court accepted the Director's view that employer bears the burden of proving what portion of a third-party settlement was allocated to the PETC in order to obtain a setoff of its liability to that person under the Act. In the absence of proof of the apportionment, the court held that employer is not entitled to a credit.[6] *Force*, 938 F.2d at 985, 25 BRBS at 20(CRT). The court reasoned that an employer remains liable for benefits to the PETC, absent a showing that he or she has been compensated from some other source.[7] *Id.*; *see also Valdez v. Crosby & Overton*, 34 BRBS 69 (2000). The United States Court of Appeals for the Fourth Circuit subsequently adopted the Ninth Circuit's conclusion, holding that the employer's offset is

[6]However, as *Force* was tried on the theory that claimant bore the burden of proof, the court remanded the case to the administrative law judge for further fact finding on any apportionment of the third-party settlement proceeds.

[7]We agree with the Director that this rationale is equally applicable to Section 3(e). *See generally Force*, 938 F.2d at 985, 25 BRBS at 19-20(CRT).

limited to that amount intended for a particular PETC, the decedent or the widow/claimant, and that employer bears the burden of proving the amount allocated to each. *Sellman*, 967 F.2d at 972-973, 26 BRBS at 9(CRT). If there is no credible evidence of the apportionment of the proceeds, employer does not receive any credit. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). The administrative law judge did not discuss these decisions, as the Director asserts, but relied on decisions issued prior to *Force*. Nonetheless, we conclude she did not commit reversible error in this case.

The Board has not addressed the issue raised by the Director regarding allocation of the burden of proof in a Section 3(e) case, nor have we addressed the specific language of Section 3(e) as it relates to allocation of the proceeds of a state settlement. In this regard, there are significant differences between Section 3(e) and Section 33(f). The circuit court holdings in *Force* and *Sellman* rest on the phrase "person entitled to compensation," as only the benefits due that individual are subject to an offset.[8] This language is absent from Section 3(e). Section 3(e) provides a credit for "any amounts paid to an employee for the same injury, disability or death." Because state and Jones Act awards are also paid to widows and other survivors, and because the section specifically mentions amounts paid for "death," the phrase "any amounts paid to an employee" must be read broadly as "any amounts paid to an employee [or survivor]," as it is axiomatic that death benefits cannot be paid to the employee. *See Bundens*, 46 F.3d 292, 29 BRBS 52(CRT);[9] *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS

[8]Prior to the Ninth Circuit's decision in *Force*, Board decisions addressing the credit provisions of both Section 3(e) and Section 33(f) held that in the absence of an apportioned recovery in the other forum, employer was entitled to an offset for the entire amount against its liability under the Act. *See, e.g., Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989) (Section 33(f)); *Lustig*, 20 BRBS 207 (Section 3(e)); the Ninth Circuit's decision in *Lustig*, 881 F.2d at 595, 22 BRBS at 161(CRT), does not address the burden of proof issue, as the court held that there was no evidence that any amounts were allocated to anyone other than the claimant-widow.

[9]In *Bundens*, the claimant argued that she should not bear the burden of showing apportionment. The Director argued that it was unnecessary to determine apportionment because the combination of credit under Section 3(e) and offset under Section 33(f) would provide the employer a full credit. Interestingly, the Director also argued that it would be impossible to ever know how the funds were allocated between the claims in the federal tort litigation. *Bundens*, 46 F.3d at 303 n.23, 29 BRBS at 68 n.23(CRT). The court specifically declined to address the burden of proof argument; instead, it deferred to the Director's position. However, the court noted that the burden of proof issue had been addressed in *Force* and *Sellman* but it distinguished those cases as they involved the apportionment of funds among multiple parties and *Bundens* involved the apportionment

152(CRT) (2d Cir. 1992); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT). The language of Section 3(e) thus provides a credit for recovery for "any amounts paid" for the "same injury, disability, or death" as the one claimed under the Act without specific limitation to amounts received by a "person entitled to compensation" as in Section 33(f).

Moreover, under Section 3(e) "*any amounts* paid"[10] to the employee/survivor for the same injury, disability, or death "shall be credited against *any liability"* under the Act*."* Congress enacted Section 3(e) in 1984 to overrule the result of the decision in *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), thereby enabling liable longshore employers to receive credit for payments made to employees under state workers' compensation laws for the same injury, regardless of which employer paid the benefits.[11] 130 Cong. Rec. 8326, 25905 (1984);[12] *see also Ibos*, 317

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of funds among multiple claims. *Bundens*, 46 F.3d at 302 n.22, 29 BRBS at 67 n.22(CRT).

[10]"[A]ny amounts paid to an employee" in Section 3(e) has been interpreted to mean the "net amount received" such that fees paid to others, such as attorney's fees, are excluded from the amount of the credit. *Bundens*, 46 F.3d at 304 n.24, 29 BRBS at 69 n.24(CRT); *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT).

[11]In *Melson*, the United States Court of Appeals for the Fifth Circuit held that the claimant could receive both state and longshore benefits for the same injury because there was no statutory provision allowing a longshore employer a setoff against benefits paid by an employee's second, non-longshore, employer. The court agreed with the Board that Section 33(f) did not apply because the non-longshore employer was not a third party, that Section 14(k), now 14(j), did not apply because the employer did not make advance payments of compensation, and that the judicially-created credit doctrine did not apply because the employer did not make the payments under the state settlement. *Melson*, 594 F.2d at 1074-1075, 10 BRBS at 499-500.

[12]The legislative history states: "[t]he conferees amended [the section of the proposed law] by substituting the words 'to an employee' for 'by an employer' . . . . *This change clarifies the conferees' intent that the scope of this section be read broadly.*" 130 Cong. Rec. 25905 (1984) (emphasis added). The report then gives examples of when the offset would apply:

> not only to instances where the employee received State workers' compensation, but also where he received benefits under the Federal Employees' Compensation Act, and where the employee's nonlongshore

F.3d at 487, 36 BRBS 98(CRT). Based on the language of the section, the only requirement is that the recovery under the state law be for the "same injury, disability *or* death for which benefits are claimed." We interpret this phrase broadly because it is written in the disjunctive, thereby encompassing all potential benefits resulting from the same cause. Moreover, Section 3(e) explicitly provides that the amount paid to the employee under the state claim offsets *any liability* the employer has under the Act that is related to that same injury, disability or death. Thus, the language of Section 3(e) is quite expansive, particularly when compared with that of Section 33(f). Therefore, under Section 3(e), employer is entitled to a credit against "any liability" under the Act for "any amount" paid under the state law for the same injury, disability or death claimed under the Longshore Act. Given the statutory language of Section 3(e), in the absence of specific evidence of the apportionment of a state settlement, *see Ponder*, 24 BRBS at 56, we hold that employer is entitled to a credit for the amount of the state benefits paid.

In this case, there is no dispute that the amount recovered under the state settlement is for the same injury, disability or death involved in the claim herein. There also is no dispute with the administrative law judge's findings that the 1984 settlement resolved the past, present and future state claims of both claimant and decedent related to decedent's exposure to asbestos, but it did not apportion the $30,000 settlement between the parties. On the face of the agreement, it is apparent that the settlement compensated both decedent's asbestosis-related injury and the future claims of his wife for his asbestos-related death. Under the Act, claimant sought death benefits for decedent's asbestos-related death, and the administrative law judge determined that the Special Fund is liable for the payment of death benefits to claimant. These payments are thus "any liability" due for the same injury or death. As the elements of Section 3(e) have been satisfied, and as the settlement did not allocate the settlement funds, the Special Fund is entitled to a credit in the net amount of the unapportioned settlement proceeds, $30,000.

We also reject our dissenting colleague's opinion that our interpretation of Section 3(e) ignores the condition that the benefits must be "claimed" in order to be eligible for offset and that only death benefits were claimed in this case. In isolation, it is true that claimant herein sought only death benefits. However, when decedent was alive, he *claimed*, and was awarded, disability benefits under the Act. The two cases are integral in that they are both related to the same injury – decedent's asbestosis, resulting in

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> claim is against an employer other than the one against whom he has filed a longshore claim.

130 Cong. Rec. 25,905 (1984). Thus, Section 3(e) explicitly overruled *Melson*. Finally, the report notes that the credit also applies to cases paid by the Special Fund. *Id.*

asbestos-related disability and asbestos-related death. The administrative law judge found that the 1984 state settlement resolved all claims for disability benefits and future claims for death benefits related to this injury. Thus, both disability and death benefits have been *claimed* under the Act, and a credit for the full amount is appropriate. Therefore, we affirm the administrative law judge's order granting the Section 3(e) credit to the Special Fund.

Accordingly, the administrative law judge's Order on Reconsideration is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the opinion of my colleagues affirming the administrative law judge's decision to award a Section 3(e) credit to the Special Fund. I disagree with the majority's conclusion that the claimant-widow's benefits are offset by the full amount of the state settlement since it is undisputed that the settlement included both disability benefits due the employee and the future death claim of the widow. I would hold that employer bears the burden of establishing its entitlement to a credit and the amount thereof by showing how much of the 1984 settlement would be allocated to claimant's state claim for death benefits. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991).

Section 3(e) of the Act 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 [the Jones Act], shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e) (emphasis added). Although Section 3(e) speaks of "any amounts paid" pursuant to a state claim being credited against "any liability" under the Act, it also requires that the amounts paid be "for the same injury, disability, or death for which benefits *are claimed* under this chapter." (emphasis added). The Supreme Court has instructed, "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 484 (1917). The Court also has specifically recognized that Congress's use of a verb tense is significant in construing statutes. *United States v. Wilson*, 503 U.S. 329, 333 (1992) (by using verbs in the past and present perfect tenses Congress indicated that computation of credit must occur after the defendant begins his sentence); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (by using the past tense, "performed," as well as the present tense, "performs," the statute plainly reveals that a continuing relationship is not a pre-requisite for a payment's qualification as wages); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 63-64 n.4 (1987) (based on the statute's language and structure, particularly its pervasive and undeviating use of the present tense, the statute does not permit citizens' suits for wholly past violations). *See also U.S. ex rel Totten v. Bombardier Corp.*, 380 F.3d 488, 493 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 2257 (2005) (rejecting a reading of the statute equating the present-tense "provides" in the statute with the past-tense "has provided" as inconsistent with the language of the statute).

Here, the statutory wording "are claimed" is in the present tense. "Are claimed" means claimed currently.[1,2] Consequently, by using the verb form in the present tense ("are claimed"), Congress restricted the Section 3(e) credit to amounts paid for the same

[1]*See* 2A Sutherland Statutory Construction §46.1 (2005) ("In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning." Also, "[u]nless the defendants can demonstrate that the natural and customary import of the statute's language is either repugnant to the general purview of the court or for some other compelling reason should be disregarded, the court must give effect to the statute's plain meaning."). No compelling justification for reading the statute in other than the natural way has been shown here.

[2]"Are claimed" also normally can be read to distinguish claimed from not claimed; however, that distinction is encompassed in the meaning set forth above, and there is no basis in this context for reading the language merely as creating the distinction. Further, to do so would be to fail to recognize the particular formulation of the language respecting claiming which was chosen by Congress.

injury, disability or death for which benefits are *currently* claimed under the Act,[3] *i.e.*, benefits which are being claimed at the time credit is given against liability imposed under the Act.

Based on the record before us, the only such benefits are the benefits claimed by Anna Barcsz.[4] Mrs. Barcsz claims benefits solely under Section 9 of the Act. Section 9 states: "If the injury causes *death*, the *compensation therefore* shall be known as a *death benefit* and shall be payable in the amount and to or for the benefit of the persons following…." 33 U.S.C. §909 (emphasis added). From this language, it is clear that the benefits Mrs. Barcsz claims are compensation for Charles Barcsz's death.

Since, under Section 3(e) credit is given for amounts paid for the *same injury, disability or death for which benefits are claimed*, and the benefits presently claimed under the Act are solely for Charles's death, any amounts credited must be amounts paid (under another workers' compensation law or the Jones Act) for Charles's death. The settlement provided payment both for state workers' compensation claims for disability compensation and medical treatment, and for compensation claims for his death; however, under the facts presented here, only amounts paid for Charles's death are creditable against a liability imposed by the Act. The administrative law judge credited the amount of the entire settlement payment. Accordingly, I would vacate the administrative law judge's decision and remand this case for further fact-finding on the issue of the amount to be credited. Employer, as the party raising Section 3(e) as an affirmative defense, bears the burden of establishing the amount paid under the state law settlement which is allocable as payment for Charles's death. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994); *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990); *Pigott v. General Dynamics Corp.*, 23 BRBS 30 (1989).[5] To make the allocation and crediting decision, the administrative law judge should consider evidence as to how the settlement was actually apportioned or, if adequate credible evidence of the actual apportionment is not available, objective factors such as

[3]The majority equates "are claimed" with "have been claimed," thereby ignoring the Supreme Court's admonition regarding verb tenses. While Congress undoubtedly could have written the statute to read "have been claimed," it did not do so. Further, as noted, no compelling justification has been shown for giving "are claimed" a meaning other than its natural and customary import.

[4]Based on the record before us, although disability compensation and medical benefits were previously claimed by decedent, there is no current claim for such benefits.

[5]Additional reasons for imposing this burden on employer are set forth in *Force*, 938 F.2d at 985, 25 BRBS at 19(CRT).

those suggested in *Force* (*e.g.*, the going rate at the time for settlements or judgments for the same type of payments for death). *See Force*, 938 F.2d at 985-986, 25 BRBS at 20(CRT). *See also I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *aff'd in part, vacated in part on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984(1993).

For these reasons, I would remand the case to the administrative law judge for further consideration of this issue.

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JUDITH S. BOGGS
Administrative Appeals Judge