U.S. Department of Labor

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

BRB Nos. 15-0350, 15-0350A,
and 15-0350B

WESLEY A. WIGGINS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent A, B	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED	)	
	)	
	)	
Self-Insured	)	DATE ISSUED: Sept. 20, 2016
Employer/Respondent	)	
Cross-Respondent	)	
Cross-Petitioner B	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	
Cross-Respondent	)	
Cross-Petitioner A	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and Modification, Errata Order, and Supplemental Errata Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Wesley A. Wiggins, Gates, North Carolina, pro se.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals, and the Director, Office of Workers' Compensation Programs (the Director) and employer cross-appeal, the Decision and Order on Remand and Modification, Errata Order, and Supplemental Errata Order (2011-LHC-01029, 01030) of Administrative Law Judge Kenneth A. Krantz 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).

Claimant injured his knees on June 15, 2004, during the course of his employment for employer as a rigger/forklift driver. CX 2 at A. In a decision issued on February 11, 2008, Administrative Law Judge Bergstrom accepted the parties' stipulations that claimant's knee injuries reached maximum medical improvement on October 31, 2006, and that claimant had a 52 percent left knee impairment and a 40 percent right knee impairment. The administrative law judge awarded claimant permanent partial disability benefits under the schedule for each knee impairment; the awards ran consecutively from October 31, 2006. *See* 33 U.S.C. §908(c)(2), (22).

Meanwhile, claimant had injured his neck and back during the course of his employment on September 1, 2005. CX 2 at B. In a decision issued on November 30, 2012, Administrative Law Judge Krantz (the administrative law judge) awarded claimant compensation for the 2005 injury comprised of temporary total disability from October 31, 2006 to November 1, 2008, and ongoing permanent partial disability benefits commencing November 2, 2008, based on a loss of wage-earning capacity.[1] 33 U.S.C. §908(b), (c)(21). The administrative law judge ordered employer to pay claimant the unscheduled permanent partial disability benefits in full from November 1, 2008, and to pay the remaining owed scheduled benefits so that the combined weekly payments from the two awards would not exceed the total disability rate of $670.45 per week.[2] *See*

[1] Claimant was awarded $670.45 per week for temporary total disability and $479.25 per week for permanent partial disability.

[2] In fact, however, the scheduled awards had been fully paid by the time this award was entered. *See* discussion, *infra*.

generally I.T.O. Corp. of Baltimore v. Green, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999). The administrative law judge's Order also stated:

> Employer is entitled to a credit towards its liability for the period of October 31, 2006 to November 1, 2008 total disability, based on permanent partial disability paid under the schedule.

2012 Decision and Order at 35. The administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability. *Id*. at 32-34. Employer appealed the denial of Section 8(f) relief. The Board vacated the denial of Section 8(f) relief and remanded the case. *Wiggins v. Northrop Grumman Shipbuilding, Inc.*, BRB No. 13-0129 (Nov. 26, 2013) (unpub).

While the case was pending on remand, a dispute arose over the amount of compensation employer was paying claimant, and claimant contacted the district director's office concerning the credit employer was taking. Upon investigation, the district director noted factual errors in the administrative law judge's 2012 decision regarding claimant's average weekly wage and the date of maximum medical improvement as it pertained to the 2005 neck and back injury. In referring the case to the administrative law judge for a formal hearing on these issues, the district director suggested that the amount and manner of employer's recoupment of any overpayment should be determined in the Section 22 modification proceeding. 33 U.S.C. §922. In his pre-hearing statement, the Director raised issues concerning the type and amount of benefits due claimant and whether employer is entitled to a credit for the benefits paid for the knee injuries against benefits due for the neck and back injury. Employer moved the administrative law judge to dismiss the Director's motion for modification or for summary decision based on the Director's lack of standing to request modification. The administrative law judge denied employer's motion. Subsequently, the Director submitted an amended Pre-Hearing Statement in which he conceded employer's entitlement to Section 8(f) relief, but did not again raise the issue of employer's entitlement to a credit.

At the 2014 hearing, the parties stipulated that the average weekly wage for the 2005 back injury is $847.98 and that the date of maximum medical improvement is October 12, 2005.[3] Decision and Order on Remand at 3. The administrative law judge

[3] In the initial proceeding on the back injury claim, the parties had stipulated that claimant's average weekly wage was $1,005.67 and that the date of maximum medical improvement was October 31, 2006. 2012 Decision and Order at 2.

awarded claimant additional total disability benefits.[4] Pursuant to the Director's concession on remand that Section 8(f) applies, the Special Fund became liable for claimant's unscheduled permanent disability benefits beginning on October 9, 2007. *Id.* at 4.

Employer moved for reconsideration, contending that the administrative law judge should reinstate the credit award that had been contained in the 2012 decision. In an Errata Order issued on April 30, 2015, the administrative law judge granted reconsideration and modified the Order paragraph of his 2015 decision to include employer's entitlement to a credit for its scheduled permanent partial disability payments for the 2004 bilateral knee injury against its liability for the 2005 neck and back injury for the period from October 31, 2006 to November 1, 2008. The Director filed a motion for reconsideration of the Errata Order, requesting that the administrative law judge specify that the payments of permanent partial disability benefits for the 2004 knee injury from October 31, 2006 to November 1, 2008, be credited towards any future payments due for the knee injury, rather than for any total disability payments owed claimant for his 2005 neck and back injury.

In his Supplemental Errata Order, the administrative law judge denied the Director's motion for reconsideration. He stated that claimant received excess compensation during the period of claimant's total disability from October 31, 2006 to November 1, 2008, as claimant also received a scheduled award for his knees during this period, and claimant is not entitled to concurrent scheduled and total disability awards. The administrative law judge concluded that, pursuant to *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993) and *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001), employer is entitled to a Section 14(j) credit, 33 U.S.C. §914(j), for its overpayment of permanent partial disability payments for the 2004 knee injuries toward its liability for total disability benefits for the back injury. Supp. Errata Order at 3-4.

Claimant, pro se, and the Director appeal the administrative law judge's awarding employer a credit for scheduled benefits paid against benefits due during the period of total disability.[5] BRB Nos. 15-0350/A. Employer responds, urging affirmance of the

[4] The administrative law judge awarded claimant compensation for temporary total disability from September 27, 2005 to October 10, 2005, permanent total disability compensation from October 11, 2005 to October 31, 2008, and ongoing permanent partial disability benefits from November 1, 2008. The Special Fund assumed liability on October 9, 2007. Decision and Order on Remand at 3-4.

[5] Claimant's pleadings assert he is totally disabled. This issue was not before the administrative law judge on remand from the Board and was not raised in the petitions

award of a credit. Employer cross-appeals the Director's standing to request Section 22 modification on the credit issue, averring that the credit was first granted by the administrative law judge in his initial decision in November 2012 and should have been appealed by claimant at that time. BRB No. 15-0350B. The Director responds that employer's contention is meritless.

SECTION 22

We first address employer's challenge to the Director's standing to request Section 22 modification and to appeal the administrative law judge's decision on the credit issue. Section 22 of the Act gives the administrative law judge the authority to review a compensation order "[u]pon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title). . . ." 33 U.S.C. §922; *see* 33 U.S.C. §919(d). Section 22 permits modification of a prior compensation order "on the ground of a change in conditions or because of a mistake in a determination of fact." 33 U.S.C. §922.

We reject employer's contention that its entitlement to a credit is a legal issue that could only have been challenged by claimant's timely appeal to the Board following the issuance of the administrative law judge's November 2012 Decision and Order. First, the amount of compensation due claimant is an "ultimate fact," which is subject to Section 22 modification. *See M.R.* [*Rusich*] *v. Electric Boat Corp.*, 43 BRBS 35, 37 (2009) (amount of Section 3(e) credit is subject to Section 22 modification). Second, the Director may move for modification as he is a "party-in-interest" within the meaning of Section 22, as the administrative law judge correctly stated in denying employer's motion to dismiss. Moreover, employer's contention overlooks the fact that it was employer who sought reinstatement of the credit, which the administrative law judge had not awarded in his Decision and Order on Remand; the administrative law judge had vacated his 2012 decision. *See* Decision and Order on Remand at 3. In addition, the reinstated credit award was not actually modified in any way. Finally, the Director has standing to appeal the credit issue to the Board, both because the Special Fund alleges it is aggrieved,[6] and

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for modification. Therefore, this issue is not subject to review by the Board. Claimant may seek modification pursuant to Section 22 on the issue of his disability status. 33 U.S.C. §922.

[6] The Special Fund assumed liability for the 2005 neck and back injury on October 9, 2007; it is required to reimburse employer for any compensation employer paid related to the 2005 injury after that date. The Director states that the administrative law judge's credit order required the Special Fund to reimburse employer for its premature schedule award payments from October 31, 2006 (when the parties agreed that claimant's bilateral knee impairments reached maximum medical improvement) to November 1, 2008 (when

because the Director can appeal allegedly erroneous legal and factual determinations that affect the administration of the Act. 20 C.F.R. §802.201(a);[7] *see Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995). In addition, the propriety of the credit is properly before the Board pursuant to claimant's timely appeal of the administrative law judge's 2014 and 2015 Orders. *See* 20 C.F.R. §802.220. Accordingly, we reject employer's contentions that the issue of its entitlement to a credit is not properly before the Board.

CREDIT

Claimant and the Director challenge the administrative law judge's granting of a credit to employer for its payment of permanent partial disability compensation for the 2004 knee injuries against employer's liability for total disability from October 31, 2006 to November 1, 2008, for the 2005 neck and back injury. The Director argues that payments awarded for the knee injuries cannot be credited against payments due under an award for the separate back/neck injury.

In his Supplemental Errata Order dated June 4, 2015, the administrative law judge stated that, in his November 30, 2012 decision, he had awarded claimant temporary total disability for the combination of the 2004 knee injuries and the 2005 neck and back injury. Supp. Errata Order at 2. The administrative law judge, therefore, rejected the Director's contention that any scheduled disability payments made concurrently with claimant's total disability period should be credited only against employer's future liability for the 2004 knee impairments. *Id*. at 3. The administrative law judge found that both *Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) and *Vinson*, 27 BRBS 220, support crediting the scheduled knee payments toward employer's liability for concurrent total disability compensation because, otherwise, claimant would have been overcompensated

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employer's liability for payment of the schedule award resumed) because the administrative law judge found that employer is entitled to a credit against its liability for the 2005 neck and back injury. Thus, to the extent employer's schedule payments were credited to its liability for total disability from October 31, 2006 to October 9, 2007, for the 2005 neck and back injury, the result is that employer now has not fully paid the scheduled award and the administrative law judge's credit, in practical terms, requires the Special Fund to pay this portion of employer's liability even though the schedule awards are not subject to Section 8(f) relief. *See* Dir. Br. at 10; Dir. Resp. Br. at 2.

[7] Section 802.201(a) of the Board's regulations provides that the Director "shall be considered a party adversely affected" when acting as a representative of the Special Fund or when appealing a decision which affects the administration of the Act. 20 C.F.R. §802.201(a).

during the period of total disability. The administrative law judge found that *Vinson* provides that employer is entitled to compensation for advance compensation against future payments for the same injury and, in this case, the scheduled permanent partial disability payments employer paid are advance payments towards the portion of claimant's total disability attributable to claimant's knee injury. Supp. Errata Order at 3. The administrative law judge also found that the April 2015 modification decision addressed mistakes of fact that allowed the administrative law judge to credit employer for the "overpayment" of scheduled permanent partial disability from October 31, 2006 to November 1, 2008, toward claimant's compensation for total disability from October 31, 2006 to October 9, 2007, pursuant to *Spitalieri*. *Id*. at 4. We agree with claimant and the Director that the award of credit is improper on the facts presented in this case, and we reverse that award.

Section 14(j) of the Act provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). Employer contends the scheduled permanent partial disability benefits it paid for claimant's 2004 knee injuries were "advance payments of compensation" for claimant's concurrent total disability for the 2005 back/neck injury, such that it is entitled to a credit. In *Vinson*, the claimant sustained a compensable work injury in 1987. Claimant sustained a second, unrelated work injury in 1990. Employer subsequently credited an overpayment made as a result of the 1987 injury against its liability for the 1990 injury. In its decision, the Board held that advance payments of compensation for one injury may not be credited under Section 14(j) against payments due for a subsequent, unrelated work injury.

The Board rejected the very contention that employer makes here: that the plain language of Section 14(j) does not preclude the awarded credit because it states employer is entitled to reimbursement out of "any" unpaid compensation due. *Vinson*, 27 BRBS at 222. The Board first reasoned that Section 14 as a whole references only a single compensable injury:

> Our review of Section 14 in *toto* indicates that Section 14(j) was not intended to allow an employer to credit an overpayment of compensation made as a result of an injury arising under the Act against a subsequent, non-related work-injury. Specifically, Section 14(b) states that the first installment of compensation shall become due on the fourteenth day after the employer has knowledge of "the injury or death." 33 U.S.C. §914(b). Similarly, Section 14(d) provides that an employer's controversion of a

> claim is due on or before the fourteenth day after it has knowledge of "the alleged injury or death." 33 U.S.C. §914(d). Lastly, pursuant to Section 14(g), an employer's notice of final payment of compensation shall state "the date of the injury or death." 33 U.S.C. §914(g). Thus, the plain language of Section 14 references a *single* compensable injury.

Vinson, 27 BRBS at 223 (emphasis in original). The Board also agreed with the Director that employer's voluntary payments of compensation for the 1987 work injury, which terminated upon claimant's return to work in 1989, could not rationally be deemed "advance" payments of compensation for the subsequent 1990 work injury that had yet to occur.[8] *Id*. Thus, the Board affirmed the administrative law judge's denial of a credit for benefits due for the 1990 injury.[9]

In his Supplemental Errata Order in this case, the administrative law judge found employer entitled to a credit for the portion of the scheduled awards due during claimant's total disability because he stated that claimant's total disability was due to the combination of his 2004 knee injuries and 2005 back/neck injuries. This statement is not borne out with reference to the administrative law judge's 2012 decision or 2014 modification decision. In his 2012 decision, the administrative law judge found claimant unable to return to his usual work solely because of his 2005 neck and back injury, based on his

[8] Employer asserts that the Director's litigation position in this case is not entitled to deference. In *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), the Board noted that, in view of the totality of Section 14 of the Act and its plain language in subsections (b), (d), and (g), the Director's position was reasonable and did not contravene the plain text of the statute. The Director, in *Vinson*, was not appearing before the Board as the representative of the Special Fund. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 637 F.3d 280, 45 BRBS 9(CRT) (4th Cir.), *cert. denied*, 132 S.Ct. 757 (2011).

[9] Similarly, in *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), the decedent was awarded permanent partial disability compensation pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), and the claimant was awarded death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. The Board held, and the United States Court of Appeals for the Fifth Circuit affirmed, that employer cannot credit pursuant to Section 14(j) excess disability payments to decedent's estate against its liability for death payments to the claimant, because disability benefits cannot be viewed as an advance payment of compensation on the subsequent death claim.

crediting of Dr. Barnum's opinion. 2012 Decision and Order at 26-27.[10] The total disability award was not based on a finding that the 2004 knee injuries were aggravated in the 2005 work incident, resulting in total disability. Moreover, the finding based on Dr. Barnum's opinion was not modified in the 2014 Decision and Order on Remand. Thus, the award for the 2005 injury compensates total disability attributable only to that injury. Because claimant sustained two separately compensable work injuries, *Vinson* precludes employer's entitlement to a credit for benefits due under the 2008 Order for the 2004 scheduled injuries against any compensation due for the separate 2005 injuries. *Vinson*, 27 BRBS at 223. That the schedule and total disability awards here were overlapping, unlike in *Vinson*, does not provide a basis for a departure from *Vinson's* holding. *See* discussion, *infra*.

The administrative law judge also erred in finding *Spitalieri* supportive of a credit award. Section 22 states that if benefits are decreased by virtue of a modification order, "any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation. . . ." 33 U.S.C. §922. The court in *Spitalieri* stated that the issue therein was "whether under 33 U.S.C. § 922 an employer who overpaid a claimant [temporary total disability benefits] is nevertheless liable to pay additional compensation for a permanent partial hearing loss *resulting from the same injury*." *Spitalieri*, 226 F.3d at 172, 34 BRBS at 87(CRT) (emphasis added).[11] The claimant sustained in a single work accident head, neck, back and leg injuries, as well as a hearing loss and a psychiatric condition. Claimant was awarded temporary total disability benefits. Employer subsequently sought termination of the award through modification proceedings on the ground that claimant could return to his usual work, and claimant sought scheduled permanent partial disability benefits for the hearing loss caused by the accident, which had been precluded because of total disability award. The court held that the temporary total disability award was properly terminated and that employer was entitled to credit its overpayment of temporary total disability benefits against its liability for the scheduled hearing loss benefits, as the termination of an award is a "decrease" in compensation within the meaning of Section 22.

[10] The administrative law judge specifically declined to credit Dr. Stiles's opinion because it was based on other medical conditions, such as claimant's knee injuries, in conjunction with the 2005 injuries. 2012 Decision and Order at 27.

[11] *See also Spitalieri*, 226 F.3d at 170, 34 BRBS at 86(CRT) (emphasis added), wherein the court stated framed the issue as: "Is an employer who paid a claimant Workers' Compensation benefits for a temporary total disability during a period after he recovered from his injuries and became capable of returning to his usual employment entitled to a credit for such overpayment to be applied to a schedule award for a permanent partial binaural hearing loss of 6.9% *arising out of the same accident*?"

Contrary to the administrative law judge's conclusion, *Spitalieri* does not provide support the proposition that its holding applies to payments made for unrelated work injuries. *See* Supp. Errata Order at 3. Although Section 22 states that "any payment" in excess of a decreased rate "shall be deducted from any unpaid compensation," the United States Court of Appeals for the Second Circuit's holding cannot be isolated from the facts of the case. The court specifically addressed only the situation in which the claimant sustained various injuries in a single accident, and concluded that the Board's "refusal to apply a credit for overpayment of an unscheduled award against a schedule award *arising out of the same accident* has no basis in common sense or in the statute." *Spitalieri*, 226 F.3d at 173, 34 BRBS at 89(CRT) (emphasis added). In this case, claimant sustained injuries to separate body parts in separate work accidents, and he was not "overpaid." *See* discussion, *infra.* *Spitalieri* thus does not support the awarded credit for the scheduled payments made during the period of total disability.

We hold that claimant is entitled to full compensation for the 2004 knee injuries and for the 2005 neck/back injuries, without application of any credit. Employer fully paid claimant his consecutive scheduled permanent partial disability awards for the 2004 knee injuries (103.12 weeks commencing October 31, 2006, followed by 115.2 weeks). These awards were fully paid before the administrative law judge held a hearing on September 7, 2011, on the claim for the 2005 injuries. The adjudication of the latter claim led to the finding that claimant was totally disabled by his 2005 injuries for a portion of the time he was awarded scheduled permanent partial disability benefits. Because a claimant cannot receive concurrent partial and total awards under this situation, *see Fenske v. Serv. Employees Int'l, Inc.*, __ F.3d __, 2016 WL 4488010 (9th Cir. Aug. 26, 2016), the scheduled award would have lapsed until claimant was no longer totally disabled. *Bogden v. Consolidation Coal Co.*, 44 BRBS 43 (2010). When claimant's total disability ended, he have been would be entitled to two permanent partial disability awards under the precepts of *Green*, 185 F.3d 239, 33 BRBS 139(CRT). Due to the lapse of four years between the issuance of the compensation orders and the consequent overlapping awards of scheduled permanent partial and total disability benefits, employer's payment of the scheduled awards must be viewed as having been made prematurely. Claimant, however, was not "overcompensated" for either injury. Employer properly paid the scheduled award under the terms of the 2008 Decision and Order; in the hindsight afforded by the 2012 Decision and Order, it turned out that employer paid the scheduled awards prematurely.[12] Therefore, the administrative law judge's award of a credit during the period of October 31, 2006 through November 1,

[12] Thus, employer's premature, i.e., "advance," payments of scheduled permanent partial disability apply against its liability for the scheduled benefits when they would actually have commenced after claimant's total disability ended. 33 U.S.C. §914(j); *see generally LaRosa v. King & Co.*, 40 BRBS 29 (2006).

2008, for employer's scheduled permanent partial disability benefits is reversed. The administrative law judge's award of temporary and permanent total disability benefits payable by employer from September 27, 2005 through October 8, 2007, is affirmed. The administrative law judge's award of permanent total disability benefits from October 9, 2007 through October 31, 2008, and of ongoing permanent partial disability benefits from November 1, 2008, payable by the Special Fund is affirmed. *See* Decision and Order on Remand at 3-4.[13]

Accordingly, the administrative law judge's Errata Order and Supplemental Errata Order awarding employer a credit are reversed. The administrative law judge's Decision and Order on Remand and Modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[13] The Special Fund is liable to employer for any benefits employer paid to claimant in excess of its liability. Employer is liable to the Special Fund for any benefits the Special Fund paid that are actually the liability of employer. *See* Decision and Order on Remand at 3-4; *see generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83(CRT) (5th Cir. 1989), *vacated in part on other grounds*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990)(en banc).