BRB No. 92-197

JOSEPH A. BURICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DATE ISSUED:_____
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

David Utley (Devirian & Utley), Wilmington, California, for claimant.

Robert E. Babcock (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees (91-LHC-333) of Administrative Law Judge Alfred Lindeman 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, a longshoreman, sustained a work-related injury to his left knee in 1981. Tr. at 43-44. He filed a claim under the Act against Eagle Marine Services, his employer at the time, as well as a third-party action against the vessel owner, American President Lines. Claimant and American President settled the third-party claim in 1982 for $50,000, resulting in a net recovery to claimant of $33,333. Erratum (Sept. 6, 1991); Cl. Ex. 5; Tr. at 19. As part of the settlement agreement, claimant withdrew his claim under the Act, and Eagle Marine waived its right to reimbursement of temporary total disability benefits it had paid claimant in the amount of $9,770.59. Cl. Exs. 5-6.

During the course of his employment with Stevedoring Services of America, employer herein, claimant re-injured his left knee on October 25, 1988 while working on a container. Employer paid temporary total disability benefits from October 26, 1988 to July 10, 1989, and then claimant filed a claim for permanent partial disability benefits.

At the hearing, claimant and employer disputed claimant's average weekly wage, the extent of disability, the amount of credit to which employer is entitled, and employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. The administrative law judge found that employer paid temporary total disability benefits based on an incorrect average weekly wage, that claimant sustained a three percent impairment as a result of his 1981 injury, and that claimant has a cumulative impairment of 15 percent.[1] Decision and Order at 3. The administrative law judge then determined that claimant is entitled to 43.2 weeks of permanent partial disability benefits for his 15 percent impairment under Section 8(c)(2), 33 U.S.C. §908(c)(2), plus interest, minus any credit to which employer is entitled. Further, he concluded that employer is not entitled to Section 8(f) relief, as the duration of claimant's entitlement to benefits is less than 104 weeks. Decision and Order at 4.

With regard to the amount of credit to which employer is entitled, the administrative law judge initially determined that Section 33(f), 33 U.S.C. §933(f), does not apply to this case because the 1982 settlement and the 1988 claim for benefits concerned different injuries. The administrative law judge then applied Section 3(e), 33 U.S.C. §903(e)(1988), as interpreted by the United States

[1]Although the 1982 third-party settlement indicated that claimant sustained a 10 percent impairment as a result of his 1981 injury, the administrative law judge in this case found that, according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988), claimant actually sustained a three percent impairment. Decision and Order at 3.

Court of Appeals for the Ninth Circuit, to determine that employer is entitled to a credit for benefits claimant received for his three percent permanent partial disability in 1981.[2] The administrative law judge converted that three percent to a dollar amount and concluded that employer is entitled to a credit for $5,464.63, based on claimant's 1988 average weekly wage. Decision and Order at 5-7. Thereafter, the administrative law judge granted claimant's motion for reconsideration and modified the award of credit to reflect employer's entitlement to credit for benefits paid for the three percent impairment, based on claimant's 1981 average weekly wage. Consequently, he awarded employer a credit of $2,344.81. Decision and Order on Recon. The administrative law judge then awarded claimant's counsel an attorney's fee in the amount of $6,310.50. Supp. Decision and Order

Employer appeals these decisions, contending the administrative law judge erred in not crediting the entire amount of claimant's 1982 third-party settlement against its liability for claimant's 1988 injury in accordance with Section 33(f). Alternatively, employer argues that, under the aggravation rule and credit doctrine, it is entitled to a credit for the $9,770.59 in longshore benefits paid by claimant's previous employer, Eagle Marine, for his 1981 knee injury.[3] Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging reversal. The Director argues that Section 33(f) does not apply because the 1982 settlement and the 1988 claim are not for the same injuries, and that no credit is due employer for the temporary total disability benefits paid by Eagle Marine because temporary total disability benefits paid by one employer cannot be credited against another employer's liability for permanent partial disability benefits. The Director also contends that employer is not entitled to a credit for benefits paid as a result of claimant's prior three percent impairment because, as no

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[2]The Ninth Circuit explained that the effect of the 1984 Amendments was to broaden and codify the credit doctrine. Thus, it stated:

> [Section 3(e)] now allows the crediting against an LHWCA award of any other workers' compensation benefits or Jones Act benefits, received for a prior injury, *as well as any LHWCA benefits awarded for that prior injury*.

Todd Shipyards Corp. v. Director, OWCP [Clark], 848 F.2d 125, 127, 21 BRBS 114, 116 (CRT) (9th Cir. 1988) (emphasis added). On the contrary, Section 3(e) makes no mention of previous benefits awarded under the Act. *See* 33 U.S.C. §903(e) (1988). Moreover, under Section 3(e), the benefits paid under state workers' compensation or under the Jones Act must be for the *same* injury or disability and not a prior injury. Nonetheless, an independent credit doctrine exists in case law that provides an employer with a credit for prior disability payments under certain circumstances in order to avoid claimant's receipt of a double recovery for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*).

[3]Employer appeals the attorney's fee award as a protective measure only, stating that remand for reconsideration of the fee will be necessary if the Board determines that employer is entitled to a greater credit than that awarded by the administrative law judge. Employer also moves for oral argument; employer's motion is denied. 20 C.F.R. §802.306.

benefits were awarded previously under the Act, the credit doctrine does not apply. In reply, employer contends that the third-party settlement included recovery for a number of claims, including claimant's permanent partial disability;[4] therefore, claimant cannot justly obtain double recovery for the same disability. Further, employer asserts that Eagle Marine's payment of temporary total disability benefits should be considered a contribution toward the settlement for claimant's permanent partial disability. Finally, employer maintains that the Director's argument regarding its entitlement to a credit for benefits paid for the three percent impairment was raised improperly in a response brief and should not be addressed.

Initially, employer contends it is entitled to a credit for the entire amount claimant received in his 1982 settlement pursuant to Section 33(f). An employer is entitled to a Section 33(f) credit only when a claimant recovers proceeds from a third-party action based on the same injury for which the employer is liable and the same disability for which the claimant is entitled to compensation under the Act. *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80, 87 (1993) (McGranery, J., dissenting), *aff'd on recon. en banc*, ___ BRBS ___, BRB Nos. 86-2456/A (Sept. 23, 1994) (Brown and McGranery, JJ., dissenting); *see also* 33 U.S.C. §933(a), (f). In this case, the settlement was the outcome of a third-party claim for damages resulting from claimant's 1981 knee injury which occurred while he worked for Eagle Marine. The administrative law judge's award is the result of claimant's claim against employer for compensation under the Act for his 1988 knee injury. As an employer is entitled to a Section 33(f) credit only when the claim under the Act and the third-party settlement are based on the same disability, the third party from the 1981 claim, American President, is not liable to employer herein, as the two actions were not predicated on the same injury or disability. Had it not waived its lien rights, Eagle Marine, and not employer, would be entitled to recover pursuant to Section 33(f) the temporary total disability benefits it paid claimant for the 1981 injury. Because the two claims filed by claimant involved different injuries and different disabilities, Section 33(f) is inapplicable to this case; therefore, we affirm the administrative law judge's denial of a Section 33(f) credit. *See Chavez*, 27 BRBS at 86-87; *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *modifying on recon.* 21 BRBS 355 (1988).

Next, employer contends that the administrative law judge erred in not crediting it with the entire amount of Eagle Marine's "contribution" to claimant's third-party settlement. Prior to the 1982 settlement, Eagle Marine paid claimant $9,770.59 in temporary total disability benefits for his 1981 left knee injury. As a part of the settlement agreement, Eagle Marine waived any rights it had to collect that amount of money from the settlement with American President. Employer contends that

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[4]The third-party settlement specifically provides:

> I acknowledge that this release constitutes a waiver and discharge of all future claims as well as all present claims on account of the matter herein set forth . . . including all past, present and future mental, nervous, emotional and physical, partial and total, temporary and permanent disabilities. . . .

Cl. Ex. 5.

although this money was paid for temporary total disability, upon Eagle Marine's waiver of its lien, the payments became Eagle Marine's contribution to the settlement and should be considered benefits paid under the Act, toward claimant's original permanent partial disability, by a previous longshore employer. Thus, employer seeks to obtain credit for the entire amount of previously paid temporary total disability benefits against its liability for permanent partial disability benefits for the cumulative effect of claimant's two knee injuries. In response, the Director contends that the administrative law judge erred in awarding employer any credit against its liability.

We decline to address the Director's argument that employer is not entitled to any credit, as the issue is not properly raised before the Board. Generally, the Board will not consider new issues raised in a response brief which challenge the administrative law judge's findings or decision. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); 20 C.F.R. §802.212(b). We note that in this case claimant urges the Board to affirm the administrative law judge's decision and has not appealed the issue of whether employer is entitled to any credit for benefits paid for claimant's pre-existing three percent impairment. The Director, however, directly challenges the administrative law judge's finding that employer is entitled to such a credit. Because the Director raises the challenge in a response brief and not in an appeal of her own, we decline to address her contention.

We also reject employer's contention and affirm the administrative law judge's finding that employer is not entitled to a credit for the entire amount of temporary total disability benefits Eagle Marine paid claimant. In *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986), *modifying on reh'g en banc*, 751 F.2d 1460, 17 BRBS 29 (CRT) (5th Cir. 1985), the United States Court of Appeals for the Fifth Circuit rejected a similar argument. In *Nash*, the claimant injured his right knee in high school. He then suffered a second injury to his right knee while working for Chaparral Stevedoring Company, and a third injury to the knee while working for Strachan Shipping. After the injury at Chaparral, the claimant entered into a settlement for a 10 percent permanent partial disability, and after the injury at Strachan Shipping, he filed a claim for benefits under the Act for his entire knee impairment. In adjudicating the claim, the administrative law judge determined that the claimant sustained a 20 percent permanent partial disability from the high school injury, a 10 percent permanent partial disability from the Chaparral injury, and a four percent permanent partial disability from the Strachan Shipping injury. Consequently, he awarded benefits for a 34 percent disability. The Board modified the award, determining that, as the claimant had received compensation under the Act from Chaparral for a 10 percent impairment, he is entitled only to benefits for the remaining 24 percent impairment for which he had not been paid. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983) (Ramsey, C.J., dissenting). The Fifth Circuit, sitting *en banc*, affirmed, noting that under the credit doctrine both Chaparral and Strachan Shipping were liable for Nash's pre-existing impairment, and holding that the Board properly interpreted the credit doctrine to apply only to compensation actually received for the same disability, which in that case was for the 10 percent impairment pursuant to the settlement with Chapparal. *Nash*, 782 F.2d at 522, 18 BRBS at 55 (CRT).

In this case , Eagle Marine paid claimant over $9,000 in temporary total disability benefits

for his 1981 injury. Employer now seeks to credit this entire amount against its liability for permanent partial disability benefits. Employer's assertion, however, is inconsistent with the holding in *Nash*, as the disabilities being compensated are not the same. Eagle Marine paid claimant for temporary total disability, and employer may not receive a credit for the entire prior payment of temporary total disability against its liability for permanent partial disability. Therefore, we reject employer's argument that it is entitled to a credit for the amount Eagle Marine paid to claimant in temporary total disability benefits. *See generally ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989) (an employer liable for permanent total disability benefits is not entitled to a credit for permanent partial disability benefits paid by a previous employer); *Nash*, 782 F.2d at 520, 18 BRBS at 50 (CRT).

Accordingly, the administrative law judge's decisions are affirmed.[5]

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[5]Inasmuch as we affirm the administrative law judge's decision, we affirm his fee award also, and we reject employer's contention that the case should be remanded for reconsideration of the amount of the fee.