

DAVID M. JONES)
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 Claimant-Petitioner)
)
 v.)
)
 TIDEWATER EQUIPMENT)
 CORPORATION)
)
 Self-Insured)
 Employer-Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter & Montagna), Norfolk, Virginia, for claimant.

Susan B. Potter (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2604) of Administrative Law Judge Fletcher E. Campbell, 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 Longshore Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

The sole issue raised by claimant's appeal is whether the administrative law judge erred in finding employer entitled to a credit under Section 3(e) of the Act, 33 U.S.C. §903(e), for an attorney's fee awarded to claimant's counsel as a result of an award under the Virginia Workers' Compensation Act.

Claimant sustained an eye injury in the course of his employment as a first class shipfitter for employer. Claimant filed claims for compensation for the subject injury under both the Virginia Workers' Compensation Act and the Longshore Act. While the federal claim was pending, the Virginia Workers' Compensation Commission awarded claimant fifty weeks of permanent partial disability compensation and awarded claimant's counsel an attorney's fee of \$2,000 to be paid directly to counsel by employer from accrued compensation due claimant. Subsequently, the parties resolved claimant's longshore claim by stipulation, agreeing that claimant was entitled to an additional thirty weeks of permanent partial disability benefits under the Longshore Act; however, the parties remained in dispute as to employer's entitlement to a credit against claimant's longshore benefits for the attorney's fee paid as part of the state award. Accordingly, the issue of employer's entitlement to a credit for the \$2,000 attorney's fee was submitted for decision by the administrative law judge. In his Decision and Order, the administrative law judge found employer entitled, pursuant to Section 3(e) of the Longshore Act, to a credit for the \$2,000 fee paid from accrued compensation to claimant's counsel for his services in the state claim, reasoning that denying employer a credit would violate the Longshore Act's prohibition against double recovery and would impose liability on employer under the Longshore Act for an attorney's fee incurred in a state claim.

On appeal, claimant contends that the administrative law judge erred as a matter of law in finding employer entitled to a Section 3(e) credit for the attorney's fee awarded in the state compensation claim, noting that the award of the credit is inconsistent with longstanding circuit court and Board precedent. Employer responds, urging affirmance of the administrative law judge's award of the credit.

Section 3(e) of the Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law ... shall be credited against any liability imposed by this Act." 33 U.S.C. §903(e). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has not addressed the issue of an employer's entitlement to a Section 3(e) credit for an attorney's fee paid as part of a state workers' compensation award. The Board and the two circuit courts that have addressed this issue, however, have uniformly held that attorney's fees paid as part of a state workers' compensation award are not properly included in an employer's Section 3(e) credit as such fees do not serve as compensation for the employee's injury, but rather as reimbursement for the expenses incurred in bringing the state claim. See *Lustig v. U.S. Department of Labor*, 881 F.2d 593, 595-596, 22 BRBS 159, 161 (CRT)(9th Cir. 1989), *aff'g in pertinent part and rev'g on other grounds Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988); *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 1088, 13 BRBS 301, 307 (5th Cir. 1981), *cert. denied*, 454 U.S. 1123 (1983); *Shafer v. General Dynamics Corp.*, 23 BRBS 212, 214 (1990); *Hoey v. General Dynamics Corp.*, 17 BRBS 229, 231 n.3 (1985).

In this regard, we note that the rationale of the administrative law judge in awarding employer a credit in the instant case, *i.e.*, that denial of a credit for the attorney's fee paid in the state claim would violate the Longshore Act's prohibition against double recovery, was

explicitly rejected by the United States Courts of Appeals for the Fifth and Ninth Circuits. Specifically, in *Lustig*, the Ninth Circuit cited with approval the following reasoning of the Fifth Circuit in *Landry*:

The amount of [claimant's] state award which has been allocated to his attorney did not serve as compensation for his injury, but rather as reimbursement for the expenses he incurred by having to resort to the courts for compensation. To credit that sum against an LHWCA *compensation* award is to mix apples and oranges; such a crediting procedure would not obviate double recovery, as the LHWCA award does not duplicate [claimant's] *de facto* recovery of litigation expenses under state law. Rather, the LHWCA award should be diminished only by state compensation the plaintiff actually receives.

Lustig, 881 F.2d at 595-596, 22 BRBS at 161-162 (CRT), citing *Landry*, 643 F.2d at 1088, 13 BRBS at 307. More recently, the Board reaffirmed its prior holding that attorney's fees are excluded in calculating the offset pursuant to both Sections 3(e) and 33(f), 33 U.S.C. §§903(e), 933(f), because, as claimant was never in receipt of the funds designated as attorney's fees, there is no danger of a double recovery for the disability in question. *Jenkins v. Norfolk & Western Railway Co.*, 30 BRBS 109, 111 (1996).

With respect to the case at bar, the administrative law judge's allowance of a credit for the attorney's fee paid in the state claim, in effect, deprived claimant of a portion of the benefit which the Longshore Act was intended to provide. See *generally Ferguson v. Southern States Cooperative*, 27 BRBS 16, 22-23 (1993).

Thus, inasmuch as claimant is entitled to receive the benefits due him under the Longshore Act subject to employer's Section 3(e) credit for only those Virginia state compensation benefits he actually received, we reverse the administrative law judge's award of a Section 3(e) credit for the \$2,000 attorney's fee paid in the state workers' compensation claim. See *Lustig*, 881 F.2d at 595-596, 22 BRBS at 161-162 (CRT); *Landry*, 643 F.2d at 1088, 13 BRBS at 307; *Jenkins*, 30 BRBS at 109; *Shafer*, 23 BRBS at 214; *Hoey*, 17 BRBS at 231 n.3.

Accordingly, the administrative law judge's Decision and Order awarding a Section 3(e) credit to employer for the attorney's fee paid by employer under state law is reversed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge