

TOPIC 3 COVERAGE

(For a discussion of Section 3(a), see Topic 1, supra).

3.1 GOVERNMENT EMPLOYEES

Section 3(b) of the LHWCA provides:

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

33 U.S.C. § 903(b).

In Evans v. Louisiana Department of Highways, 430 F.2d 1280, 1282 (5th Cir. 1970), the court held a state employee's action untenable for compensation benefits under the LHWCA for injuries sustained while working on a bridge over navigable waters. For the federal sector, see Eagle-Picher Industries v. United States, 937 F.2d 625, 630-31 (D.C. Cir. 1991) (federal employees not precluded from longshore type claims/remedies in that they retain their maritime common law claims, but are not covered by the LHWCA).

One judge has held that the Georgia Ports Authority is part of the State of Georgia and therefore employees of the Authority are excluded from coverage under the LHWCA. Benemon v. Georgia Ports Authority, 27 BRBS 424 (ALJ) (1993). But, in Fitzgerald v. Stevedoring Services of America, 34 BRBS 202, (BRB No. 00-0724) (2001), the Board held that despite this fact, an employee of the Georgia Ports Authority who was “leased” to Stevedoring Services of America was not excluded from coverage. The Board reasoned that the claimant was a borrowed employee of SSA as an employer and therefore covered because Section 4(a) provides liability for *every* employer, even a borrowing employer.

In Keating v. City of Titusville, 31 BRBS 187 (1997), the Board held that employees of the City of Titusville were not covered by the LHWCA pursuant to the provisions of Section 3(b). The Board noted that, although the LHWCA does not define “subdivision” of a State, the City of Titusville constituted such a subdivision because it is “able to take property, enact ordinances and tax its citizens.” Moreover, the city “has been duly recognized as a municipal corporation under the laws of the State of Florida, as evidenced by its City Charter.” The Board further noted that the city owned the land surrounding the marina where the injuries occurred “and it has the lease from the state on the submerged lands.” Accordingly, the Board determined that Claimants were not covered under the Act.

3.2 OTHER EXCLUSIONS

Section 3(c) of the LHWCA provides:

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

33 U.S.C. § 903(c).

3.2.1. Solely Due to Intoxication

Even if a claimant is injured in the course of employment, Section 3(c) bars compensation if the injury was occasioned solely by the intoxication of the employee. Oliver v. Murry's Steaks, 17 BRBS 105 (1985). Section 20(c) provides a presumption that the claimant's injury was not occasioned solely by his intoxication. 33 U.S.C. § 920(c). The Section 20(c) presumption must be rebutted with substantial evidence before Section 3(c) will bar benefits to the employee.

The Board has held that the Section 20(c) presumption can be overcome only by substantial evidence that the claimant was intoxicated and that the injury was caused solely by the intoxication. Walker v. Universal Terminal & Stevedoring Corp., 7 BRBS 1019 (1978); Shelton v. Pacific Architects & Eng'rs, 1 BRBS 306 (1975).

In Sheridon v. Petro-Drive, Inc., 18 BRBS 57 (1986), the Board held that the judge erred in finding Section 20(c) rebutted by proof of intoxication alone. The employer must also show the injury was due to intoxication and, although every hypothetical cause need not be negated, it must present evidence that permits no other rational conclusion but that intoxication was the sole cause. Id. at 60. The Board thus vacated the judge's decision and remanded for proper application of Section 20(c).

In Walker, 7 BRBS 1019, where an intoxicated claimant asphyxiated in his own vomit, the Board reversed the judge's conclusion that the injury was solely due to intoxication and held the Section 20(c) presumption was not rebutted. The Board reasoned that the employer had not ruled out other possible causes where a jump or fall to the ship's deck could have triggered the vomiting. The **Third Circuit** reversed the Board, holding that the judge correctly found the presumption rebutted and his decision was supported by substantial evidence. The **Third Circuit** concluded that the employer need not refute every imaginable theory of death. Walker v. Universal Terminal & Stevedoring Corp., 645 F.2d 170, 13 BRBS 257 (3d Cir. 1981).

More recently, in Birdwell v. Western Tug & Barge, 16 BRBS 321 (1984), the Board affirmed a judge's conclusion that the claim was not barred by Section 3(c). The judge noted that a medical opinion that intoxication was the **primary** cause of death did not establish intoxication as the **sole** cause of death. Moreover, the claimant's death occurred when he drowned after

attempting to walk a mooring line to a vessel, which the judge noted is risky in any condition. The judge thus found the evidence insufficient to rebut Section 20(c).

See also Phoenix Assurance Co. v. Britton, 289 F.2d 784 (D.C. Cir. 1961) (where intoxicated employee driving company truck was killed on the road, numerous factors entering into the cause of the accident prevented Section 3(c) from barring compensation); Maryland Casualty Co. v. Cardillo, 107 F.2d 959 (D.C. Cir. 1939) (where intoxicated insurance collector was robbed and killed, Section 3(c) did not bar compensation because employer did not show that decedent's injuries were not occasioned by the murderous assault); Shelton v. Pacific Architects & Eng'rs, 1 BRBS 306 (1975) (where no direct proof that claimant's intoxication caused him to fall from his third floor hotel window and sustain severe injuries was presented, hypothetical of how intoxication may have logically caused accident was insufficient to rebut Section 20(c)).

In Lawson v. North American Shipyard, (BRB No. 98-1057)(April 27, 1999)(Unpublished), the ALJ found that employer established that cocaine intoxication was the sole cause of the claimant's work accident and the claim was barred pursuant to Section 3(c) based upon: (1) a physician's opinion that the amount of cocaine in claimant's body was a very significant contributing event in the accident, (2) the claimant's lack of credibility, and (3) lack of evidence of any other reasonable explanation for the claimant's fall. The Board reversed stating that "the administrative law judge determined that to hold an employer liable where an expert goes as far as rationally possible in attributing an accident to intoxication, without eliminating every obscure possibility, could not have been the intent of Congress with respect to 3(c)." In this case, the employer offered no evidence of the circumstances surrounding the claimant's work injury; therefore, in the absence of evidence of the circumstances of the fall, other than the claimant's testimony, the employer did not establish that the accident was due solely to intoxication.

3.2.2 Willful Intention

Section 3(c) also bars compensation if the injury was occasioned by the willful intention of the employee to injure or kill himself or another. Section 20(d) presumes that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. See Green v. Atlantic & Gulf Stevedores, 18 BRBS 116 (1986) (under Section 3(c), word "solely" applies only to intoxication clause).

The **United States Supreme Court** dealt with the Section 20(d) presumption as it applied to a suicide case in Del Vecchio v. Bowers, 296 U.S. 280 (1935). Applying the "**bursting bubble**" theory of presumptions, the **Court** found substantial evidence to rebut the presumption that decedent did not intend to kill himself where the decedent suffered from ear pain and headaches, had undergone one operation, and had been told that he might need more surgery. Following Del Vecchio, the **Ninth Circuit** held that employer's **suggestion** that decedent committed **suicide** was sufficient to "burst the bubble" and permit the Section 20(d) presumption to fall out of the case. O'Leary v. Dielschneider, 204 F.2d 810 (9th Cir. 1953); Salmon Bay Sand & Gravel Co. v. Marshall, 93 F.2d 1 (9th Cir. 1937).

In cases where the facts establish that the employee committed suicide, the issue is the willfulness of the employee's intention. Where decedent's death was caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation. Cooper v. Cooper Assocs., 7 BRBS 853 (1978), aff'd in pertinent part sub nom. Director, OWCP v. Cooper Assocs., 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979) (death due to suicidal impulse related to stress of work).

See also Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929 (5th Cir. 1951), cert. denied, 342 U.S. 932 (1952); Terminal Shipping Co. v. Traynor, 243 F. Supp. 915 (D. Md. 1965); Maddon v. Western Asbestos Co., 23 BRBS 55, 61 (1989) ("chain of causation" established between decedent's work injury (asbestosis) and its effects (carcinoma of the lungs) precluded the formation of a rational and willful intent to commit suicide); Brannon v. Potomac Elec. Power Co., 6 BRBS 527 (1977), aff'd sub nom. Director, OWCP v. Potomac Elec. Power Co., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (injury at work aggravated by working conditions, culminating in worsening mental condition and suicide); Gould v. General Dynamics Corp., 26 BRBS 88 (ALJ) (1992) (decedent's suicide found not to be occasioned by willful intent where he killed himself due to depression over his incapacitated condition which was causally related to his occupational disease).

In Schmulian v. Marinship Corporation, (BRB Nos. 96-1093 and 96-1093A)(Apr. 28, 1997) (Unpublished), the claimant was suffering from an asbestos induced mesothelioma. The only treatment that could be employed was to drain the fluid from the lungs, which was done several times until it became impossible due to the tumor's encasement of the entire lung. At that point, the claimant shot himself, and was rushed to a hospital. The claimant had previously initiated a "no code" order so no life saving operations were performed. The employer tried to argue that there was no diagnosed mental illness so 3(c) would bar the death benefits claim due to the claimant's willful intent to kill himself. The Board affirmed the judge's finding that the claim for death benefits was not barred under 3(c) as the claimant's willful intent to kill himself was not the sole cause of the death. The holding was based on two alternate grounds: 1) the suicide would not have occurred but for the effects of the work injury; and 2) that the effect of the almost daily emergency room procedures to drain the lung combined with the imminent prospect of death produced an irresistible urge that the claimant could not resist. The result is that the claimant lacked the requisite willful intent to commit suicide within the meaning of Section 3(c).

The Board held that the word "solely", as it appears in Section 3(c), applies only to the intoxication clause and not to the willful intent to injure or kill himself or another clause. Schmulian v. Marinship Corporation, BRB Nos. 96-1093 and 96-1093A at p. 4, citing Green v. Atlantic & Gulf Stevedore, Inc., 18 BRBS 116 (1986). Furthermore, the Board upheld the judge's finding that the deceased had a diagnosable mental condition that simply had not been diagnosed. The Board found this sufficient under the rationale exposed in Konno v. Young Bros., Ltd., 28 BRBS 57 (1994) (if suicide is the result of an irresistible urge then there is no bar to recovery).

Cases involving the employee's **willful intent to injure another** turn on their specific facts. The Board remanded a case for further findings where the judge mistakenly focused on an assailant's

intent to injure the employee, rather than the employee's intent. Williams v. Healy-Ball-Greenfield, 15 BRBS 489 (1983) (two claimants shot by a third employee while at work).

On remand, the Board affirmed the judge's finding that the claims were not barred by Section 3(c), where the claimant and his decedent brother did not willfully intend to injure or kill the aggressor **at the time of the injuries** despite their earlier harassment and abuse of the aggressor. Williams v. Healy-Ball-Greenfield, 22 BRBS 234, 236-37 (1989). See Kirkland v. Air America, Inc., 23 BRBS 348 (1990) (claimant-spouse, who willfully participated in a felony leading to her husband's murder, is prohibited from securing compensation benefits arising from the murder).

In Arrar v. St. Louis Shipbuilding Co., 780 F.2d 19, 18 BRBS 37 (CRT) (8th Cir. 1985), rev'g BRB No. 83-1996 (1985), the court reversed a Board opinion affirming the judge's finding that an injury was caused by a claimant's willful intention to injure another. Here, two co-workers, Batts and Bozovich, got into a fight. There was a controversy over what happened thereafter, with Batts testifying the claimant hit or grabbed him and the claimant contending he was an innocent bystander attacked by Batts. The court held the judge erred in finding Batts' testimony sufficient to rebut Section 20(d), as it established that the claimant was attempting to stop the fight, as readily as a conclusion that he intended to injure Batts. Thus, Section 3(c) did not bar compensation.

See also O'Connor v. Triple A Mach. Shop, 13 BRBS 473 (1981) (affirming ALJ's decision that claim was barred by Section 3(c) despite allegations that claimant was intoxicated and could not independently form a willful intent to injure another); Kielczewski v. Washington Post Co., 8 BRBS 428 (1978) (harassment alone insufficient to show willful intent sufficient to rebut); Rogers v. Dalton Steamship Corp., 7 BRBS 207 (1977) (reversing ALJ and holding evidence insufficient where it established only that claimant was engaged in a verbal altercation). Compare Green, 18 BRBS 116.

The **Fourth Circuit** has recently held that Section 3(c) does not apply where the employee disregards his own safety by working and not taking his medication (in this case, to prevent grand mal seizures). This activity fell short of a willful intent to injure or kill. Carolina Stevedoring Co. v. Davis, 191 F.3d 447 (4th Cir. 1999) (Unpublished).

The Board has held that “willful intent” to injure oneself requires a strict standard of proof. The statute provides compensation regardless of how negligent or inadvisable one’s conduct may be, provided that there is no intention on the part of the employee to harm or injure himself or another. The duty of using due care is applicable only in intervening cause cases and applies only to guarding against re-injury following an initial work-related injury and has no relevance to the inquiry into whether an employer presented substantial evidence that a claimant willfully intended to injure himself. See Jackson v. Strachan Shipping Co., 32 BRBS 71 (1998). In Jackson, the Board reversed the ALJ and determined that the employer does not rebut the 20(a) presumption by showing that a claimant engaged in driving, contrary to the restrictions imposed by his doctor, and such driving led to an injury.

3.2.3. Misrepresentation

Section 3(c) contains the only provision under the LHWCA for barring benefits due to an **employee's misconduct**.

[ED. NOTE: See Section 31(a) for willful misrepresentation regarding post-injury earnings and Section 8(j) for suspension of prospective compensation benefits. Freiwillig v. Triple A South, 32 BRBS 371 (1990); Stevedoring Services of America v. Eggert, 953 F.2d 552, 557 (9th Cir. 1992). Section 31 provides a fine and/or imprisonment for misrepresentation by a claimant for the purpose of obtaining benefits.]

Misrepresentation in an employment application relating to a prior injury is **not** one of the bases for barring benefits described in Section 3(c). Such misrepresentation on an employment application will not justify denial of compensation benefits. Newport News Shipbuilding & Dry Dock Co. v. Hall, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), aff'g 13 BRBS 873 (1981); Hallford v. Ingalls Shipbuilding Div., Litton Sys., 15 BRBS 112 (1982).

There is thus no statutory basis for adopting the recent trend in state workers' compensation cases to deny benefits where a claimant misrepresented his medical history on his employment application, employer relied on the misrepresentation, and the claimant's subsequent injury was causally related to the concealed medical history. 1C A. Larson, The Law of Workmen's Compensation § 47.53 (1980); Hall, 13 BRBS 873.

Some of the circuits have addressed this in the context of the Section 20(a) presumption and burdens of proof in regards to causation. In Bludworth Shipyard Inc. v. Lira, 700 F2d 1046 (5th Cir. 1983), the **Fifth Circuit** held that an employee's deliberate, intentional and unexcused misconduct, resulting in an unforeseeable work-related injury, may sever the connection between the original work-related injury and the subsequent consequences he may suffer. In Bludwoth, the court stressed the fact that the claimant intended to deceive the authorities who did not know he was a former addict when they gave him narcotics. In Jones v. Director, OWCP, 977 F.2d 1106 (7th Cir. 1992) the **Seventh Circuit** held that the test is whether the causal effect attributable to the employment has been "...overpowered and nullified by influences originating entirely outside the employment." It further suggested, without so holding, that a worker's reckless disregard of his own health and safety would ordinarily not be foreseeable, but that it is generally foreseeable that workers will seek employment for which they are qualified even if there might be some risk of aggravating an injury." Id. At 1114. Thus, under this holding, foreseeable negligence on the part of the employee cannot constitute an intervening cause. It is deliberate misconduct on the claimant's part that amounts to an intervening cause, not merely a hapless lapse of the moment.

3.3 SMALL VESSEL EXCLUSIONS

3.3.1 Small Vessel Construction

Section 3(d)(1) of the LHWCA provides:

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

33 U.S.C. § 903(d)(1).

For a general discussion of the definition of "vessel," see Stevens v. Metal Trades, 22 BRBS 319, 321-22 (1989); McCullough v. Marathon Letourneau Co., 22 BRBS 359, 363-64 (1989). (See also Topic 1.4.3, and especially 1.11.12, supra).

3.3.2 Federal Maritime Subsidies

Section 3(d)(2)(A) of the LHWCA provides:

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee -- (A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

33 U.S.C. § 903(d)(2)(A).

3.3.3 State Workers' Compensation

Section 3(d)(2)(B) of the LHWCA states:

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee -- (B) if the employee is not subject to coverage under a State workers' compensation law.

33 U.S.C. § 903(d)(2)(B).

3.3.4 Commercial Vessels

Section 3(d)(3) of the LHWCA provides:

(3) For purposes of this subsection, a small vessel means-

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

33 U.S.C. § 903(d)(3).

3.4 CREDIT FOR PRIOR AWARDS

Section 3(e) of the LHWCA provides:

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 Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.

33 U.S.C. § 903(e).

It is now well-established that a claimant can obtain concurrent state and federal awards payable by the same employer for the same injury, so long as the employer receives a credit to avoid double payment to the claimant. See Topic 50.4.1, *infra*. The Board has held that an employer liable for benefits under the LHWCA would be entitled to a credit, pursuant to Section 3(e) “against benefits the claimant receives under another workers’ compensation law for the same injury.” See Redmond v. Sea Ray Boats, Inc., 32 BRBS 1 (1998).

In cases of dual liability, where an employer has a duty to pay worker’s compensation under either a state regime or the LHWCA, an “employer’s payment of worker’s compensation under a state statute discharges the employer’s liability *pro tanto* under the Longshore Act.” Reich v. Bath Iron Works Corp., 42 F.3d 74, 76 (1st Cir. 1994).

The credit the employer receives in a claim under the LHWCA is a reflection of the payments made, to an employee, under the state worker’s compensation act. If the state award is changed the credit awarded the employer under §903(e) should be amended to reflect the claimant’s reduced or enlarged state benefits. For example, if the claimant is forced to repay state benefits after the employer has won an appeal in state court, the credit that the employer received in its LHWCA case should be proportionately reduced. The reduction is for the amount of the credit that no longer accurately reflects “amounts paid to [the] employee.” Hird v. Bath Iron Works, Corp., (BRB No. 90-1720 and 90-1720A)(Sept. 29, 1995) (Unpublished), citing McDougall v. E.P. Paup Co., 21 BRBS 204 (1988), *aff’d and modified sub nom. E.P. Paup, Co. v. Director, OWCP*, 999 F.2d 1341 (9th Cir. 1993). If the award under the LHWCA is not amended, the employer will receive a windfall in the form of a credit for a payment that is no longer being made.

The Board has held that the LHWCA does not contain a provision which entitles an employer to a credit for income a claimant has earned from other employers, Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46, (1999), or in the form of back pay, Simmons v. Electric Boat Corp., (BRB No. 00-0393)(Dec. 28, 2000)(Unpublished). In general, the LHWCA contains specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury,

disability or death. In addition to Section 3(e), see 33 U.S.C. §§ 914(j) (Covers the advance payment of benefits pursuant to the LHWCA) and 933(f) (provides an offset against amounts due under the LHWCA for any death).

[ED. NOTE: *In addition, an independent credit doctrine exists in case law which provides an employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. See Strachan Shipping Co. v. Nash, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(en banc); Adams v. Parr Richmond Terminal Co., 2 BRBS 303 (1975), Cooper v. Offshore Pipelines International, Inc., 33 BRBS 46 (1999).]*

In Alexander v. Director, OWCP, 273 F.3d 1267 (9th Cir. 2001), the **Ninth Circuit** held that, under Section 3(e), in a last responsible employer case, settlements with prior employers for long term exposure injury are not to be credited against the amount owed by the last responsible employer. In Alexander, the settlements that the claimant received were alternative to an entire award against any one of the three settling employers, who might have been liable for an entire award if found to be the claimant's last responsible employer. The **Ninth Circuit** found that as Section 3(e) refers only to payments made under "other workers' compensation laws," the statute provides no credit for settlements made under the statute itself. The **Ninth Circuit** also found that the last responsible employer's argument that Section 14(j) should be read in light of Section 2(22) to authorize credit, is mistaken: "The plain language of Section 14(j) authorizes credit for compensation advances made only by 'the employer,' not 'the employer(s).'" The court further found that Section 33(f) can not be used to secure credit in this instance since it is limited to the situation in which the third party is potentially responsible to both the employee and the covered employer.

3.4.1 LHWCA, Jones Act, and State Compensation

Section 3(e) provides a statutory credit for state workers' compensation benefits or Jones Act benefits received by employees. Bundens v. J.E. Brenneman Co., 28 BRBS 20 (1994) (Where the record is unclear as to how the settlement amount is apportioned among various claims being settled, the employer is entitled to offset the entire net amount against its liability under the LHWCA.). This provision is consistent with prior cases holding employers are entitled to a credit under the LHWCA for payments made pursuant to a state award. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 12 BRBS 890 (1980); Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962). See Darling v. Mobil Oil Corp., 864 F.2d 981, 986 (2d Cir. 1989) (state law preempted where it interferes with full execution of federal law); Le v. Sioux City & New Orleans Terminal Corp., 18 BRBS 175 (1986). Accord Bouchard v. General Dynamics Corp., 963 F.2d 541, 543-44 (2d Cir. 1992) (Connecticut law determined to conflict with § 3(e)); Fontenot v. AWI, Inc., 923 F.2d 1127, 1132 n.38 (5th Cir. 1991). Contra E.P. Paup Co. v. Director, OWCP, 999 F.2d 1341, 27 BRBS 41, 48 (CRT) (9th Cir. 1993) (LHWCA does not preempt Washington state law requiring reimbursement of previously paid state benefits upon award of benefits under federal maritime law).

Nothing in the federal legislation prohibits states from excluding coverage to workers eligible for LHWCA benefits or from seeking reimbursement of amounts paid to an employee while pursuing the federal remedy. Paup, 999 F.2d at 1349. The purpose of the provision of the LHWCA broadening an employer's right to receive offset was intended to prevent double recovery. The **Ninth Circuit** found that the Washington statute, by requiring repayment of state benefits when there is coverage under the LHWCA, actually furthered the objective of the federal statute by preventing double recovery. Paup, 999 F.2d at 1350.

The LHWCA works to prevent double recovery by the employer as well as the employee. The credit the employer receives in a claim under the LHWCA is a reflection of the payments made, to an employee, under the state worker's compensation act. If the state award is changed the credit awarded the employer under §903(e) should be amended to reflect the claimant's reduced or enlarged state benefits. For example, if the claimant is forced to repay state benefits after the employer has won an appeal in state court, the credit that the employer received in its LHWCA case should be proportionately reduced. The reduction is for the amount of the credit that no longer accurately reflects "amounts paid to [the] employee." Hird v. Bath Iron Works, Corp., (BRB No. 90-1720 and 90-1720A)(Sept. 29, 1995)(Unpublished), citing McDougall v. E.P. Paup Co., 21 BRBS 204 (1988), aff'd and modified sub nom. E.P. Paup, Co. v. Director, OWCP, 999 F.2d 1341 (**9th Cir.** 1993). If the award under the LHWCA is not amended, the employer will receive a windfall in the form of a credit for a payment that is no longer being made.

An employer is entitled to a Section 3(e) offset for amounts paid under a state statute for "disfigurement" against federal compensation for temporary and permanent total disability since the physical injury upon which all benefits are based is the same. D'Errico v. General Dynamics Corp., 996 F.2d 503, 27 BRBS 24 (CRT) (**1st Cir.** 1993). Congressional intent establishes that, when an employer is paying compensation under a state award and is entitled to Section 8(f) relief, the Special Fund may claim a Section 3(e) credit for payments made by the employer to the claimant pursuant to a state award against the liability found under Section 8(f). Stewart v. Bath Iron Works Corp., 25 BRBS 151, 155-56 (1991).

In reference to Section 9(b) there is a family unit exception to this rule wherein the employer's overall liability under both the state and federal statutes may exceed the 66 2/3 percent maximum imposed by Section 9(b). In Ferguson v. Southern States Cooperative, 27 BRBS 17 (1993) where one of the decedent's three children was from a prior marriage and entitled to larger death benefits under state law, the employer was not entitled to offset its state liability to the other claimants under the LHWCA. In Ferguson, the Board noted that the **United States Supreme Court** explicitly recognized in Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 U.S. 715, 724 (1980), 12 BRBS 890, 894, that concurrent jurisdiction could result in more favorable awards under a state act than under the LHWCA.

Section 3(e) provides a credit for "amounts paid to an employee." As the **Ninth Circuit** discussed in Lustig v. Todd Shipyards Corp., 881 F.2d 593, 595, 22 BRBS 159, 161 (CRT) (**9th Cir.** 1989), this language is distinct from the words "any amounts paid by an employer," rejected by

Congress in enacting Section 3(e). Thus, the Board reasoned, it is appropriate for the judge to look to the amount paid to each claimant and credit the amount due each under state law. Ferguson, 27 BRBS at 23.

Federal disability benefits, such as black lung benefits, however, are not subject to the Section 3(e) credit. Foundation Constructors v. Director, OWCP (Vanover), 950 F.2d 621, 625 (9th Cir. 1991); Todd Shipyards Corp. v. Director, OWCP (Clark), 848 F.2d 125, 128 (9th Cir. 1988).

Social Security disability benefits are offset by any recovery a claimant receives under the LHWCA. Thus, a claimant receiving LHWCA benefits will have his Social Security disability benefits reduced accordingly. 42 U.S.C.A. § 424, et seq.; Ladner v. Secretary of Health, Education and Welfare, 304 F. Supp. 474 (S.D. Miss. 1969) (LHWCA lump sum award, as substitute for permanent partial disability payments was properly offset against social security disability insurance benefits, notwithstanding that test for amount of workmen's compensation benefits was loss of scheduled member, and test for amount of social security benefits was inability to engage in substantial gainful activity).

3.4.2 Service Disability Benefits

The **Ninth Circuit** has held that **veterans' disability benefits** are not subject to the credit doctrine to offset an employer's liability under the LHWCA because such benefits are not only not claimed or paid pursuant to the LHWCA, but also are not paid pursuant to a state workers' compensation law or the Jones Act. Thus, veterans' disability benefits are not included within the credit doctrine as codified in the LHWCA. Todd Shipyards Corp. v. Director, OWCP, 848 F. 125, 21 BRBS 114 (CRT) (9th Cir. 1988), aff'g 20 BRBS 30 (1987).

Moreover, the employer is not entitled to a credit, as an offset against its liability under the LHWCA, for a claimant's benefits received under the Black Lung Act for his pneumoconiosis, as the claimant's pneumoconiosis and a bad back are not the same injury or disability. Vanover v. Foundation Constructors, 22 BRBS 453 (1989), aff'd sub nom. Foundation Constructors v. Director, OWCP, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991).

3.4.3 Offset Excluding Attorney's Fees

The credit under Section 3(e) extends only to compensation paid to the claimant and not to attorney fees paid to his counsel. Bouchard v. General Dynamics Corp., 963 F.2d at 543.

The **Ninth Circuit** affirmed the Board's denial to the employer of a credit for attorney's fees since the money allocated to the claimant's attorney did not serve as compensation for the decedent's injury, but rather was reimbursement for the expenses incurred in bringing the state claim. Jenkins v. Norfolk & Western Railway Co., 30 BRBS 108 (1996), Lustig v. U.S. Dept. of Labor, 881 F.2d

593, 22 BRBS 159 (CRT) (**9th Cir.** 1989), aff'g in pertinent part and rev'g on other grounds 20 BRBS 207 (1988); Landry v. Carlson Mooring Serv., 643 F.2d 1080 (**5th Cir.** 1981), cert. denied, 454 U.S. 1123 (1983); Shafer v. General Dynamics Corp., 23 BRBS 212 (1990); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985).