BRB No. 08-0653

M. R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED:
	)	03/30/2009<u>2009</u>
Self-Insured	)	
Employer-Petitioner	)	

DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Reinstatement of Compensation and Assessment of Penalties of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry & Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Order Granting Claimant's Motion for Reinstatement of Compensation and Assessment of Penalties (2008-LHC-00488, 00489, 00490, 00491) 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).

Claimant injured his back on October 5, 1987, during the course of his employment for employer as a welder. Employer paid claimant compensation under the Act for temporary total disability, 33 U.S.C. §908(b), at a compensation rate of $322.11, as well as permanent partial disability benefits totaling $16,079.73 under the Connecticut Workers' Compensation Act. CXs P, Z. Claimant returned to work for employer until

October 15, 1999, when he burst a blood vessel in his left eye. Claimant was cleared to return to work on June 1, 2000, with restrictions on climbing and activities requiring depth perception. Employer could not provide suitable alternate employment, and claimant was terminated two weeks later. Subsequently, claimant filed claims under the Act for repetitive trauma injuries to his hands, arms, shoulders, and knees, and for a neck injury. Claimant underwent surgery for bilateral carpal tunnel syndrome and ulnar neuropathy, for which employer paid temporary total disability benefits at a compensation rate of $532.46, based on claimant's average weekly wage in October 1999, and permanent partial disability under the Act for a nine percent bilateral hand impairment. 33 U.S.C. §908(c)(3).

Thereafter, claimant sought temporary total disability benefits for the combined effects of his neck, back, shoulder, knee, and hand conditions. At the hearing, the parties presented stipulations and a proposed order in which employer agreed to resume paying compensation for temporary total disability at claimant's average weekly wage for the 1987 back injury, and it accepted liability for claimant's knee and shoulder conditions, as well as for claimant's back and hand conditions. Claimant withdrew the claim for the alleged neck injury and his assertion that his average weekly wage in October 1997 is applicable to the continuing award. Based upon the parties' stipulations and the evidentiary record, Administrative Law Judge Cowen issued a Decision and Order Awarding Benefits on January 24, 2003, ordering employer to pay claimant temporary total disability benefits from March 18, 2002, at a weekly rate of $322.11.

In September 2007, claimant moved for modification, contending he is permanently totally disabled. 33 U.S.C. §§908(a), 922. Employer also moved for modification, asserting that claimant's disability is only partial. In February 2008, employer informed claimant that it was implementing a Section 3(e) credit, 33 U.S.C. §903(e), based on its $16,079.73 permanent partial disability payment for claimant's back injury under the Connecticut award, and it unilaterally discontinued temporary total disability payments to claimant to recoup the credit. In April 2008, claimant filed a motion for summary decision concerning employer's modification request, and a motion for reinstatement of compensation and assessment of penalties. *See* 33 U.S.C. §914(f).

On May 23, 2008, Administrative Law Judge Geraghty (the administrative law judge) issued an Order Granting Claimant's Motion for Summary Decision (Summary Decision Order) and an Order Granting Claimant's Motion for Reinstatement of Compensation and Assessment of Penalties (Order Granting Reinstatement). In her Summary Decision Order, the administrative law judge found that employer did not present any vocational evidence when the case was before Judge Cowan; therefore, she found that employer may not present evidence of suitable alternate employment for the first time on modification to show a change in claimant's economic condition. The

administrative law judge also found that employer failed to show any improvement in claimant's physical condition. Accordingly, the administrative law judge granted claimant's motion for summary decision with regard to employer's request for modification, and the award of total disability benefits was not modified.

In her Order Granting Reinstatement, the administrative law judge addressed employer's implementation of a Section 3(e) credit. The administrative law judge found that employer was required to raise the existence of any Section 3(e) credit when discussing and agreeing to stipulations while the case was before Judge Cowan in 2003. The administrative law judge found that employer's failure to assert the credit in the prior proceedings is not a mistake of fact that may be addressed on modification. The administrative law judge also found that employer cannot show a change of circumstances as the Section 3(e) credit from claimant's 1987 back injury arose prior to the proceedings before Judge Cowan in 2003 and that employer's failure to raise the credit at that time precludes it from raising the issue in a modification proceeding. The administrative law judge also found that claimant would be prejudiced by employer's post-stipulation assertion of the credit. The administrative law judge therefore ordered reinstatement of claimant's compensation benefits pursuant to Judge Cowan's decision. The administrative law judge further found claimant entitled to a Section 14(f) assessment on employer's past-due compensation payments after it unilaterally terminated compensation benefits.

Finally, on June 26, 2008, the administrative law judge issued a Decision and Order Awarding Benefits, pursuant to the parties' stipulations. The administrative law judge found that claimant reached maximum medical improvement on October 6, 2003, and awarded claimant compensation for permanent total disability, subject to annual adjustments pursuant to Section 10(f), 33 U.S.C. §910(f). Employer was ordered to provide medical care for claimant's work-related hand, knee, shoulder, and back injuries.

On appeal, employer challenges the administrative law judge's finding that it cannot assert its entitlement to a Section 3(c) credit and the award of a Section 14(f) assessment. Claimant responds, urging affirmance of the administrative law judge's findings.

Employer contends the administrative law judge erred by finding that its failure to raise its entitlement to a Section 3(e) credit at the time of the initial proceeding before Judge Cowan precludes it from raising the applicability of the credit in a modification proceeding. In her Order Granting Reinstatement, the administrative law judge found that the credit issue raises neither a mistake of fact in the initial decision nor a change in condition since the entry of the initial award. The administrative law judge found that employer's credit existed at the time of the entry of Judge Cowan's January 2003 order,

and the administrative law judge found that employer's failure to assert the credit at that time was not the kind of mistake that can be remedied through modification proceedings. The administrative law judge essentially found that employer is attempting to correct its litigation error by raising the credit issue in the Section 22 proceeding. Order Granting Reinstatement at 3-4. The administrative law judge also stated in a footnote that a credit against compensation due is akin to an affirmative defense which must be raised at the first hearing or else the defense is waived. *Id*. at 4 n. 7, *citing Travelers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir. 1994). The administrative law judge also found that claimant would be prejudiced by employer's receipt of a credit at this juncture.[1] *Id*. at 4.

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 section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e). Section 3(e) contains mandatory language: payments under a state compensation scheme paid to claimant for the same injury or disability "shall" be credited against federal liability. *See Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992) (state payments must be credited against federal payments, even if state payments are more generous). Moreover, there is no time frame, *per se*, in which employer must claim the credit. For example, in *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007), a state settlement occurred in 1984. The employee's Longshore Act claim was adjudicated in December 1984, and employer did not assert a credit against the permanent total disability benefits awarded, nor did the Special Fund, as employer had been granted Section 8(f) relief. *See* 33 U.S.C. §908(f). Following the employee's death, the widow's claim was adjudicated in 2004 and the Special Fund was held liable for all death benefits. *See* 33 U.S.C. §909. In a motion for reconsideration, employer raised for the first time the issue of a Section 3(e)

[1] The administrative law judge credited "claimant's representations" that he agreed to accept compensation at a lower average weekly wage than he alleged was applicable in return for employer's agreement to immediately reinstate temporary total disability benefits, and that he would not have agreed to using claimant's average weekly wage in 1987 to derive claimant's compensation rate if he knew employer would claim a credit that would result in the cessation of benefit payments for almost a year.

credit, claiming that as the state settlement encompassed any potential death claim, the credit should apply to all benefits due under the death benefits award.[2] No issue was raised concerning the timeliness of employer's assertion of a credit, but the facts support the inference that a credit may be asserted at any time, subject, as in this case, only to the statute of limitations contained in Section 22.[3]

In this case, as employer unilaterally suspended benefits due under the terms of a compensation order, its actions in seeking to obtain a Section 3(e) credit must be viewed in the context of Section 22, which may be used to modify the terms of a prior compensation order. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Id.* at 256; *see Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968). The scope of Section 22 extends to *any* mistake in fact, *Banks*, 390 U.S. 459, including mixed questions of law and fact. *See, e.g., Moore v. Virginia Int'l Terminals, Inc.*, 35 BRBS 28 (2001); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989); *see generally Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459 (2d Cir. 2008). Thus, in order to obtain a Section 3(e) credit on the facts of this case, employer must establish that there was a mistake in fact in the prior decision and that it is entitled to modification of Judge Cowan's award.[4]

We hold that the administrative law judge erred in finding that employer's assertion of a Section 3(e) credit does not raise the issue of a mistake in fact in the prior decision. Employer's entitlement to the credit raises a mixed question of law and fact concerning the amount of benefits due claimant under the Longshore Act. The amount of

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[2] On the merits, the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, reversed the Board's holding that benefits on the disability claim could be credited against the death claim. The court further held that employer bears the burden of establishing apportionment of the state settlement in order to establish an offset on the death claim. In this regard, the court stated that a motion to modify an award by claiming a credit under Section 3(e) should be treated no differently than a motion for modification under Section 22 with regard to which party bears the burden of proof. *Barscz*, 486 F.3d at 752, 41 BRBS at 22(CRT).

[3] Section 22 states that a petition for modification may be filed "at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim. . . ."

[4] "Change in condition" modification is not applicable here, as the credit existed prior to the initial proceeding.

compensation due claimant is the "ultimate fact" which is subject to modification pursuant to Section 22. *See G. K. v. Matson Terminals, Inc.*, 42 BRBS 15 (2008); *see also Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Moreover, there is no statutory or regulatory impediment to employer's raising entitlement to a Section 3(e) credit on modification. *Barscz*, 486 F.3d 744, 41 BRBS 17(CRT); *Bouchard*, 963 F.2d 541, 25 BRBS 152(CRT). The administrative law judge erred in relying on general civil law principles that a defense is waived unless it is raised in the initial hearing. A credit is not a "defense" to a claim even though employer bears the burden of establishing its entitlement to a credit.[5] Furthermore, the failure of employer to raise its entitlement to a credit earlier also is not a basis for declining to modify, as modification is not defeated merely on the ground of finality. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003) (prior litigation strategy not a bar to modification); *see also Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002); *R.V. v. Friede Goldman Halter*, ___ BRBS ___, BRB No. 08-0605 (Mar. 13, 2000).[6] Therefore, the administrative law judge erred in concluding that the employer's asserting a pre-existing Section 3(e) credit does not provide a basis for modification based on a mistake in fact.

Moreover, on the facts of this case, the administrative law judge erred in finding that claimant would be prejudiced by belated implementation of a Section 3(e) credit because he compromised his position before Judge Cowan. *See* n. 1, *supra*. The United States Court of Appeals for the Second Circuit has acknowledged the broad scope of modification, *see Jensen*, 346 F.3d 273, 37 BRBS 99(CRT); *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001), and the Seventh Circuit has stated that Section 22 articulates a

[5] For example, Sections 12(d) and 13(b)(1) state that employer must raise any objection based on untimely notice or filing "at the first hearing of such claim." 33 U.S.C. §§912(d), 913(b)(1). Moreover, the failure to raise the applicability of Section 8(f) at the initial hearing cannot be remedied through Section 22. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *see also* 33 U.S.C. §908(f)(3). *Cf. Director, OWCP v. Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986)(Section 8(f) can be raised in modification proceeding if issue not waived and grounds did not exist for its application in the prior proceeding).

[6] In *R.V.*, the Board overruled its decision in *Lombardi v. Universal Maritime Services Corp.*, 32 BRBS 83 (1989), relied on by the administrative law judge here, which had held that employer's failure to present evidence of suitable alternate employment at the initial hearing barred such evidence in modification proceedings. The Board held in *R.V.* that the *Lombardi* holding was contrary to the statutory preference for accuracy over finality. *See* discussion, *infra.*

preference for accuracy over finality in the substantive award. *Old Ben Coal,* 292 F.3d 533, 36 BRBS 35(CRT). In this regard, in considering whether to grant Section 22 modification, the relevant inquiry is whether re-opening would render "justice under the Act." The Seventh Circuit stated this inquiry should focus on a party's actions and intent in seeking modification. In determining whether a party's actions in a particular case overcome the statutory preference for accuracy over finality, relevant factors include the diligence of the parties, the number of times that the party has sought modification, and the quality of the new evidence which the party wishes to submit. *Id.*;[7] *see also Sharpe v. Director, OWCP*, 495 F.3d 125 (4th Cir. 2007).

In this case, the administrative law judge's finding that a grant of a Section 3(e) credit would prejudice claimant was based on claimant's representation that he stipulated to a lower average weekly wage before Judge Cowan in order to quickly resolve the claim and that he would not have done so had employer asserted its credit at that time. This representation is insufficient to preclude modification as the administrative law judge did not address factors that can mitigate any prejudice. Judge Cowan's decision was based on the stipulations of the parties. Stipulated compensation orders are not Section 8(i) settlements, 33 U.S.C. §908(i), and therefore are subject to modification pursuant to Section 22. *Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Finch v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 196 (1989); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988). Thus, the average weekly wage to which the parties stipulated in 2003 is subject to modification based on a mistake in fact.[8] Claimant's ability to seek modification on this issue may obviate any prejudice

[7] In *Old Ben Coal,* the court stated that an administrative law judge is not required to reopen a case under Section 22 where the party seeking modification engaged in sanctionable conduct (*i.e.,* recalcitrance and callousness toward the adjudicatory process, as in *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976)) or where it is clear from the moving party's submissions that reopening could not alter the substantive award, or where a party was attempting to thwart a good faith claim or defense. *Old Ben Coal Co. v. Director, OWCP,* 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). In *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107, 110 (2003), the Board stated that something less than sanctionable conduct may justify a refusal to reopen the case pursuant to Section 22, but the fact that evidence may have been available earlier is not enough. Thus, the Board affirmed modification of the award based on employer's evidence of suitable alternate employment where claimant did not cooperate with employer's vocational expert prior to the initial hearing.

[8] The administrative law judge noted that claimant argued in the alternative that he should be permitted to seek modification on this issue, but did not reach the argument. Decision and Order at 4, n.8.

resulting from a compromise on the wage issue and the belated application of a Section 3(e) credit. Accordingly, we vacate the administrative law judge's denial of a Section 3(e) credit on modification, and we remand this case for the administrative law judge to address employer's entitlement to a Section 3(e) credit bearing in mind that accuracy is preferred, litigation tactics are not necessarily a bar to modification, and that any prejudice to claimant may be mitigated by additional modification proceedings. On remand, the administrative law judge should address any other factors relevant to employer's entitlement to a Section 3(e) credit.

Employer also contends the administrative law judge erred in holding employer liable for a Section 14(f) assessment. As we vacate the decision and remand this case to the administrative law judge, we also vacate the Section 14(f) assessment for payments due during the period employer unilaterally suspended compensation commencing in March 2008. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 166 (1988). Moreover, employer correctly notes that a claim for a Section 14(f) assessment must first be made in default proceedings before the district director, which was not done in this case. *Von Lindenberg v. I.T.O. Corp. of Baltimore*, 19 BRBS 233 (1987); *Quintana v. Crescent Wharf & Warehouse Co.*, 18 BRBS 254 (1986).

Accordingly, the administrative law judge's Order Granting Reinstatement is vacated, and the case is remanded for further proceedings in accordance with this opinion. The administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge