

SHEILAH HUNTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: <u>Oct. 7, 2014</u>
HUNTINGTON INGALLS,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Order Denying Summary Decision of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory Camden (Montagna Klein Camden, LLP), Newport News, Virginia, for claimant.

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

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer’s Request for Summary Decision (2013-LHC-01588) 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 supported by substantial evidence, rational, 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 her right knee on July 6, 2004, during the course of her employment for employer. Claimant underwent surgery on her right knee on August 9,

2011. CX 1.¹ Claimant also began having pain in her left knee, which her physicians stated was due in part to claimant's altered gait due to the right knee injury. Claimant sought authorization for surgery on her left knee. *Id.* Employer paid disability and medical benefits for the right knee condition; specifically, employer paid claimant temporary total disability benefits for the right knee injury from August 9 through September 27, 2011. CX 3. Employer would not authorize surgery for the left knee. Claimant pursued benefits for the left knee condition under both the Longshore and the Virginia Workers' Compensation Acts.

The parties attended an informal conference on the longshore claim with the district director on January 19, 2012. CX 7. Claimant informed employer that she had undergone left knee surgery on January 3, 2012. During the informal conference, employer agreed to accept the left knee condition as a compensable consequence of claimant's July 6, 2004 right knee injury. *Id.* The district director recommended that employer pay medical expenses for the left knee and reimburse claimant's personal health insurance provider, and pay claimant temporary total disability benefits commencing January 3, 2012. *Id.* Employer subsequently accepted the district director's recommendation and paid claimant temporary total disability benefits from January 3 through April 15, 2012. EX 1.

Employer also agreed to the compensability of claimant's claim under the Virginia Act. Specifically, the parties agreed to an award of temporary total disability benefits "for record purposes only" because compensation had already been paid pursuant to the Longshore Act. CXs 8, 9. The Virginia Workers' Compensation Commission (VWCC) issued an award on June 15, 2012, pursuant to the parties' agreement, whereby employer was ordered to pay claimant temporary total disability benefits from August 9 through September 27, 2011 and from January 3 to April 15, 2012. The VWCC additionally directed claimant to pay her attorney \$500 for his professional services. Finally, the VWCC stated that employer is entitled to a credit for the payments it made under the Longshore Act. CX 10. Claimant paid the \$500 fee to her attorney in July 2012. CX 11 at 12.

Claimant's counsel subsequently sent a letter to employer, requesting that it reimburse claimant for the \$500 attorney's fee on the ground that employer is not entitled to a credit for attorney's fees it pays under state law. CX 11 at 1. Employer declined to pay. Claimant's counsel sought an order requiring employer to pay claimant an additional \$500 in compensation on the ground that the amount claimant paid her attorney pursuant to the Virginia award may not be offset against employer's

¹ The exhibit numbers refer to attachments to the parties' pleadings before the administrative law judge, as no formal hearing was held in this case.

compensation liability under the Longshore Act. Employer moved for summary decision on the grounds that it first paid claimant all benefits due under the Longshore Act, from which no attorney's fee was deducted, and did not seek a Section 3(e) credit. Claimant opposed employer's motion.

In his Decision and Order Granting Employer's Request for Summary Decision, the administrative law judge denied claimant reimbursement of the \$500 she paid as an attorney's fee under the Virginia award. The administrative law judge reasoned that claimant was fully paid under the Longshore Act prior to the entry of the state award "for record purposes only" and that claimant cannot obtain reimbursement of the state attorney's fee award because employer is not liable for an attorney's fee under Section 28 of the Act, 33 U.S.C. §928. Claimant appeals this decision, and employer responds, urging affirmance.

On appeal, claimant contends the administrative law judge erred as a matter of law in concluding that employer is not liable for the \$500 she paid in state attorney's fees, as employer is not entitled to a credit under Section 3(e) of the Act, 33 U.S.C. §903(e), for the amount of state attorney's fees. Claimant avers that this issue has already been addressed in this case with respect to prior payments of benefits. Employer responds that claimant's contentions are without merit, asserting that the Board's prior decision in this case is based on different facts and thus is not controlling. For the reasons that follow, we reject claimant's contention and affirm the administrative law judge's decision.

Section 3(e) of the Longshore Act provides that:

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 . . . shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e). It is well-established that employer's credit extends only to the net amount paid to claimant under a state compensation law for the same injury, disability or death as that for which benefits are claimed under the Act. *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989). Thus, an employer is not entitled to a credit for the amount of state attorney's fees, as such payments are not compensation for the claimant's injury. *Id.*; *Landry v. Carlson Mooring Serv.*, 643 F.2d 1080, 13 BRBS 301 (5th Cir. 1981); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990).

The Board has previously addressed the application of Section 3(e) in this case. *Hunter v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 06-0764 (May 24, 2007). Claimant had been awarded eight weeks of temporary total disability benefits in 2006 by the VWCC, pursuant to the parties' agreement, for her right knee injury. The

VWCC also awarded claimant's attorney a fee of \$400 to be paid by claimant. Subsequently, an administrative law judge found that claimant's injury was within the Act's coverage, and he also awarded claimant eight weeks of temporary total disability benefits, as well as a credit to employer for benefits paid under the Virginia statute.

Claimant sought an order from the administrative law judge requiring employer to pay her an additional \$400 in compensation because the amount of the state attorney's fee may not be credited against employer's liability under the Act, pursuant to Section 3(e). The administrative law judge agreed that employer is not entitled to a credit for the amount of the attorney's fee under Section 3(e), but he declined to order employer to pay claimant \$400. Claimant appealed.

The Board held that the administrative law judge had properly determined that employer is not entitled to a credit for the \$400 state attorney's fee, pursuant to Section 3(e), as the credit applies only to amounts actually paid to claimant. *Hunter*, slip op. at 3 (citing *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT); *Landry*, 643 F.2d 1080, 13 BRBS 301). However, the Board held that the administrative law judge erred in not also awarding claimant \$400 so that she would receive her full recovery under the Longshore Act undiminished by the state fee award, noting the evidence that claimant had, in fact, paid her attorney the fee awarded by the VWCC. *Hunter*, slip op. at 4. The Board modified the administrative law judge's decision to hold employer liable for \$400 so that claimant would receive her full recovery under the Longshore Act.

The posture of the current case, however, is materially different. As the administrative law judge found, employer first paid claimant all benefits she sought under the Longshore Act following the district director's informal conference. Subsequently, the VWCC awarded claimant compensation as well. The compensation awarded under the state act was for the same period of disability and at the same rate as the Longshore Act payments; thus the state award was "for record purposes only." CX 9. In this respect, the VWCC gave employer credit for the full amount of its payments under the Longshore Act. In addition, the VWCC awarded claimant's attorney \$500 to be paid by claimant. The fact that the VWCC credited the federal benefits, which were paid first, and in full, and no payment was made to claimant pursuant to the Virginia workers' compensation law, precludes the result claimant seeks in this case.

By its terms, Section 3(e) applies when payment has been made to the employee pursuant to another workers' compensation law. That section provides that "amounts *paid* to an employee . . . pursuant to any other workers' compensation law . . . shall be credited" 33 U.S.C. §903(e) (emphasis added). Under the facts before us, no amounts have been paid to claimant pursuant to Virginia's workers' compensation law. This differs from the situations in *Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2^d Cir. 1992), *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT), and

Shafer, 23 BRBS 212, as well as in the prior decision in this case, where payments actually were made to the claimants under another workers' compensation law and the issue was the amount of the credit to be applied against the liability imposed under the Longshore Act. Adoption of claimant's argument would ignore the plain language of the statute, which states that the Section 3(e) credit applies to amounts *paid* to claimant under another workers' compensation law. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997) (words in statute are to be given their plain meaning whenever possible); *Thornton v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010). Here, as no amounts were paid to claimant under the Virginia law, Section 3(e) is not applicable.² Therefore, we affirm the administrative law judge's order granting employer's motion for summary decision, as there are no genuine issues of material fact and employer is entitled to a decision in its favor as a matter of law. *See generally Cathey v. Service Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.*, 47 BRBS 9 (2013).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Request for Summary Decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² Moreover, as the administrative law judge recognized, the relief claimant seeks would require employer to pay an attorney's fee under the Longshore Act when the requirements of Sections 28(a) and (b) have not been met.