BRB No. 91-547

ESTELL R. PARKS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order Granting Modification of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Marianne Demetral Smith (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order Granting Modification (90-LHC-708) of Administrative Law Judge Edward C. Burch 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant sustained a work-related injury on June 7, 1983, for which he was paid compensation for permanent partial disability, 33 U.S.C. §908(c)(21), pursuant to a March 3, 1987 award. Claimant had an average weekly wage of $720.80 and a 15 percent loss of wage-earning capacity, resulting in a loss of $108.12 per week and a compensation rate of $72.08 per week. The Special Fund was found responsible for claimant's compensation benefits under

Section 8(f), 33 U.S.C. §908(f), after employer paid 104 weeks of permanent disability compensation.

On March 10, 1989, employer filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, in which it alleged that significant wage increases constituted a change in economic condition such that claimant no longer had a loss of wage-earning capacity and thus that claimant's benefits, received pursuant to Section 8(f), should be terminated. See 33 U.S.C. §§908(f)(2)(B), 922 (1988). A formal hearing was held and, although notified, claimant did not appear. The administrative law judge decided the case on the basis of employer's evidence consisting of claimant's earnings records for the period January 30, 1988 to January 21, 1989, and June 10, 1989 to June 2, 1990. These uncontradicted records established that claimant was earning approximately $1,300 - $1,550 per week, or 200 percent of his $720.80 pre-injury average weekly wage. When adjusted for inflation, claimant's pre-injury $720.80 average weekly wage in 1983 yielded $1,083 in 1989. The administrative law judge therefore concluded that claimant no longer had a loss of wage-earning capacity, and he terminated claimant's compensation benefits as of March 10, 1989, which is the date employer filed its Section 22 petition for modification. In addition, the administrative law judge ordered that

> any assessments to be made against the employer for funds paid [to the Special Fund] during that time frame be credited to the employer.

Order at 2. The administrative law judge's Decision and Order was filed on November 14, 1990, 20 months after the motion for modification was filed. The Director appeals the administrative law judge's Order commencing modification retroactively to the date the petition for modification was filed and directing that the Special Fund credit employer for the "overpayment" of its assessment to the Special Fund. Employer informed the Board on March 28, 1991, that it would not respond to the Director's Petition for Review.

The administrative law judge's Order requires the Special Fund to credit employer to the extent that it overpaid its annual assessment to the Special Fund, as calculated pursuant to Section 44 of the Act, 33 U.S.C. §944. The administrative law judge found that an "overpayment" arose during the period in which the claimant received an overpayment of compensation, i.e., from the date employer filed its Section 22 petition on March 10, 1989, until the filing of the administrative law judge's modification order on November 14, 1990, some 20 months later.[1] The

[1]There was no attempt to recoup overpayments from claimant. See generally Stevedoring Services of America v. Eggert, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir. 1992), cert. denied, 112 S.Ct. 3056

"overpayment" resulted from claimant's obtaining compensation from the Special Fund under Section 8(f) during a period when the judge subsequently found he did not have a loss of wage-earning capacity and thus was not entitled to compensation. See 33 U.S.C. §908(c)(21). Employer argued below that the Special Fund should not have included the benefits claimant received during this period when it calculated employer's annual assessment to the Special Fund pursuant to Section 44. The credit awarded by the administrative law judge apparently is to be applied by the Special Fund against employer's 1991 calendar year assessment.

The Director first argues that the plain language of Section 22 mandates that compensation cannot be retroactively terminated, that termination is only effective upon the filing of the administrative law judge's Order, and that employer is therefore not entitled to a credit, as there is no period of overpayment. Section 22 states that modification of a prior order may be granted based on a change in condition or a mistake in fact, and that a new compensation order may be issued

> which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation ....

33 U.S.C. §922 (emphasis added). We agree with the Director. While Section 22 states that compensation may be terminated, it does not provide for retroactive termination. We agree with the Director that the plain language of Section 22 provides that retroactive termination is not permissible, as the section explicitly states, with two excepting provisions, that "such new order shall not affect compensation previously paid...." In the instant case, the Special Fund properly paid compensation pursuant to the 1987 award through the date the administrative law judge's order on modification was filed. Accordingly, the Director argues that the administrative law judge erred by affecting compensation paid prior to the issuance of his order.

Section 22 provides two exceptions to the provision that a new order should not affect compensation previously paid. First, it states that an increase in compensation may be made effective from the date of injury. Secondly, it states that if any

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(1992).

compensation due is unpaid, an award decreasing the compensation rate may be effective from the date of injury, and that employer shall receive a credit against compensation due. We hold that the adminis-trative law judge's retroactive termination was in error in this case because his Order affected compensation previously paid and neither of the exceptions applies. In this case, there was no increase in compensation; thus, the first exception cannot apply. The second exception is also inapplicable as no further compensation was due at the time of the "decrease" in compensation, so there is nothing against which to credit the overpayment. The administrative law judge's order therefore erroneously affects compensation previously paid. See generally Stevedoring Services of America v. Eggert, 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir. 1992), cert. denied, 112 S.Ct. 3056 (1992); 33 U.S.C. §914(j) (1988). Employer is not entitled to a credit against its assessment under Section 44 as, pursuant to the plain language of Section 22, the administrative law judge erred in terminating the already paid compensation retroactively. Accordingly, claimant's compensation was properly included when the Secretary of Labor calculated employer's annual assessment under Section 44 for calendar years 1989 and 1990 and employer is not entitled to a credit for calendar year 1991.[2]

As the Director further contends, the plain language of Section 22 provides additional grounds for reversal of the administrative law judge's award of a credit against employer's future annual assessment. Section 22 is limited by its terms to the modification of a claimant's compensation award. Thus, the

[2]To the extent the Director contends that Section 22 would never authorize retroactive termination, while this issue need not be addressed in this case, we note that prior Board cases addressing and permitting retroactive modification under some circumstances are distinguishable. While an employer is obligated to comply with the terms of an award until a new award is entered, where employer terminates compensation payments due under an award and subsequently obtains Section 22 modification, modification may be retroactive to the date of termination. See Shoemaker v. Schiavone and Sons, Inc., 20 BRBS 214 (1988); Richardson v. General Dynamics Corp., 19 BRBS 48, 50-51 (1986). Termination of compensation payments by an employer or the Special Fund prior to obtaining modification, however, is not prohibited by the plain language of Section 22, since the order on modification would not "affect compensation previously paid" as none was paid in this instance. See 33 U.S.C. §922. Employer and the Special Fund, however, risk incurring a Section 14(f) penalty, 33 U.S.C. §914(f), if they unilaterally suspend payments, and it is later determined that claimant is entitled to benefits after termination. Id. See Maria v. Del Monte/ Southern Stevedores, 22 BRBS 132 (1989) (en banc) (decision on recons.).

Board has held that Section 22 does not authorize modification of an attorney's fee award because such an award is not compensation. Fortier v. Bath Iron Works Corp., 15 BRBS 261 (1982). Similarly, Section 22 does not authorize awarding employer a credit on its Section 44 assessment, as the money paid into the Special Fund, while used for, inter alia, compensation pursuant to Section 8(f), is not itself compensation.[3] See 33 U.S.C. §902(12). We therefore hold that a Section 22 proceeding is not a proper means for an employer to obtain a credit against its assessment to the Special Fund. Accordingly, the administrative law judge's finding that employer is entitled to a credit against a subsequent year's Section 44 assessment is reversed.

We further hold that Section 44(c) of the Act does not authorize a credit to an employer against a subsequent assessment.[4]

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[3] Section 44(i) defines several uses for money paid into the Special Fund that are not compensation, e.g., to defray expenses of medical examinations ordered pursuant to Section 7(e), 33 U.S.C. §907(e). See 33 U.S.C. §944(i)(4).

[4] Section 44 provides in pertinent part:

> (c) Payments into such fund shall be made as follows:
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> * * *
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> (2) At the beginning of each calendar year the Secretary shall estimate the probable expenses of the fund during that calendar year and the amount of payments required (and the schedule therefor) to maintain adequate reserves in the fund. Each carrier and self-insurer shall make payments into the fund on a prorated assessment by the Secretary determined by-
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> (A) computing the ratio (expressed as a percent) of (i) the carrier's or self-insured's workers' compensation payments under this Act during the preceding calendar year, to (ii) the total of such payments by all carriers and self-insured under this Act during such year;
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> (B) computing the ratio (expressed as a percent) of (i) the payments under Section 8(f) of this Act during the preceding calendar year which are attributable to the carrier or self-insured, to (ii) the total of such payments during such year attributable to all carriers and self-insured;
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> (C) dividing the sum of the percentages computed under sub-paragraphs (A) and (B) for the carrier or self-insured by two; and

Section 44(c) was amended in 1984. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1653, §24(a). The legislative history states that Section 44(c)(2) was amended by Congress in order to make the annual assessments more equitable between self-insured employers and carriers who transferred a far greater percentage of their compensation claims to the Special Fund for payment pursuant to Section 8(f) than those who transferred a small percentage of their compensation claims. See 130 CONG. REC. S11621 (daily ed. Sept. 20, 1984); 130 CONG. REC. H9732, H9734-35 (daily ed. Sept. 18, 1984).

The Director argues that because the Special Fund cannot recoup Section 8(f) payments made to claimant if they are retroactively terminated, awarding a credit to self-insured employers and carriers against their annual assessments would "jeopardize the fiscal integrity of the Fund." We find this argument persuasive in terms of equity and a congruent interpretation of the Act as a whole. It is well-established that neither the Special Fund nor an employer can obtain recompense under the Act when claimant receives payments of compensation to which he later is determined not to be entitled; they can only receive a credit against future compensation due the claimant. See generally Ceres Gulf v. Cooper, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); Stevedoring Services of America v. Eggert, 953 F.2d at 552, 25 BRBS at 92 (CRT); Vitola v. Navy Resale and Services Support Office, BRBS , BRB No. 91-763 (Sept. 29, 1992); 33 U.S.C. §§914(j), 922. It is therefore inequitable that the credit awarded to employer would, in effect, return to employer its alleged overpayment to the Special Fund because the Special Fund is not similarly entitled to recover the overpayment from claimant. Additionally, if employer had not obtained Section 8(f) relief, employer could not recover from claimant any amount it had overcompensated him.

Furthermore, while the administrative law judge's award of a credit in this case may seem to equitably account for the employer's proportionate use of the Special Fund pursuant to Section 8(f) from March 10, 1989 to December 31, 1990, equally accounting for the proportionate share of every other self-insured employer and carrier during the same period would require a corresponding retroactive surcharge on these participants, since the proportionate ratio of their payments would marginally increase in relation to the decline in the instant employer's

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(D) multiplying the percent computed under sub-paragraph (C) by such probable expenses of the fund (as determined under the first sentence of this paragraph).

ratio. Section 44(c), however, does not authorize retroactive surcharges, as the circumstances requiring payment into the Special Fund are limited to those described in Section 44(c)(1), (2) and (3), and only annual assessments are authorized. Additionally, a retroactive credit would necessarily increase the administrative burden of managing the Special Fund, as the Secretary would first calculate employer's credit, and then have to recalculate every other participant's ratio in order to accurately comply with any subsequent award(s) of a retroactive credit.

In sum, the administrative law judge's retroactive termination of claimant's compensation pursuant to Section 22 and his determination that employer is entitled to a credit against a future assessment pursuant to Section 44 are not authorized by the Act. We therefore reverse his award of a credit to employer against its assessment payable to the Special Fund.

Accordingly, the administrative law judge's Order Granting Modification is reversed insofar as claimant's award was retroactively terminated and employer was awarded a credit against a subsequent annual assessment to the Special Fund. In all other respects, the administrative law judge's Order Granting Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge