BRB Nos. 97-1143
and 97-1143A

DOMINGO ALEXANDER	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
Cross-Respondent	)	
	)	
v.	)	
	)	
TRIPLE A MACHINE SHOP	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Order on Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Dianna Lyons (Kazan, McClain, Edises, Simon & Abrams), Oakland, California, for claimant.

Herman Ng (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for self-insured employer.

LuAnn Kressley and Joshua Gillelan II (Martin Krislov, Deputy Solicitor of National Operations; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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:

Claimant appeals the Decision and Order on Remand and Order on Motion for Reconsideration (91-LHC-1163) of Administrative Law Judge Alfred Lindeman 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 findings of fact and the 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).

This case is before the Board for the second time. To briefly reiterate the facts, claimant was employed by Triple A and other employers, including General Engineering, Service Engineering, and Southwest Marine, as a sheetmetal worker, shipfitter and boilermaker from the 1940's through 1982, last working for Triple A in 1980. After leaving Triple A, claimant worked for Southwest Marine until September 1982, when he was laid off. Starting in December 1982, claimant obtained employment outside the coverage of the Act with Pullman Power as a construction worker. He remained in this employment until February 1983, when he retired after suffering a neck injury.

Claimant was diagnosed with asbestosis in 1978. On October 31, 1979, he filed the first of four claims for benefits under the Act, alleging injury due to exposure to asbestos and other industrial toxins and naming Triple A as one of the potentially responsible employers.[1] These claims were eventually referred to the Office of Administrative Law Judges, and a formal hearing was conducted on July 8, 1991, before Administrative Law Judge Alfred Lindeman. During these proceedings, claimant settled his claims pursuant to Section 8(i), 33 U.S.C §908(i), with three employers: General Engineering, Service Engineering, and Southwest Marine.

In his initial Decision and Order dated December 12, 1991, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23)(1994), for a 37.5 permanent impairment based on Dr. Raybin's opinion that claimant demonstrated a Class III disability under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (the *Guides*), as of June 13, 1989. The administrative law judge also granted employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), but denied it a credit for the payments claimant received pursuant to the settlements with the other employers named in this claim. The administrative law judge also found that while employer did not timely controvert the claim, claimant was not entitled

[1]Claimant also filed a claim for benefits under the California State Workers' Compensation Act. On January 7, 1985, claimant was awarded benefits for a 38 percent permanent partial disability under state law, pursuant to which claimant received $11,812.50, plus costs and less attorney's fees. Triple A Ex. Q.

to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), because he found that compensation was not due until 1989, years after the initial claim was filed. Decision and Order at 7. Both parties appealed.

On appeal, the Board affirmed the administrative law judge's determination that claimant was a voluntary retiree, but vacated his finding that the onset date for the award of permanent partial disability was in 1989, and remanded for reconsideration of this issue, as Dr. Raybin's 1989 report stated that claimant demonstrated a Class II impairment in 1983. The Board also agreed with claimant that the administrative law judge erred in determining that employer was not liable for a Section 14(e) penalty based on the fact that the onset of claimant's disability was in 1989 because under Section 14(b) compensation is due on the 14th day after employer is notified pursuant to Section 12, 33 U.S.C. §912, or had knowledge of the injury. Moreover, the Board accepted employer's argument on cross-appeal that the administrative law judge erred in not granting it an offset for amounts paid to claimant pursuant to his settlements with the other Longshore Act employers in the claim, holding that application of the general credit doctrine which functions to preclude a double recovery for benefits for the same injury or disability applies to support a credit in this instance. In so concluding, the Board noted that the avoidance of double recovery would militate in favor of an offset, regardless of the source of the payment. Accordingly, the Board held that under the circumstances presented, where claimant had received money under Section 8(i) settlements from prior employees based on the same pulmonary impairment for which he is receiving compensation from employer, it was necessary to vacate the denial of the offset, and the Board directed the administrative law judge to reconsider this issue in light of the purposes of the credit doctrine and Section 14(j), 33 U.S.C. §914(j)(1994), on remand. *Alexander v. Triple A Machine Shop*, BRB No. 92-0878A/B (Aug. 19, 1996)(unpublished)

On remand, relevant to the present appeal, the administrative law judge found that Dr. Raybin's determination that claimant suffered a Class II impairment in 1983 was based on an incorrect application of the AMA criterion, and reinstated his prior determination that the onset date for the award of permanent partial disability compensation was in 1989. In addition, he concluded on remand that Section 14(j) does not provide a basis for awarding employer a credit for the Section 8(i) settlement payments made to claimant by other Longshore employers because the statutory language of that provision contemplates the situation where the same employer has made advance compensation payments. The administrative law judge further determined that a credit was also not warranted under the judicially created credit doctrine because claimant's Section 8(i) settlements did not represent a double recovery for the same injury. Claimant's motion for reconsideration regarding the administrative law judge's finding regarding the commencement date was denied in an Order dated April 8, 1997.

Claimant now appeals the administrative law judge's finding regarding the onset date, arguing that Dr. Raybin's 1989 opinion in conjunction with the results of claimant's 1983 pulmonary function tests mandate a finding that claimant first had a permanent impairment in May 1983. Employer responds, urging that the 1989 onset date found by the administrative law judge be affirmed. Employer also cross-appeals the administrative law judge's refusal to grant it a credit for the Section 8(i) payments claimant received from his other Longshore employers. Claimant replies,

reiterating his prior arguments, and responds to employer's cross-appeal, urging that the administrative law judge's denial of a credit for the payments claimant received under Section 8(i) from his other Longshore employers be affirmed. The Director also responds, agreeing with the claimant. The Board heard oral argument on this case in San Francisco, California on September 15, 1997.

We first address claimant's argument on appeal that the administrative law judge erred in failing to find that the date of onset of his permanent partial disability was May 6, 1983, based on Dr. Raybin's August 13, 1989, report indicating that claimant exhibited a Class II impairment at that time. In this report, Dr. Raybin concluded that based upon the forced vital capacity (FVC) reading noted in claimant's 1983 pulmonary function study, this study demonstrated that claimant had a Class II pulmonary impairment as of May 6, 1983, and that a June 13, 1989, pulmonary function study indicated a Class III impairment. In his Decision and Order on Remand, the administrative law judge found that Dr. Raybin's opinion that claimant suffered a Class II impairment in 1983 was based on an incorrect application of the AMA criterion because he wrongfully assumed that a FVC of 60 to 90 percent of predicted was indicative of a Class II impairment, when, in fact, the Fourth Edition of the AMA *Guides* published in 1993 requires that such readings fall between 60 to 79 percent of predicted. Inasmuch as the pulmonary function study performed at Presbyterian Hospital in 1983 which formed the basis for Dr. Raybin's opinion reflected an FVC reading of 85 percent of predicted, the administrative law judge found that claimant exhibited no impairment in 1983, and that he was not shown to have had a permanent impairment under the AMA *Guides* until a test was performed on June 13, 1989, which reflected a forced vital capacity of 59 percent of predicted. CX. 25, p. 430. In denying claimant's request for reconsideration, the administrative law judge found that while claimant correctly asserted that the 1993 *Guides* were not applicable, as they were not in existence when Dr. Raybin rendered his 1989 opinion, the applicable 1988 *Guides* contained the same criteria as those in the 1993 version, as both require that claimant's FVC be between 60 and 79 percent of predicted to qualify as a Class II impairment. The administrative law judge also rejected claimant's argument that a comparison of his actual 1983 pulmonary function test results with the predicted normals set forth in the 1988 *Guides* supported Dr. Raybin's opinion that claimant had a Class II impairment in 1983, finding that claimant's FVC reading of 3.16 was 82 percent of the predicted normal of 3.85, whereas his forced expiratory value (FEV) value of 2.04 was 67.5 percent of the predicted normal of 3.02.

Claimant and the Director correctly argue that the administrative law judge erred in determining that claimant did not exhibit a Class II impairment in 1983. The administrative law judge's finding that Dr. Raybin's assessment of a Class II impairment in 1983 was premised on a misapplication of the AMA *Guides* cannot be affirmed as it is based on the wrong numerical data. In making this determination, the administrative law judge relied upon the 85 percent of predicted FVC reading on the May 1983 test, but this percentage is not supported by a comparison of claimant's actual 1983 FVC reading with the predicted FVC values contained in Table 2 of the applicable AMA *Guides*. Claimant and the Director correctly state that claimant's actual 1983 FVC reading is 3.04, and when that figure is compared with the reference values contained in the *Guides*, the results demonstrate a Class II impairment, consistent with Dr. Raybin's opinion.

In his Order on Reconsideration, the administrative law judge purported to compare the "predicted normal" values contained in the 1988 *Guides*, with claimant's actual 1983 FVC value. However, his finding that claimant's FVC reading is not indicative of a Class II Impairment is based on the belief that claimant's 1983 FVC reading was 3.16 when in fact it was actually 3.04.[2] Comparison of claimant's actual FVC reading of 3.04 with the relevant predicted normal values for a 67 year old man yields a result which is 78.45 percent of the predicted normal of 3.875, and a result of 78.9 percent if the age of 68 is used, both of which are indicative of a Class II impairment under the *Guides*. Inasmuch as employer does not dispute that the only record evidence of pulmonary impairment under the *Guides* is that underlying Dr. Raybin's opinion, we vacate the administrative law judge's finding that Dr. Raybin's opinion that claimant exhibited a Class II impairment in 1983 was based on an incorrect application of the *Guides*, and modify his Decision and Order and Order on Motion for Reconsideration to hold that Dr. Raybin's 1989 opinion establishes a commencement date of May 6, 1983, as a matter of law.[3] *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). The case must be remanded for the administrative law judge to award benefits under Section 8(c)(23) as of this date.

Claimant also correctly asserts that inasmuch as his injury became manifest within one year of his February 1983 retirement, his average weekly wage should be calculated based on his earnings during the 52-week period prior to his exiting the work force, pursuant to Section 10(c), 33

[2]Claimant and employer both erroneously assumed while the case was before the administrative law judge that claimant's 1983 FVC was 3.16. This was actually his IVC (Inspiratory Vital Capacity) value. *See* Employer's Proposed Findings, Conclusion And Brief On Remand at p.5; Claimant's Petition For Reconsideration at p.2. In his Order on Motion for Reconsideration, the administrative law judge did not identify the FVC value he used, but stated that dividing claimant's FVC test results by the predicted value of 3.85 resulted in a finding that his FVC was 82 percent of predicted. This result follows from using the IVC value of 3.16 rather than the FVC value of 3.04 (3.16 /3.85= 82 percent).

[3]In light of our determination that claimant's FVC reading supports Dr. Raybin's assessment of a Class II impairment in 1983, we need not address the parties' alternate arguments relating to his 1983 FEV values.

U.S.C. §910(c), and Section 10(d)(2)(A), 33 U.S.C. §910(d)(2)(A). *See generally Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987). Claimant urges the Board to modify the administrative law judge's decisions to reflect his entitlement to compensation based on an average weekly wage of $549, the stipulated average weekly wage in 1982. Tr. at 40. Inasmuch, however, as the relevant 52-week period for calculation of claimant's average weekly wage is from May 6, 1982 until May 6, 1983, we cannot say that the 1982 earnings apply as a matter of law. Accordingly, the administrative law judge's finding that claimant is entitled to compensation based on the National Average Weekly Wage in 1989 is vacated, and the case is remanded for him to calculate claimant's average weekly wage for the 52-week period prior to his May 6, 1983 injury. *See LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

We next address employer's arguments on cross-appeal that the administrative law judge erred in failing to grant it a credit for the Section 8(i) settlement payments made to claimant by the other potentially liable Longshore employers in this claim. Initially, we agree with employer that the administrative law judge erred in failing to follow the Board's directive in our prior decision in concluding on remand that the credit doctrine does not apply. In his initial Decision and Order in this case, the administrative law judge granted employer a credit for amounts paid under the state award, but found that the credit provisions set forth at Sections 3(e) and 33(f), 33 U.S.C. §§903(e), 933(f), do not provide a basis for allowing employer an offset for amounts paid to claimant pursuant to settlements with the three other employers in this claim. On appeal, the Board vacated that determination, noting that the administrative law judge did not address the applicability of Section 14(j) or the general credit doctrine, and remanded the case, stating:

> We conclude that the application of the general credit doctrine, which functions to prevent a double recovery of benefits for the same injury or disability, applies to support a credit in this instance.... Certainly, the avoidance of a double recovery would militate in favor of an offset, regardless of the source of the payment.

Alexander, slip op. at 6. Because the Board held the general credit doctrine applicable in its prior decision, this determination constitutes the law of the case. *See generally Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991). Accordingly, we agree with employer that the administrative law judge erred in reconsidering this issue on remand.

We also agree with employer that the administrative law judge's rationale for concluding that it is not entitled to a credit cannot, in any event, be affirmed. Initially, the administrative law judge found Section 14(j) did not apply, finding it authorizes a credit only when the same employer who has made advance payments of compensation seeks the credit against later payments. Section 14(j) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). Although Section 14(j) is phrased in the singular, employer is correct that under Section 2(22) of the Act, 33 U.S.C. §902(22), the singular includes the pleural. Thus, the use of the singular does not mandate the conclusion that the same employer ultimately liable must have made the advance payments. In an occupational disease case, moreover, the employer liable for the payment of benefits is determined as a matter of law. Thus, under *Travelers Ins. Co. v. Cardillo*, 225 F.2d

137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), in the case of an occupational disease the last covered employer to expose claimant to potentially harmful stimuli prior to claimant's awareness of his injury is liable for claimant's entire disability. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). The administrative law judge found that as employer was the last employer in this case, it is the responsible employer and is wholly liable for claimant's disability. Claimant's prior employers are not liable for any contribution to claimant's disability, as liability under *Cardillo* is not apportioned among successive employers. Where an employer makes voluntary payments but a later employer is ultimately responsible under *Cardillo,* it cannot seriously be asserted that claimant is entitled to both the voluntary payments and a full overlapping recovery from the responsible employer, with Section 14(j) inapplicable because different employers are involved. Rather, with appropriate credits or reimbursement,[4] claimant recovers once for the full extent of his disability from the sole responsible employer. Therefore, we do not agree that Section 14(j) does not apply solely because other employers other than the employer ultimately liable made payments here.[5]

In any event, even if Section 14(j) is strictly construed as inapplicable, the credit doctrine of *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986), *modifying on reh'g en banc*, 751 F.2d 1460, 17 BRBS 29 (CRT) (5th Cir. 1985), supports employer's entitlement to a credit, as discussed in our prior opinion. In reaching a contrary conclusion, the administrative law judge relied on statements in *Nash* that "limitations on employee recovery are not favored, absent statutory authority" and that the purpose of the credit doctrine is to prevent double compensation for the same injury. *Id.* He then concluded that employer was not entitled to a credit because claimant's Section 8(i) settlement payments did not represent a double recovery for the same injury. Rather, he found that the settlement payments could reasonably be considered as payments from the other employers based on 1) their settlement value to end a potentially more expensive lawsuit and 2) their contribution to claimant's pre-existing pulmonary disability on the basis of which employer had received relief under Section 8(f). Decision and Order on Remand at 6.

As noted by the Board in its prior Decision and Order, the credit doctrine discussed in *Nash* allows employer to credit prior disability payments against its total liability under the aggravation rule to avoid a double recovery by claimant for the same disability. *See Nash*, 782 F.2d at 513, 18 BRBS at 45 (CRT). Under the aggravation rule, where a work-related injury aggravates, accelerates or combines with a prior condition, the employer at the time of the aggravation is liable for the full amount. In *Nash*, employer was held liable for a 34 percent loss to claimant's knee under the

[4]We note that there is no question of reimbursement of the other employers in this case.

[5]We note, moreover, that allowing a credit on the facts presented is consistent with Section 14(j), as the payments were clearly payments of compensation under the Act. Such a credit serves the recognized purposes of this provision, *i.e.*, preventing an employee from receiving double recovery for the same injury, death or disability, and ensuring the prompt payment of compensation. *See Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992)*; Jenkins v. Norfolk & Western Railway Co.*, 30 BRBS 109, 110 (1996).

schedule, 33 U.S.C. §908(c)(1), which resulted from the combination of a 20 percent impairment sustained in a high school injury, an additional 10 percent loss while employed by another longshore employer and the 4 percent loss resulting from the last injury. Employer received a credit in that case for the compensation claimant received from the prior employer. *See also Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, *aff'd on recon.* 20 BRBS 26 (1987), *aff'd in pert. part sub nom. Director, OWCP v. Bethlem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

We agree with employer that the administrative law judge's reliance on *Nash* to reject employer's credit in the present case was improper. The facts in *Nash* differ from those in the present case, in that *Nash* involved the liability of successive employers for claimant's traumatic injuries to his knee whereas the present case involves one occupational disease claim against multiple employers for the same injury. Nonetheless, as in *Nash*, employer's liability here rests on legal principles under which one employer is liable for the totality of the same injury; in *Nash*, employer was liable for claimant's entire 34 percent loss of use in the knee whereas in this case, under *Cardillo*, employer is liable for claimant's entire disability due to his occupational disease. Thus, the present case is similar to *Nash* in that as one employer is liable for the entire disability, a credit for previous payments toward that disability is proper to avoid double recovery.

While it is correct that in *Nash* the court stated that limitations on employee recovery are not favored absent statutory authority, 782 F. 2d at 518, 18 BRBS at 52 (CRT), in relying on this language to support the denial of a credit in this case, the administrative law judge gave determinative weight to this statement rather than to the court's actual holding that the employer was entitled to a credit to the extent that the claimant had already been compensated for his injury.[6] This holding applies equally in the present case, as claimant is entitled to one recovery for his occupational disease, for which employer is wholly liable. To allow claimant to retain the previous payments from prior employer plus a full recovery from the responsible employer under *Cardillo*, allows claimant here a double recovery, similar to the situation in *Nash*. In finding that the payments received here do not represent a double recovery, the administrative law judge attempted to characterize them as something other than compensation for the same disability. We agree with employer that this conclusion cannot be affirmed. The administrative law judge found that the settlement payments could reasonably be considered as payments from the other employers based on their settlement value and the employers' contribution to claimant's pre-existing pulmonary disability. Inasmuch, however, as these employers had no legal obligation to contribute to claimant's benefits, they owed no benefits for any contribution to claimant's disability. As employer is wholly liable, these contributions can result only in claimant's receiving a double recovery.[7]

[6]Claimant's reliance on *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp. [Krotsis]*, 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990), for the proposition that the credit doctrine only applies where the aggravation rule is employed ignores the fact that in that case the credit doctrine did not apply because there had only been one award and thus the advance payments employer had made were properly the subject of a credit under Section 14(j).

[7]Claimant's argument that allowing employer a credit for claimant's pre-existing disability

where employer has also received Section 8(f) relief will result in a double credit is without merit. *Nash* itself involved this same situation.

The Director's argument that *Nash* is an aberration and that the continuing viability of the credit doctrine has been called into question by the Supreme Court's recent decisions in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), and *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, ___ U.S. ____, 117 S.Ct. 796, 31 BRBS 5 (CRT) (1997), is without merit, as neither case discusses either *Nash* or facts relevant to this case.[8] The Director asserts that awarding a credit in the present case is improper because Congress has spoken by enacting Sections 3(e), 14(j), and 33(f), none of which specifically applies in this case. It is not surprising, however, that the Act does not provide a credit for payments which employers are not supposed to make. In any event, our holding here follows from the *Cardillo* and aggravation rules, two well-settled principles under the Act which are not explicitly stated therein.

For the foregoing reasons, we reverse the administrative law judge's denial of credit to employer for monies received by claimant from his prior employers. Inasmuch as the employer is entitled to a credit here as a matter of law, the case is once again remanded to allow the administrative law judge to determine the amount of the credit due.

Accordingly, the administrative law judge's finding regarding the commencement date for the award of permanent partial disability compensation is vacated, and his Decision and Order on Remand and Order on Reconsideration are modified to reflect a commencement date of May 6, 1983. Inasmuch as claimant's injury became manifest within one year of his retirement, his finding that claimant is entitled to compensation based on the National Average Weekly Wage in 1989 is also vacated, and the case is remanded for him to re-calculate claimant's average weekly wage based on his actual earnings for the 52-week period prior to his May 6, 1983 injury, and award benefits under

[8]The Director avers that since its decision in *Cowart*, the Court has directed that the Act be interpreted literally and that any ill effects of the law must be alleviated by Congress. He cites *Yates* for the proposition that the provision against double recovery is not absolute and that application of a statute's plain language is a double-edged sword, enuring to claimant's detriment at some times and to employer's detriment at others. While these arguments may generally reflect the tenor of these cases, they are tangential at best to the credit question in this case. The Court was interpreting the statutory language of Section 33(g), 33 U.S.C. §933(g), in *Yates* and *Cowart*, a different issue than that here.

Section 8(c)(23) accordingly. The administrative law judge's finding that the credit doctrine is inapplicable on the facts presented is reversed, and the case is remanded for determination of the amount of the credit consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge