

ROSEMARY LIUZZA)	
(Widow of JAKE LIUZZA))	
)	
Claimant-Respondent)	
)	
v.)	
)	
COOPER/T. SMITH)	DATE ISSUED: <u>June 29, 2001</u>
STEVEDORING COMPANY,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John F. Dillon, New Orleans, Louisiana, for claimant.

Alan G. Brackett and Daniel J. Hoerner (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-LHC-1704) of Administrative Law Judge Clement J. Kennington 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 conclusions of law of the administrative law judge if they 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).

Jake Liuzza (decedent) worked as a longshoreman for multiple employers between 1947 and 1984, and allegedly was exposed to asbestos. Decedent voluntarily retired in 1984. In May 1993, decedent was diagnosed as suffering from malignant lung cancer, and he died on September 30, 1994, as a result. Claimant, decedent=s widow, thereafter sought permanent partial disability benefits for the period prior to decedent=s death, as well as death benefits. 33 U.S.C. "908(c)(23), 909. In his initial Decision and Order, the administrative law judge determined that employer is liable for any benefits due as the

responsible employer. The administrative law judge concluded, based upon the testimony of claimant and decedent=s son, that claimant established the existence of working conditions, specifically exposure to asbestos, which could have contributed to decedent=s lung cancer, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. '920(a), presumption, and that employer had rebutted it. Based upon his weighing of the evidence as a whole, the administrative law judge found that claimant established a causal relationship between decedent=s employment and his lung cancer. The administrative law judge determined that decedent was totally disabled from May 18, 1993 through the date of his death. Accordingly, he awarded decedent permanent partial disability compensation based upon a 100 percent impairment from May 18, 1993, through September 30, 1994, pursuant to Section 8(c)(23), and death benefits and funeral expenses to claimant, pursuant to Section 9.

Employer appealed, contending that the administrative law judge erred in concluding that it is the responsible employer, that claimant established a causal relationship between decedent=s employment and his ultimately fatal lung cancer, and that decedent was totally disabled during the period prior to his death. The Board vacated the administrative law judge=s finding regarding the extent of decedent=s disability prior to his death and remanded the case for reconsideration of the extent of impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Board affirmed the decision in all other respects. *Liuzza v. Cooper/T. Smith Stevedoring Co.*, BRB No. 99-0401 (Jan. 10, 2000) (unpublished). Following this decision, employer sought a credit for the overpayment of decedent=s disability benefits against its liability for claimant=s future death benefits.

On remand, the administrative law judge found that due to lack of medical evidence regarding the degree of impairment, decedent was not entitled to any permanent partial disability benefits from June 1, 1993, through July 27, 1994, but was entitled to compensation benefits based on a 51 percent impairment rating from May 18, 1993, to May 31, 1993, and from July 28, 1994, until his death from cancer. 33 U.S.C. "902(10), 908(c)(23). The administrative law judge further determined, summarily, that employer is not entitled to an offset of any overpayment of benefits it made on behalf of decedent against benefits it owes claimant, decedent=s widow, as these are separate claims and no statutory basis permits an offset.¹ In the present appeal of the decision on remand, employer contends that it is entitled to a credit under Section 14(j) of the Act, 33 U.S.C. '914(j). Claimant responds, urging affirmance of the administrative law judge=s determination that employer is not entitled to a credit against the death benefits owed claimant.

¹Employer had paid compensation benefits for a 100 percent impairment for the period of May 18, 1993, through September 30, 1994, pursuant to the administrative law judge=s original decision.

This case involves an issue of first impression on the facts presented. In reviewing cases of first impression involving a statute, the Board must first look to the plain language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). The relevant statutory provision is Section 14(j) which provides, "If 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). If the intent of Congress is clear from the plain language of the statute, that is the end of the matter. The Board must give effect to the unambiguously expressed intent of Congress. See *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this case, the plain language of the statute does not address the issue presented: whether employer is entitled to credit an overpayment of disability benefits against its liability for an award of death benefits. The Board, therefore, must look to analogous interpretations of Section 14(j) or of other similar statutory provisions.

Initially, we reject employer=s contention that the Board=s decision in *Hawkins v. Harbert Int=l, Inc.*, 33 BRBS 198 (1999), supports its claim for a Section 14(j) credit. In *Hawkins*, the Board affirmed an administrative law judge=s decision to allow an employer a credit for its overpayment of the death benefit for a decedent=s child against its continuing obligation to pay ongoing death benefits to the widow. The Board=s decision in *Hawkins* turned on the premise that the Act provides for only one death benefit, see 33 U.S.C. '909 (Alf the injury causes death, the compensation therefore shall be known as a *death benefit*@), and thus, a credit out of the same death benefit is not prohibited. *Hawkins*, 33 BRBS at 202. As the two claims involved in the instant case are two separate claims, an *inter vivos* disability claim and a death benefits claim, *Hawkins* is distinguishable from the present case and does not compel the conclusion that employer herein is entitled to a credit under Section 14(j).² See also *Valdez v. Crosby & Overton*, 34 BRBS 185 (2000)

²We also reject employer=s assertion that the administrative law judge erroneously relied on *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992), *rev=g* 756 F.Supp. 303 (S.D. Tex. 1990), as the administrative law judge apparently cited that case for the general proposition that an employer could not recoup overpaid benefits except as offsets against future payments, which is not inconsistent with the proposition that disability compensation cannot be credited against death benefits. See, e.g., *Cooper*, 957 F.2d at 1207 n.15, 25 BRBS at 132 n.15 (CRT). Employer=s attempts to distinguish *Ceres*, on the ground that in that case employer did not controvert the claim and paid benefits voluntarily to a claimant who ultimately was found to be entitled to nothing, whereas employer in the present case controverted the claim and paid benefits only pursuant to the administrative law judge=s order, also is not dispositive of the issue of offset, as Section 14(j) does not require

(Decision on Recon.); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

In this regard, it has consistently been held that a worker=s claim for disability benefits and a survivor=s claim for death benefits involve two separate and distinct rights. See *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 8 BRBS 464 (3^d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Close v. Int=l Terminal Operations*, 26 BRBS 21 (1992). In fact, a separate claim must be filed in order to receive death benefits under Section 9, *Almeida v. General Dynamics Corp.*, 12 BRBS 901 (1980), and the right of the employee=s widow to recover death benefits does not arise until the date of the employee=s death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

The separate nature of disability and death benefits is well demonstrated in judicial determinations interpreting other sections of the Longshore Act. The Act formerly contained a provision stating: AThe total compensation payable under this chapter for injury or death shall in no event exceed the sum of \$7,500.@ 33 U.S.C. '914(m) (amended 1948, 1956, 1961) (repealed 1972) (emphasis added). Several courts of appeals held that the employer was liable for up to \$7,500 in disability benefits *and* \$7,500 in death benefits; the two types of benefits were not to be aggregated in determining if one \$7,500 limit was reached, based on the plain language of the statutory provision, which was written in the disjunctive. *Hitt v. Cardillo*, 131 F.2d 233 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 770 (1943); *Norton v. Travelers Ins. Co.*, 105 F.2d 122 (3^d Cir. 1939); *Int=l Mercantile Marine Co. v. Lowe*, 19 F.Supp. 907 (S.D.N.Y. 1938), *aff=d*, 93 F.2d 663 (2^d Cir. 1938), *cert. denied* 304 U.S. 565 (1938). AThe amount to which the widow and dependents are entitled is for their exclusive benefit and is entirely separate from the compensation for disability granted the employee himself which . . . terminate upon his death.@ *Id.*, 19 F.Supp. at 909.

In *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 21 BRBS 33 (CRT) (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit held that an employer did not have the right to withdraw from an unapproved Section 8(i) settlement of a claim for disability benefits following the death of the claimant. 33 U.S.C. '908(i). Significantly, the court rejected the employer=s attempt to have the amount of the settlement credited against its liability for death benefits, should the widow be found entitled to such. The court stated that the settlement of the disputed disability claim has no effect on the widow=s death benefits; Athe point is that [the widow=s] right to death benefits is unaffected by potential payment from proceeds of her husband=s claim.@ *Nordahl*, 842 F.2d at 785, 21 BRBS at 43(CRT).

that a mistaken overpayment can be recouped only if voluntarily made prior to an award. See *Flynn v. John T. Clark & Sons*, 30 BRBS 73 (1996).

The supposition of the employer in *Nordahl*, and the employer herein, is that the widow would receive the Aexcess@ disability benefits. In fact, an award of disability benefits following the death of the employee, other than those paid under the schedule, is properly made to the employee=s estate. See *Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); see also 33 U.S.C. '908(d). The court in *Nordahl* recognized the fallacy of the employer=s argument, stating, AWhile it is reasonable to assume that Mrs. Nordahl will take at least some portion of her childless husband=s estate, it is equally plausible that the entire \$75,000 will go to a home for destitute longshoremen.@ *Nordahl*, 842 F.2d at 785, 21 BRBS at 43(CRT). This reasoning applies equally in the present case.

In addition, case law arising under two of the Act=s other credit provisions, Sections 3(e) and 33(f), 33 U.S.C. '903(e), 933(f), strongly supports the proposition that, pursuant to Section 14(j), overpayments of disability compensation can be offset only against disability compensation due and overpayments of compensation for death can be offset only against death benefits due. Section 3(e) provides employer with a credit for payments received by the claimant pursuant to other workers' compensation laws or the Jones Act.³ In *Pigott v. General Dynamics Corp.*, 23 BRBS 30 (1989), the decedent became permanently and totally disabled as a result of asbestosis and resultant lung cancer. A state compensation order approved a settlement of \$10,000 of past-due benefits to decedent, and \$8,750 for any claim decedent or the widow claimant might have for future benefits. The settlement stated that had the matter been tried, decedent (then living) would have been entitled to \$10,000 on his claim, and the remainder was the probable value of decedent=s and claimant=s future compensation. After decedent=s death, his widow, the claimant in the Longshore case, filed a claim for death benefits under the Longshore Act against employer. The Board modified the administrative law judge=s allowance of a credit under Section 3(e), holding that the \$10,000 specifically apportioned for decedent=s lifetime state claim alone was not to be credited against employer=s liability on the death claim under the

³Section 3(e) 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 (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)(1994); see also *Puget Sound Bridge & Dry Dock Co. v. O=Leary*, 260 F. Supp. 260 (W.D. Wash. 1966) (allowing a credit for state workers= compensation death benefits against Longshore Act death benefits pursuant to Section 14(k) (renumbered 14(j) in 1984) prior to the enactment of Section 3(e)).

Act, emphasizing that a worker=s claim for disability benefits and a survivor=s claim for death benefits involve two separate and distinct rights. *Id.* at 32. In *Ponder v. Peter Kiewit Sons= Co.*, 24 BRBS 46 (1990), the Board held that under Section 3(e), a decedent=s disability benefits paid under a state settlement agreement may only be offset against his disability benefits due under the Longshore Act, and the widow=s death benefits under the California settlement may only be offset against her survivor=s benefits under the Longshore Act, crystallizing the principle that benefits received for disability or death under a state award or settlement may be used only to offset Alike@ benefits owed under the Act. *Id.* at 55-56; see also *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Section 33(f) of the Act, 33 U.S.C. '933(f),⁴ provides a credit to the employer where a claimant recovers an amount in a suit against a third party for an injury for which compensation is payable under the Longshore Act. See *Texports Stevedore Co. v. Director, OWCP [Maples]*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991). In *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), *aff=g Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), the United States Court of Appeals for the Ninth Circuit held that Section 33(f) provides that an employer may offset its liability to a

⁴Section 33(f), 33 U.S.C. '933(f)(1994), provides:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

Prior to 1959, a claimant had to elect whether to receive compensation under the Act or to proceed in negligence against a potentially liable third party. 33 U.S.C. '933(a)(19) (amended 1959). In *Hitt v. Cardillo*, 131 F.2d 233 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 770 (1943), the employee elected to receive compensation under the Act. His right to sue the third party thus passed to his employer, who recovered in excess of the statutory maximum compensation payable to the employee. Employer sought to apply this excess recovery against its liability for death benefits to the employee=s widow. The court held that, inasmuch as claims for disability and death benefits are distinct, the funds remaining at the time of death passed by operation of law to the employee=s estate, and could not be paid to the widow as a death benefit. *Id.*, 131 F.2d at 235; see also discussion, *supra*.

particular claimant only against third-party proceeds apportioned to that claimant, and that only benefits for the Aperson entitled to compensation@ may be reduced by that person=s third-party recovery.⁵ See also *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 972-973, 26 BRBS 7, 9(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). The fact that a widow Areceives@ the decedent=s benefits because of his death does not render her a Aperson entitled to compensation@ on the disability claim. See *Martin v. Kaiser Co., Inc.*, 24 BRBS 113 (1990); see also *Nordahl*, 842 F.2d at 785, 21 BRBS at 43(CRT). Therefore, employer=s contention that the death and disability benefits which claimant received in this case are not separate because claimant received both, is not dispositive, because claimant received the disability benefits only by virtue of her husband=s death. *Id.*

In keeping with *Force*, the Board has held that employer may not offset its liability under Section 33(f) for the widow=s death benefits against the \$30,000 her children received in the third-party settlement as that money was not received by claimant, *i.e.*, she was not the person entitled to compensation. *Gilliland v. E. J. Bartells Co.*, 34 BRBS 21 (2000); see also *Ponder*, 24 BRBS 46. Thus, as with Section 3(e), Section 33(f) permits an offset only for disability benefits against sums received from third parties apportioned to the disability claimant, and for death benefits against sums received from third parties apportioned to the death claimant, after the death of the employee. See *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000).

Admittedly, the language of Section 14(j) is broader than the other credit provisions, stating: Alf 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)(emphasis added). However, the Board has previously had occasion to interpret this language of Section 14(j) in context within the framework of Section 14. In *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220

⁵This portion of the Ninth Circuit=s decision in *Force* was not affected by the Supreme Court=s decision in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). In *Yates*, the Supreme Court held that the employee=s survivors cannot be Apersons entitled to compensation@ within the meaning of Section 33(g), 33 U.S.C. '933(g), prior to the employee=s death, as a claim for death benefits does not arise until the death of the employee. The *Yates* court specifically declined to rule on the interpretation of Aperson entitled to compensation@ under Section 33(f). Subsequently, in *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197 (CRT) (9th Cir. 2000), the Ninth Circuit, interpreting Section 33(f), held that a widow=s right to death benefits does not vest until the employee=s death, when she first became Aperson entitled to compensation,@ and that therefore employer was not entitled to offset against its death benefits liability any recovery she received from third parties prior to the employee=s death.

(1993), employer sought a credit for an overpayment of disability benefits for one injury against its liability for disability benefits for a subsequent, unrelated injury. The employer therein made the argument that Section 14(j) is a broad provision, which does not limit itself to any particular compensation for any particular injury. The Board looked to Section 14 as a whole, in order that the section could be interpreted consistently, within the rules of statutory construction. The Board noted that Section 14(b) states that the first installment of compensation is due on the fourteenth day after the employer has knowledge of the injury or death, and that Section 14(d) provides that an employer's controversy of a claim is due on or before the fourteenth day after it has knowledge of the alleged injury or death. Moreover, pursuant to Section 14(g), an employer's notice of final payment of compensation shall state the date of the injury or death. The Board held in *Vinson* that the plain language of Section 14 references a *single* compensable injury. *Vinson*, 27 BRBS at 223. The Board further stated that a payment could not rationally be deemed an advance for an event that had yet to occur. The Board therefore held that employer was not entitled to credit overpayments from the first injury against its liability for benefits for the second injury. *Id.*

As applied to this case, subsections (b), (d), and (g) of Section 14 refer to injury or death in the disjunctive, thereby denoting that separate action is required by employer on claims for disability and for death. This is consistent with the law discussed above regarding the separate nature of claims for disability and for death benefits, and the principle that disability and death claims involve separate and distinct rights and beneficiaries. Moreover, it is consistent with the case law interpreting the former Section 14(m) and the significance of the disjunctive *or* in that section. *Hitt*, 131 F.2d 233; *Norton*, 105 F.2d 122; *Int'l Mercantile Marine Co.*, 19 F.Supp. 907. Furthermore, the fact that the disability and death benefits were awarded at the same time does not detract from the separate nature of the respective claims. The disability benefits therefore cannot be viewed as an advance payment on the subsequent death claim. Consistent with *Vinson*, and interpreting Section 14 as a whole, we hold that employer may not offset excess disability payments against its liability for death benefits pursuant to Section 14(j).

We reject employer's remaining argument, that it should be granted an offset based on the spirit of Section 14(j) and the principles of equity and fairness, because otherwise it has no recourse to recoup the overpayment. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has rejected a weighing the equities approach under Section 14(j) in holding that overpayment of compensation may not be used to offset an attorney's fee award. *Guidry v. Booker Drilling Co.*, 901 F.2d 485, 23 BRBS 82(CRT) (5th Cir. 1990).

In sum, we reject employer's contention that it is entitled to offset excess disability payments against its liability for death benefits pursuant to Section 14(j). It is well established that disability and death claims are based on distinct rights of distinct

individuals. *Nordahl*, 842 F.2d at 785, 21 BRBS at 43(CRT). Thus, like state or third-party recoveries which are offset only against Alike@ benefits, *i.e.*, benefits for the disability claimant against disability benefits due under the Act, and benefits for the death claimant against death benefits due under the Act, advance payments of disability benefits cannot offset future liability for death benefits. Therefore, we affirm the administrative law judge's denial of a credit to employer under Section 14(j).

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge