VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

CHRISTOPHER C. LYNCH, Claimant

Opinion by WILDER
Deputy Commissioner

v. VWC File No. 174-23-12 AUG 20 2007

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, Employer
-Self-Insured-

John H. Klein, Esquire - BY PRIORITY MAIL
MONTAGNA, KLEIN & CAMDEN, LLP
for the Claimant.

Benjamin M. Mason, Esquire - BY PRIORITY MAIL
MASON, MASON, WALKER & HEDRICK, PC
for the Defendant.

Hearing before Deputy Commissioner WILDER in Hampton, Virginia on August 10, 2007.

**PRESENT PROCEEDING**

This case is before the Commission on the employer's March 5, 2007 application, alleging that the claimant has received the maximum amount of compensation allowed by §65.2-518 of the Virginia Workers' Compensation Act (the Act) for his March 11, 2004 industrial accident. The employer seeks to terminate the Commission's April 17, 1998 award of compensation for temporary total disability.

**PRIOR PROCEEDINGS**

The employer did not initially accept the claimant's March 11, 1994 accident as compensable under the Act, prompting him to file an April 12, 1995 claim that was the subject of an April 10, 1998 hearing and April 17, 1998

Opinion by Deputy Commissioner Elizabeth Phillips. At the hearing, the employer acknowledged that the claimant had suffered a compensable injury by accident while earning an average weekly wage of $639.23, that the Commission could enter an award for all payments of compensation the employer had previously made pursuant to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 et seq., and that the employer had not made any suitable employment available to the claimant after September 1, 1997. Deputy Commissioner Phillips determined that the claimant had made reasonable efforts to market his residual work capacity and entered an award of compensation for temporary total and temporary partial disability for various dates through May 5, 1997 as well as for temporary total disability beginning September 1, 1997 and continuing. Neither party requested review of this Opinion by the Full Commission.

By a letter dated March 3, 2003, the Commission advised that its records showed that the claimant "has now received the maximum 500 weeks of compensation benefits" and requested information confirming "the total amount of compensation paid in this case." The employer responded on March 24, 2003, attaching a copy of a Form LS-208 detailing the payments made under the LHWCA. Based on the employer's comment that the claimant was receiving "permanent total disability" under the LHWCA, the Commission entered a May 2, 2003 award that terminated the Commission's April 17, 1998 award, effective December 19, 2000, and entered an award of compensation for permanent total disability beginning December 20, 2000 and continuing. The

Commission then entered a May 8, 2003 amended award that corrected the claimant's compensation rate from $426.12 per week to $426.16 per week.

The employer requested review of this award by the Full Commission. On June 10, 2003, the Commission vacated the May 8, 2003 award. Neither party appealed the decision of the Full Commission to the Court of Appeals.

**DEFENSES**

The claimant defends the employer's application on the grounds that the employer has not paid the maximum amount of benefits allowable under §65.2-518 of the Act and that the employer is not entitled to a credit for payments of compensation made under the LHWCA by the Special Fund of the United States Department of Labor.

**PRE-HEARING AND POST-HEARING EVIDENCE**

Since there were no medical issues between the parties, the requirement that they submit Designations of Medical Records was waived. The record was closed at the conclusion of the hearing on August 10, 2007.

**ISSUES**

Has Lynch received the maximum amount of compensation allowed under the Act? Should the employer receive credit for the payments of compensation made by the Special Fund?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

It is found that the employer is entitled to a credit for the payments of compensation made under the LHWCA by the Special Fund and that, therefore, the employer has met its obligation to pay the maximum amount of compensation set forth in §65.2-518 of the Act. The parties agreed regarding

the amount of compensation paid under the LHWCA but disagreed regarding the impact of the payments made by the Special Fund on the employer's obligation to pay compensation to the limits set forth in §65.2-518. Section 65.2-520 governs credits that an employer may take against its liability for compensation under the Act and reads as follows:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation. . .

In Moore v. Virginia International Terminals, Inc., 22 Va.App. 396, 470 S.E.2d 574 (1996), aff'd 256 Va. 46, 486 S.E.2d 528 (1997), the Court of Appeals held that an employer who has made payments of compensation under the LHWCA is entitled to a credit against awards entered under the Act in the total amount of benefits paid under the LHWCA. The Commission, noting the Act's policy against double recoveries, held in Dodson v. Newport News Shipbuilding & Dry Dock Company, 77 OWC 282 (1998) that an employer who has made payments of compensation under the LHWCA may take an immediate credit against any award entered under the Act. In Emerson v. Newport News Shipbuilding & Dry Dock Company, VWC File No. 180-10-32 (September 24, 2001), the Commission wrote that "there is no question but that the employer is entitled to a dollar for dollar credit against its liability under the Act for any payments made under the LHWCA. . ., in this case of monies paid through the Special Fund."

The Commission in Emerson was not directly confronted with the issue whether an employer may take a credit for payments made under the LHWCA by the Special Fund but rather made this statement in connection with the issue presented about whether the employer had taken the proper steps to collect its credit. Nevertheless, given the Act's policies against double recoveries, see also Bay Concrete Construction Company v. Davis, 43 Va. App. 528, 600 S.E.2d 144 (2004), and in favor of granting credits for payments made under the LHWCA, it is found that the employer should receive a credit for the payments made under the LHWCA by the Special Fund. Given this finding, the employer has met its obligation of paying the maximum amount of benefits set forth in §65.2-518.

Therefore, the employer's March 5, 2007 application is granted, and the Commission's April 17, 1998 award is hereby terminated, effective beginning February 26, 2007. Medical benefits pursuant to §65.2-603 shall continue for as long as necessary.

An attorney's fee of $500.00 is hereby awarded to John H. Klein, Esquire, for legal services rendered on behalf of the claimant and shall be collected directly from the claimant.

This case is ordered removed from the hearing docket.

**REVIEW**

**You may appeal this decision by filing a request for review with the Commission within 20 days of receipt of this Opinion.**

cc: Christopher C. Lynch
Newport News Shipbuilding & Dry Dock Company