RES JUDICATA, FULL FAITH & CREDIT, ELECTION OF REMEDIES

The Board rejected employer's argument that the administrative law judge erred in failing to give full faith and credit to the Maryland Workmen's Compensation Commission's finding that claimant did not have an accidental injury arising out of and in the course of his employment. Employer had contended that claimant's claim under the D.C. Act was barred because both the Maryland and D.C. workmen's compensation statutes require such a showing in order to establish entitlement to compensation. Employer, however, failed to establish that claimant has the same burden of proof under both statutes for establishing an injury arising out of and in the course of employment. In addition, the Board noted that the Maryland Commission's finding was stated in summary fashion and did not indicate whether its determination represented a legal conclusion or factual findings; only the latter must be given the same *res judicata* effect in the forum state as they have in the rendering state. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980). The Board therefore rejected the argument that this summary conclusion would bar a subsequent determination of causation under the legal standard applicable in D.C. *Smith v. ITT Continental Baking Company*, 20 BRBS 142 (1987).

The Board rejects employer's contention that claimant's Longshore Act claim is barred by the doctrine of election of remedies based on claimant's receipt of an award under Louisiana law. The doctrine precludes a litigant from pursuing a remedy which, in a prior action, he rejected in favor of a simultaneously available alternative remedy. It generally does not apply to simultaneous remedies under the Act and state law, *see Sun Ship*, due to the crediting of one recovery against the other. Federal law preempts state law even if the state law contains "unmistakable language" making its remedy exclusive. *Munguia v. Chevron, U.S.A., Inc.,* 23 BRBS 180 (1990), *aff'd on recon. en banc*, 25 BRBS 336 (1992), *aff'd on other grounds,* 999 F.2d 808, 27 BRBS 103 (CRT), *reh'g denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied,* 511 U.S. 1086 (1994).

For the reasons stated in *Munguia*, 23 BRBS 180, the Board rejects employer's contention that claimant's settlement of his state claim precludes his claim under the Act. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated in part on other grounds on recon.*, 24 BRBS 63 (1990).

The Board rejected employer's contention that claimant's prior settlement of his FELA action barred his claim under the Act under the doctrines of *res judicata*, full faith and credit and election of remedies. The Board held that the doctrines of *res judicata* and full faith and credit were inapplicable, as the parties never actually litigated the FELA action, and claimant's longshore claim and FELA action are two distinct causes of action. The Board held that the doctrine of election of remedies did not apply to bar claimant's longshore claim, as the Act does not preempt simultaneous remedies under other statutes. *Wilson v. Norfolk & Western Ry. Co.*, 32 BRBS 57 (1998), *rev'd mem.,* 7 Fed. Appx. 156 (4th Cir. 2001).

The Fourth Circuit holds that the doctrine of election of remedies (*i.e.*, situations where an individual pursues remedies that are legally or factually inconsistent) bars a claimant who has fully recovered under the FELA from pursuing a claim under the Longshore Act for the same injury. As claimant's FELA action was concluded years earlier, he is not in need of the relatively quick proceedings available under the Longshore Act. *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000)**.**

The Ninth Circuit holds that a claimant, whose benefits under the Act are barred pursuant to Section 33(g) for failure to obtain employer's prior written approval of a third party civil action, is not precluded from seeking workers' compensation benefits under state law for the same injury. The court rules that claimant's pursuit of California state workers' compensation benefits does not frustrate the purpose behind Section 33(g), which acts to "protect the rights of employers from unfairly low third-party settlements." Because permitting benefits under California law in this instance "does not act as an obstacle to Congress' purpose" in enacting Section 33(g), the Act's forfeiture provision does not preempt state workers' compensation law. *Service Engineering Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996).

The Board affirmed administrative law judge's rejection of application of doctrines of full faith and credit and collateral estoppel, based on California workers' compensation decision, to Longshore case. Extent of disability and commencement of benefits are mixed questions of fact and law, and collateral estoppel effect can only be given to such questions when the legal standards are the same under California law as they are under the Longshore Act. Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

A Louisiana state court judgment holding that claimant was a "maritime employee" under the Longshore Act, and that there was no negligence on the part of vessel owner, precluded claimant from litigating a Longshore claim in federal court under principle of res judicata: both actions arose from the same incident, and the parties and the remedy sought are identical. Sider v. Valley Lines, 857 F.2d 1043 (5th Cir. 1988).

Under principle of collateral estoppel, relitigation of an issue necessarily and actually litigated in a prior adjudication is only precluded in a subsequent case where the parties or their privies had a full and fair opportunity to litigate the issue. Such "full and fair opportunity' is not present where the applicable legal principles or standards of proof do not remain the same from the prior to the subsequent proceeding. (Federal cases cited). Alexander v. Island Creek Coal Co., 12 BLR 1-44 (1988) (black lung case).

The Board rejects claimant's contention that his Jones Act suit determined that there was coverage under the Act and that this finding must be given collateral estoppel effect. Although the suit necessarily raised the issue of whether claimant was a seaman or a ship repairman potentially covered under the Act, the issue of situs was never litigated in district court and was not necessary to its determination. The doctrine of collateral estoppel therefore is inapplicable. Kollias v. D & G Marine Maintenance, 22 BRBS 367 (1989), rev'd on other grounds, 29 F.3d 67, 28 BRBS 70 (CRT) (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995).

The court held that because the Board affirmed a denial of medical expenses, its reversal of the administrative law judge's finding that claimant was ineligible is dicta and is not entitled to collateral estoppel effect because it was not essential to the judgment. Bath Iron Works Corp. v. Coulombe, 888 F.2d 179 (1st Cir. 1989).

The Board rejects employer's contention that the Director is barred from raising the issue of Section 8(f)(3) at a second hearing by the doctrines of res judicata and collateral estoppel. The administrative law judge sufficiently narrowed the scope of his first decision so as to clarify that he was not deciding the Section 8(f)(3) issue. Thus, as the issue was not fully and fairly litigated at the first hearing, the doctrines do not bar the Director's raising of the issue. Ortiz v. Todd Shipyards Corp., 25 BRBS 228 (1991).

Collateral estoppel prevents the court from addressing employer's contention regarding the deputy commissioner's "excuse" under Section 14(e), as the issue was resolved in a prior proceeding and the resolution was necessary to the imposition and affirmance of statutory penalties. Ingalls Shipbuilding, Inc. v. Director, OWCP, 976 F.2d 934, 26 BRBS 107 (CRT)(5th Cir. 1992), aff'g Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37 (1991).

The Board affirms the administrative law judge's finding that Pac Fish is liable as claimant's employer under the doctrine of collateral estoppel. In this case, the state court applied the same standards to determine claimant's status as a borrowed employee that have been applied in cases arising under the Act. Since this issue was actually litigated and necessary to the outcome of the state suit, the administrative law judge correctly determined that employer could not relitigate its status before him. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board holds that the administrative law judge was bound to honor the contractual agreements regarding apportionment of the state claim in setting the amount of the Section 3(e) credit under the Full Faith and Credit clause of the Constitution. Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46 (1990).

Board rejects claimant's contention that employer is estopped from asserting claimant is not covered under the Longshore Act because it had taken the opposite approach in the state forum. The Board notes that it is unclear if the Second Circuit applies the doctrine of judicial estoppel. If it does apply, claimant failed to establish the necessary elements, namely (1) an unequivocal assertion of law or fact by a party in one judicial proceeding, (2) the assertion by that party of an intentionally inconsistent position in subsequent judicial proceeding, (3) in order to mislead the court and obtain unfair advantage as against another party. The party against whom the doctrine is invoked must have been successful in the prior proceeding or have received a benefit from its previously taken position. In this case, there is no evidence that employer intentionally mislead the state board regarding its coverage position. Lepore v. Petro Concrete Structures, Inc., 23 BRBS 403 (1990).

A private litigant who seeks to use the doctrine of equitable estoppel against the government bears a very heavy burden. The court sets out the four steps necessary for the doctrine to apply and additionally notes that the party claiming estoppel must show more than mere negligence, delay, inaction or failure to follow an internal agency guideline. The doctrine does not apply to the issue of the Section 14(e) "excuse" as employer does not allege that the deputy commissioner made more than an improvident decision regarding the scope of his authority. Ingalls Shipbuilding, Inc. v. Director, OWCP, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), aff'g Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37 (1991).

The Board affirms the administrative law judge's finding that claimant cannot collaterally attack the judgment of a bankruptcy court that employer is entitled to interest on the amount of its Section 33(f) lien paid out of bankruptcy proceeds. Claimant did not challenge the distribution at the time it was made and cannot use another forum to seek redress. *Hudson v. Puerto Rico Marine, Inc.,* 27 BRBS 183 (1993), *aff'd mem.*, 93-3375 (11th Cir. Nov. 16, 1994).

The Board rejects employer's contention that collateral estoppel or *res judicata* applies to bar relitigation of the issue of the work-relatedness of claimant's hypertension. The issue was not previously litigated; thus one of the prerequisites to the invocation of collateral estoppel is not met. *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1985) (*en banc*) (Brown & McGranery, JJ., dissenting), *aff'g on recon.*, 27 BRBS 80 (1993)(McGranery, J., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP,* 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998).

The Ninth Circuit rejects employer's contention that collateral estoppel applies to bar claimant's action as a "seaman" under the Jones Act where claimant previously recovered as a "non-seaman" under the LHWCA; the court held that claimant is not estopped from bringing a Jones Act claim where the jurisdictional issue was not previously litigated and there was no express finding that claimant was not a "master or member of a crew" for purposes of the LHWCA. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995).

The Board affirms the administrative law judge's finding that employer may not assert the doctrine of collateral estoppel to a statement in a state court judgment that the court was notified that a third-party suit was amicably resolved. The court's statement is not unambiguous evidence that the parties actually executed a settlement, nor does it establish that the issue before the administrative law judge, namely the existence of a third-party settlement, was actually litigated and decided by the Florida court. Accordingly, the administrative law judge properly found that the instant claim is not barred pursuant to Section 33(g) based upon the doctrine of collateral estoppel. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

The doctrine of full faith and credit applies to judgments and not to judicial findings within a judgment. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

Section 23(a) provides that the administrative law judge is not bound by formal rules of evidence in admitting and considering evidence in cases arising under the Act. Thus, the administrative law judge in this case had greater latitude to admit evidence than did the district court, which denied the testimony of claimant’s expert pursuant to Rules 702 and 703 of the Federal Rules of Evidence. As the administrative law judge thus had different evidence before him, the district court’s decision on the issue of causation need not be given collateral estoppel effect. *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).

The First Circuit holds that the Longshore Act award is barred by collateral estoppel, having determined that the federal administrative law judge should have given collateral estoppel effect to the state workers’ compensation commission’s finding that claimant’s work injury had no permanent effect on claimant’s condition. The court rejected claimant’s argument that differences in burdens of proof and in the substantive standards under the state and federal compensation schemes make collateral estoppel inappropriate in this case; the court ruled, first, that employer had a lighter burden of proof under Section 20(a) than in the state proceeding and, second, that differences in the substantive legal standards have no bearing on the factual question of whether the work incident caused permanent injury. *Bath Iron Works Corp v. Director, OWCP [Acord],* 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

The Board reversed the administrative law judge's finding that collateral estoppel precludes claimant from litigating the issue of the extent of disability under the Longshore Act, after having brought a claim under Maine law, where the allocations of the burdens of production and proof differ materially under the two schemes. Employer's burden of establishing suitable alternate employment under the Longshore Act is greater than its burden of establishing claimant's ability to work under the state act, and claimant bore a higher burden of establishing his inability to perform any work under state law than that required under the Longshore Act. The case distinguishes *Acord,* 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997). *Plourde v. Bath Iron Works Corp.,* 34 BRBS 45 (2000).

The Board rejected claimant's argument that the administrative law judge selectively gave collateral estoppel effect to state proceedings which were adverse to him, while not accepting the favorable findings of fact. While finding of facts from one forum must be accepted in another forum, the issue of extent of disability, presented here, is a mixed question of law and fact to which collateral estoppel effect is not given due to differing burdens of proof. *Plourde v. Bath Iron Works Corp.,* 34 BRBS 45 (2000).

The Board holds that the administrative law judge erred in finding that claimant is collaterally estopped from raising the issue of Section 49 discrimination under the Act by the district court's judgment in claimant's ADA lawsuit. As the finding that is central to the court's dismissal of the ADA action bears no relationship to the issues presented by the Section 49 claim, collateral estoppel does not apply. *Dunn v. Lockheed Martin Corp., 33* BRBS 204 (1999).

The Board reversed the administrative law judge's determination that collateral estoppel bars claimant's claim for death benefits. In this case, claimant's stepmother, decedent's widow, filed and lost her claim for death benefits on the ground that decedent's death was not compensable under the Act. Claimant thereafter filed a claim for death benefits on her own behalf. The Board discussed concepts of "privity" developed in case law, including "virtual representation," and held that claimant is not in privity with her stepmother. Therefore, she is not barred by collateral estoppel or *res judicata* from having her claim heard on the merits, despite the fact that the compensability of the same death is at issue. The Board remanded the case for a hearing on the merits. *Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003).

The Board affirmed the administrative law judge's finding that the first administrative law judge's decision regarding the employee's disability claim contains no findings that are binding with regard to the issue of coverage in the claim for death benefits. From the decisions regarding the *inter vivos* claim, it is clear the sole issue that was actually litigated was whether Section 33(g)(1) barred that claim. Thus, the issue pertinent to the claim for death benefits, *i.e.*, whether decedent was a member of a crew excluded from coverage under Section 2(3)(G) was never actually litigated in the first proceeding. Consequently, the doctrine of collateral estoppel does not apply to the coverage issue raised in this case. *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd,* 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The Second Circuit held that employer was not collaterally or judicially estopped from "relitigating" the issue of the decedent's coverage under the Act. The court held that, since the parties' stipulation concerning the scope of the Act was limited to the decedent's disability claim, employer was not taking an "inconsistent" position by now asserting, as a defense to claimant's survivor's claim, that the decedent was not covered. The court observed, as did the administrative law judge and Board, that the parties merely submitted a non-binding stipulation assuming that coverage existed for the narrow purpose of allowing the administrative law judge to resolve employer's motion to dismiss the claim under Section 33(g). Thus, for purposes of collateral estoppel, the issue was never "actually litigated," and for purposes of judicial estoppel no one was "misled" by the parties' stipulation in the original disability claim proceeding. *Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 45 (2003).

The Board rejected employer's contention that claimant is estopped from receiving compensation under the Act based on the finding by a hearing officer for claimant's prior state compensation claim that he voluntarily retired. The hearing officer's finding is *dicta*, and thus does not preclude claimant from litigating the issue of his entitlement to benefits under the Act. *Dicta* is not entitled to collateral estoppel effect because the finding was not essential to the prior judgment. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

The Ninth Circuit holds that in order to apply the doctrine of estoppel four elements must be met: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or he must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his own detriment. The court reject's claimant's contention that employer is estopped from seeking a reduction in claimant's benefits pursuant to Section 22 because the parties had reached a settlement under Section 8(i). The court noted that there was no settlement under Section 8(i), and thus there was no reliance on employer's conduct to claimant's detriment. *Rambo v. Director, OWCP,* 81 F.3d 840, 843, 30 BRBS 27, 29 (CRT) (9th Cir. 1996), *aff'd and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997).

The Board rejected employer's contention that claimant should be estopped from contesting employer's entitlement to a Section 33(f) offset for amount received in third-party settlements by non-dependent children based on representations contained in Form LS-33. There is no evidence to support employer's assertion that it relied solely on the information on the forms when it approved the settlements. Moreover, there is no evidence that employer was ignorant of the full contents of the settlement agreements. Thus, the necessary elements for estoppel are not present. *Henderson v. Ingalls Shipbuilding, Inc.*, 30 BRBS 150 (1996).

In this case, the administrative law judge found that the doctrine of equitable estoppel applied to prevent claimant from proceeding with her claim for benefits. In *dicta*, the Board explained the requirements of equitable estoppel and showed how at least one of the elements, detrimental reliance, was missing from this case. Thus, the doctrine is not applicable. Although the Board found the administrative law judge erred in applying equitable estoppel, it held the error harmless as, in light of its determination that claimant's motion for modification was invalid in the context of the case, the issue of whether she was estopped from proceeding with her claim was moot. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002).

The Board affirmed the administrative law judge's finding that the doctrine of equitable estoppel does not apply to prevent employer from asserting a lack-of-coverage defense. In this case, claimant contended that employer's past payments of benefits under the Act estopped employer from denying coverage for this injury. Equitable estoppel does not apply because claimant did not rely to her detriment on those past payments. Rather, claimant filed claims for benefits under both the Longshore Act and the state act, thereby protecting her rights under state law should her claim under the Act fail. *B.E. v. Electric Boat Corp.*, __ BRBS __ (2008).

The Board reverses the administrative law judge's finding that the claim for disability benefits is barred by equitable estoppel. The Board explained with respect to the detrimental reliance element that the party claiming equitable estoppel must show that its reliance on the adverse party's representation or conduct was reasonable; *i.e.,* that knowledge of the truth could not have been acquired with reasonable diligence. In this case, the Board held first that employer failed to offer sufficient evidence that it took any action in reliance on the employee's conduct to its detriment. Moreover, any detrimental reliance that employer might have shown was not reasonable. In the absence of a formal order approving withdrawal of the disability claim, employer could not have reasonably relied on the employee's representations or conduct to draw its conclusion that the claim was no longer open. *Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007).

The administrative law judge's finding that the employee's failure to actively and diligently pursue his entitlement to disability benefits for over twenty years led employer to believe that the disability claim was no longer live is essentially a finding that the claim is barred by the doctrine of laches. It is well established that this doctrine is not available to defend against claims under the Act. *Petit v. Electric Boat Corp.,* 41 BRBS 7 (2007).

The Board rejects employer's contention that claimant cannot contend he had no restrictions before the work injury given his allegation in the state claim that he was permanently totally disabled at an earlier date. Judicial estoppel is not implicated unless the first forum accepts the legal or factual determination alleged to be at odds with the position advanced in the current forum, and such fact was not determined in the state claim. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

The Board held that the second administrative law judge erred in not giving collateral estoppel effect to the previous judge's award to employer of an offset under Section 33(f) for the entire net amount of the third-party settlements entered into by decedent and his wife (claimant), rather than the amount decedent alone received for his personal injury action. The Board held that the fact that the first hearing was on the disability claim and the second was on the death claim does not mean a lack of identity of issues, as the same third-party settlements were at issue in each case. Moreover, employer asserted two inconsistent legal arguments in the two proceedings, resulting in an inequitable windfall to employer. This is in contravention of the doctrine of judicial estoppel. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90, 96 (1996).

As a defense against a claim by one carrier that another is liable, INA argued that the other carrier's entitlement to reimbursement for 12 years of benefits was barred by the doctrines of equitable estoppel, laches and/or "jurisdictional" estoppel. The Board held that, to the extent "jurisdictional" estoppel exists, it is either a form of equitable estoppel or judicial estoppel. In any event, none of the doctrines applies to bar claimant's entitlement to benefits. The Board's decision explains the inapplicability of each. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board affirmed the administrative law judge's denial of benefits inasmuch as claimant was injured in a car accident on a public road that is not a covered situs. The Board affirmed the administrative law judge's finding that employer was not somehow estopped from contesting Longshore coverage based on the state's denial of his state claim on the ground that his remedy was under the Longshore Act. The Board held that the action of the state cannot be imputed to employer as there is no identity of interest. Moreover, the employer could not have stipulated to coverage under the Act had it so desired, and jurisdiction cannot be conferred by consent, collusion, laches, waiver or estoppel. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem.,* 15 Fed. Appx. 169 (4th Cir. 2001).

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