BRB Nos. 12-0446
and 12-0446A

DAVID G. NEWTON-SEALEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ARMORGROUP (JERSEY) SERVICES, LIMITED	)	
	)	
and	)	
	)	
FIDELITY AND CASUALTY COMPANY OF NEW YORK c/o CNA GLOBAL	)	DATE ISSUED: 05/29/2013
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Michael W. Thomas and Vanessa N. Lichtenberger (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for employer/carrier.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2011-LDA-00387) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act or the DBA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The basic facts of this case are not in dispute, and the parties so stipulated. Claimant was hired to provide security for engineers working for Bechtel Corporation in Iraq.[1] He escorted them by vehicle to and from construction sites and was injured on March 23, 2004, as he employed defensive maneuvers and his vehicle was struck by a hostile's car and rolled over. Claimant sustained serious injuries to his neck, shoulder, back, chest, and head, as well as a traumatic brain injury with brain stem and frontal lobe dysfunction. Carrier paid claimant temporary total disability and medical benefits under the Act, and the parties agreed that claimant remained temporarily totally disabled as of March 5, 2012, when the stipulations were signed.

On April 30, 2007, claimant, a resident of the United Kingdom (UK), filed negligence and breach of contract lawsuits in the UK against three defendants, all of which claimant considered his "employer:"[2] ArmorGroup Services (Jersey) Limited (AG

[1]Claimant signed a one-year contract and commenced work on May 20, 2003.

[2]UK law permits an injured employee to sue his employer for breach of contract and negligence/duty of care. Claimant's lawsuit was premised on his claim that the vehicles selected by the employers for his job were inappropriate and, therefore, unsafe. Jt. Ex. 20. Under U.S. law, a claimant cannot bring suit in tort against his employer for work-related injuries. 33 U.S.C. §905(a); *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir. 2012), *cert. denied*, 133 S.Ct. 427 (2012).

Jersey),[3] ArmorGroup Services Limited (AG UK), and ArmorGroup International, PLC (AG PLC).[4] On February 14, 2008, the UK court issued an "Approved Judgment" which was not a "trial of action." The court found "there is no real prospect" of claimant's establishing an employment contract with AG UK or AG PLC, as his only employment contract was with AG Jersey. Jt. Ex. 17 at 6. However, the court found there was "a real prospect of the claimant succeeding" in establishing he was owed a duty of care. *Id.* at 9. That is, based on the evidence presented, the court found there was potentially a special relationship between claimant, AG UK, and AG PLC such that AG UK and AG PLC could have foreseen the dangers and had a special responsibility to him. *Id.* at 9-12. Therefore, the court dismissed the two moving defendants from claimant's breach of contract claim but did not dismiss them from his duty of care claim.

Following the court's decision, on December 16, 2009, claimant and the three defendants entered into a confidential settlement agreement. Jt. Ex. 18.[5] It is undisputed that the amount of the settlement was less than the amount to which claimant would be entitled under the Act and that, prior to the settlement, claimant did not inform, or obtain prior written approval from, the DBA carrier. Upon learning of the settlement, the DBA carrier paying claimant benefits asserted that AG UK and AG PLC were "third parties," invoked the Section 33(g), 33 U.S.C. §933(g), bar, and ceased benefits payments. Jt. Ex. 24; Stipulations.

The sole issue before the administrative law judge was whether any of the AG entities involved in the settlement was a "third party" within the meaning of the Act. The administrative law judge found that AG Jersey was claimant's employer by virtue of the

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[3]The offices for AG Jersey are on the island of Jersey in the English Channel off the coast of France. Jt. Exs. 1, 7.

[4]The offices for AG UK and AG PLC are located in Buckingham Gate, London. Jt. Exs. 7, 17. The proximity of the offices undoubtedly facilitated the work of the companies: some of the AG PLC officers also held positions on the Boards of Directors of the subsidiary companies. Jt. Exs. 7, 24.

[5]In May 2008, G4S PLC acquired the entire shareholding of AG PLC. As a consequence, at the time of the settlement, G4S controlled the ArmorGroup entities in their entirety. AG PLC became "ArmorGroup International, Ltd." and became a private company. AG Jersey was renamed "G4S International Employment Services, Ltd." Jt. Ex. 8 at 2. AG UK became "G4S Risk Management, Ltd." Jt. Exs. 17-18. Thus, the settlement was with the G4S entities, and representatives of each company (at least one of whom also previously represented AG Jersey) signed the agreement. Jt. Ex. 18. For continuity and ease of understanding, the "AG" references will be used throughout this decision.

actual employment contract, AG UK was a borrowing employer by virtue of claimant's having been recruited, hired and assigned by AG UK to perform duties required under its contract with Bechtel, and AG PLC was a distinct entity and, therefore, a third party by virtue of its "clear" inability to qualify under the borrowing employer test and the decision rendered by the UK court. Accordingly, the administrative law judge found that AG Jersey carried its burden of proof to establish the applicability of Section 33(g), and he dismissed claimant's claim. Decision and Order at 15-16.

Claimant appeals, contending the administrative law judge erred in finding that AG PLC was a third party and thus in applying Section 33(g) to bar the claim. AG Jersey responds, urging affirmance. BRB No. 12-0446. AG Jersey cross-appeals the decision, contending the administrative law judge erred in finding AG UK to be a borrowing employer. Claimant has not responded to the cross-appeal. BRB No. 12-0446A. The Director, Office of Workers' Compensation Programs (the Director), responds to both appeals via consolidated brief. She agrees that the administrative law judge properly found AG UK is a borrowing employer, albeit under a different test than the one used by the administrative law judge. She also asserts that the administrative law judge erred in applying the concept of issue preclusion and relying on the UK court decision to find that AG PLC was a third party, as the court did not litigate and decide the specific issue presented in this case. Thus, the Director urges the Board to remand the case for further findings as to AG PLC. AG Jersey replies, urging the Board to reject the Director's arguments.

Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if he determines that the third party may be liable for damages for his work injuries. In order to protect an employer's lien and offset rights against any third-party recovery, 33 U.S.C. §933(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in his favor, or he must obtain his employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g).[6] Pursuant to Section 33(g)(1), prior written approval of

[6]Section 33(g), 33 U.S.C. §933(g) (emphasis added), states:

> (1) If the person entitled to compensation (or the person's representative) *enters into a settlement with a third person* referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall

the settlement is necessary when the person entitled to compensation enters into a settlement with a third party for less than the amount to which the claimant is entitled under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 26 BRBS 49, 53(CRT) (1992); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281. As Section 33(g) is an affirmative defense, the employer bears the burden of proving that the claimant entered into a fully-executed settlement with a third party without obtaining prior written approval from it and its carrier.[7] *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Failure to obtain prior written approval results in the forfeiture of disability and medical benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b).

Claimant acknowledges that: he is a "person entitled to compensation;" he entered into a settlement with the three defendants in 2009 for the same injuries for which he would be entitled to benefits under the Act; and he settled those claims for an amount less than the amount he would be entitled to under the Act without obtaining prior written approval from carrier. Thus, if any of the defendant AG entities is a "third party" under the Act, Section 33(g)(1) applies to bar claimant's claim under the Act. Claimant argues that none of the AG companies is a "third party."

A brief explanation of the AG corporate relationship is warranted before we address the issues. Founded in 1981, AG UK provided high-grade security to government and commercial clients. In 2003, AG UK was subject to a management buyout and became an indirectly wholly-owned subsidiary of AG PLC. AG UK

> be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer *of* any settlement obtained from or judgment rendered *against a third person*, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

[7]As the plain language of Section 33(g)(1) states that an employer is liable for compensation "only if written approval of the settlement is obtained from *the employer and the employer's carrier*, before the settlement is executed," the Board has held that the Act requires the claimant to obtain the prior written approval of both the employer and its carrier. *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004).

contracted with Bechtel to provide its engineers security services in Iraq, obtained the necessary DBA workers' compensation insurance, and contracted with AG Jersey, another indirectly wholly-owned subsidiary of AG PLC, to supply the security personnel to meet the Bechtel obligations. AG Jersey then contracted with AG UK to recruit and interview potential employees in its London office; the employees would sign contracts with AG Jersey, making it their official employer. AG PLC is the holding/parent company and sole shareholder of the AG subsidiaries; collectively, they are often referred to as "ArmorGroup."

Section 33(g) is designed to prevent a claimant from unilaterally bargaining away funds to which his employer might be entitled. *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). It provides protection to the employer when a claimant settles a tort suit for damages with a third person for the same injury for which he is entitled to benefits under the Act.[8] 33 U.S.C. §933. The question in this case is whether any of the AG entities constitutes claimant's "employer" or is instead a "third party" with which claimant settled his suit for damages. The parties agree that AG Jersey is claimant's employer, and not a third party, due to the employment contract between them. Decision and Order at 14; Jt. Ex. 1. As the administrative law judge found that AG Jersey is not a third party, claimant's settlement with it does not invoke the Section 33(g) bar.

In its cross-appeal, AG Jersey contends the administrative law judge erred in finding AG UK to be a borrowing employer and, therefore, not a third party. It asserts that AG UK is not a borrowing employer under any of the employer-employee tests and that the administrative law judge failed to explain how he reached his decision. Moreover, it argues that, as claimant's supervisors were AG Jersey's employees, AG Jersey, not AG UK, controlled operational issues. The Director recommends rejecting AG Jersey's contention, as she agrees with the administrative law judge's result that AG UK is a borrowing employer, but states that his analysis is more appropriate for application of the "relative nature of the work" test than the "borrowed employer" test he purported to use.

After considering the evidence, the administrative law judge stated that claimant and his co-workers were of the impression that they worked for "ArmorGroup" and did not appreciate any distinction among the entities. Although Mr. Beese and Mr. Dulake, Directors on Boards of two of the entities, stated that employees are specifically informed that they work for AG Jersey, the administrative law judge credited the statements from claimant and his co-workers, as well as communications from directors and attorneys,

[8]Section 2(1) of the Act, 33 U.S.C. §902(1), provides: "The term 'person' means individual, partnership, corporation, or association." It is clear that any of the ArmorGroup entities could be a "third person." *See generally Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting).

and found that the entities were not distinguished and were often referred to as "ArmorGroup." Decision and Order at 14; *see* Jt. Exs. 10-16, 26, 29, 30-33. The administrative law judge concluded that, other than issuing payroll checks, AG Jersey did very little as far as the contract with Bechtel was concerned. He found that the workers and supervisors were nominal employees of AG Jersey, but that operational control was exercised by AG UK. Decision and Order at 14-15. Although the employees' expense reports were labeled with the AG Jersey name, they were submitted to AG UK for processing, and the administrative law judge found that AG UK recruited, interviewed, hired, and assigned the employees, and other than being paid by AG Jersey (for tax reasons), he found they had no reason to believe they were anything but employees of AG UK. *Id.* at 15. Thus, although claimant was a *de jure* employee of AG Jersey by virtue of the contract with it, the administrative law judge found "that the evidence establishes that under the Act, AG UK was a borrowing employer and was not a third party under Section 33(g)."[9] *Id.*

In the section of his decision labeled "Law," the administrative law judge discussed only the *Ruiz* test, stating that application of the nine-part test determines whether there is a borrowing employer.[10] Decision and Order at 6. The administrative law judge did not specifically apply the facts of this case to the *Ruiz* test factors; rather, he discussed the issue in general terms, relying heavily on several facts: AG UK recruited and interviewed potential employees and executed their employment

[9]Since there are situations when there may be more than one "employer" under the Act, the finding that AG Jersey is claimant's "employer" does not preclude AG UK and/or AG PLC from also being "employers" under the Act. *Claudio v. United States*, 907 F.Supp. 581 (E.D.N.Y. 1995); *see also Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980).

[10]*Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *see also Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996) (the Board stated the principal focus of *Ruiz-Gaudet* test is whether the employer was responsible for the working conditions experienced by the employee, and whether the employment was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto). Other factors include, *inter alia*, who furnished the tools, paid the employee, could fire the employee, and whose work was being performed. *See* Decision and Order at 6.

contracts;[11] claimant and his co-workers reasonably believed that they were working for ArmorGroup; and no one involved in the case, from directors to attorneys to employees, distinguished among the companies until the UK litigation commenced. *Id.* at 14-15.

In addition to the *Ruiz* test, the Board and courts have used several other tests to address borrowed employee relationships: the "right to control" test,[12] the "relative nature of the work" test,[13] and the Restatement (Second) of Agency test.[14] Additionally, the United States Courts of Appeals for the Fourth and Eleventh Circuits have adopted their own tests. *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116, 45 BRBS 47(CRT) (11th Cir. 2011) (three criteria: whether the employee consented to employment by the borrowing employer; whether the work the employee performed was that of the borrowing employer; and whether the borrowing employer had the right to control the details of the employee's work); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000) ("authoritative direction and control" test requires a court to determine whose work is being performed by determining who has the power to control and direct the individual in the performance of his work). The Board has held that an administrative law judge must evaluate the evidence and apply whichever test he determines is best suited to the facts of a particular case. *See Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981) (Miller, J., dissenting); *see also American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001) (court noted the Board's policy, discussed the various tests, and found that the "relative nature of the work test"

[11]The administrative law judge acknowledged that AG UK's performance of these services was pursuant to a contract between AG UK and AG Jersey. Decision and Order at 15.

[12]The "right to control details of work" test requires application of four factors: 1) the right to control the details of the job; 2) the method of payment; 3) the furnishing of equipment; and 4) the right to discharge the employee. *See Burbank v. K.G.S., Inc.*, 12 BRBS 776 (1980).

[13]The "relative nature of the work" test requires a two-part analysis, examining (1) the nature of the claimant's work and (2) the relation of that work to the regular business of the employer. *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356.

[14]The Restatement (Second) test includes, *inter alia*, the extent of control, the kind of work done, the skill needed for it, the method of payment, and the length of time worked. Restatement (Second) of Agency, §220, Subsection 2; *see Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141, 144 (1981) (Miller, J., dissenting).

was best suited to the facts).[15]

The administrative law judge did not address whether the *Ruiz* test is the one best suited to the facts of this case, and he did not explain his findings in terms of the test factors. Moreover, he did not discuss whether the contracts between AG Jersey and AG UK affected the employer-employee relationship.[16] Because the administrative law judge's analysis of the facts of this case in terms of the employer-employee relationship tests is vague and, therefore, unreviewable, we vacate his finding that AG UK is a borrowing employer. We remand the case for him to reconsider the issue, considering the pertinent law and facts and requiring AG Jersey/carrier to bear the burden of establishing that AG UK is not an employer of claimant.[17] *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). Although the Director urges the Board to affirm the finding that AG UK is a borrowing employer based on application of the "relative nature of the work" test, we decline to do so because the administrative law judge has not determined that this is the most appropriate test or applied it to the facts. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). On remand, if the administrative law judge finds that AG UK is a borrowing employer, it is a statutory "employer," and claimant's settlement with it was not with a

[15]This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit because the district director who filed the administrative law judge's decision is in New York. *McDonald v. Aecom Technology Corp.*, 45 BRBS 45 (2011).

[16]None of the contracts are in the record. AG Jersey states they are "confidential and cannot be disclosed." *See* AG Jersey's P/R and Brief at 21.

[17]Although the parties touched on arguments relating to Sections 4 and 5 of the Act, 33 U.S.C. §§904, 905, this case cannot be resolved by reference to a contractor-subcontractor relationship. Section 5(a) provides in part: "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." 33 U.S.C. §905(a). Although AG Jersey did not secure insurance, AG UK secured it for the benefit of AG Jersey, and Section 4(a) provides in pertinent part: "A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor." 33 U.S.C. §904(a); *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 17 BRBS 56(CRT) (5th Cir. 1985); *Rivera-Carmona v. United States*, 858 F.Supp. 295 (D.P.R. 1994) (court stated that 1984 Amendments rejected holding in *WMATA v. Johnson*, 467 U.S. 925 (1984), and eliminated the general contractor's tort immunity despite its having secured workers' compensation insurance on behalf of its subcontractor). Thus, AG UK's having secured insurance does not, itself, render it claimant's "employer."

third party, hence, Section 33(g) does not apply. If he finds that AG UK is not an employer, it is a third party and Section 33(g) potentially applies to preclude further benefits.[18]

AG PLC's status is also at issue. Claimant and the Director argue that the administrative law judge erred in basing his decision on UK law to find that AG PLC is a third party under the Act. They agree that his decision cannot stand and that he should have applied the law under the Act/DBA to determine whether AG PLC is an employer by applying the appropriate test. Claimant also suggests that the issue may be resolved by piercing the corporate veil to determine whether the three corporate entities are one.[19] Additionally, the Director argues that the administrative law judge's error was in applying a "collateral estoppel" or "res judicata"-type analysis to the findings made in the UK court decision to determine that AG PLC is a third party under the Act. Although claimant asserts that the administrative law judge's error warrants reversal of his decision, we agree with the Director that the case should be vacated and remanded for appropriate consideration, and we vacate the administrative law judge's finding that AG PLC is a third party.

The administrative law judge stated: "AG PLC, as a single discrete entity, clearly does not qualify as an employer under the borrowed servant analysis." Rather, he said, AG PLC's status:

> depends exclusively on its holding company relationship with AG UK and AG Jersey. The critical question is whether because of that relationship they are essentially one legal entity. The answer to that question requires application of United Kingdom law and was litigated by the parties in the courts of the United Kingdom.

Decision and Order at 15. The administrative law judge then found that AG PLC was a separate legal entity because the judge in the UK court found there was no contract between claimant and AG UK or AG PLC. Otherwise, if AG PLC was not a separate entity, he stated, the contract between claimant and AG Jersey would also link claimant

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[18]If the administrative law judge finds AG PLC to be an employer by virtue of "piercing the corporate veil," he should consider the applicability of those findings to AG UK, if necessary. *See infra* at 12-13.

[19]We reject AG Jersey's argument that claimant waived these issues by failing to raise them before the administrative law judge. Claimant raised the issues of whether AG UK and AG PLC fell into the category of borrowing employer by using the various tests, as well as the issue of whether AG Jersey, AG UK, and AG PLC were really a "single entity" based on a number of facts he set forth. *See* Cl. ALJ Brief at 6-17; Cl. Reply to Section 33(g) relief at 6-7; *see also* Decision and Order at 15 (the "critical question" is whether "they are essentially one legal entity").

to AG PLC. Further, the UK court found that, even had there been a contract between claimant and AG UK, the contract would not have extended to AG PLC. Thus, based on the contract issue discussion in the UK court decision, the administrative law judge concluded that the issue of AG PLC's status as an employer had been litigated and decided, and he concluded that AG PLC "stands apart from both AG UK and AG Jersey and is a third party under the Act" such that Section 33(g) applies. *Id.*

The administrative law judge's reliance on the UK decision to determine the employment relationship under the Act in this case is mistaken. Claimant filed breach of contract and duty of care claims under UK law against the entities he believed to be his employers. Jt. Ex. 20. Two of the "employers" filed motions for summary judgment, asserting there was no breach of contract or duty of care owed. The UK court addressed claimant's contentions and rejected his assertion that either AG UK or AG PLC had a contract with him. Specifically, the court stated that, although claimant may not have known with which entity he was signing a contract, the evidence was clear that it was AG Jersey, and internal arrangements among the entities did not give rise to any other intent to contract with claimant. As there was a contract with AG Jersey, the court stated there was no need to make any other party contractually liable to him. Jt. Ex. 17 at 6-7. Thus, the UK court dismissed the breach of contract claims against AG UK and AG PLC. With regard to the duty of care claim, however, the court found "there is a real prospect" that claimant could establish the entities owed him a duty of care based on either a reasonably foreseeable loss or on a relationship of proximity. *Id.* at 8. That is, the court found there was enough evidence for claimant to show he had a "special relationship" with AG UK and AG PLC such that they had a responsibility to him. *Id.* at 11-12. Therefore, summary judgment was denied on this claim.

Res judicata can apply only if: 1) the parties in the current action are the same or are in privity with the parties in the prior action; 2) the court that rendered the prior judgment was a court of competent jurisdiction; 3) the prior action terminated with a final judgment on the merits; and 4) the same claim or cause of action must be involved in both actions. *See, e.g., Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003); *Smith v. ITT Continental Baking Co.*, 20 BRBS 142 (1987). Under the principle of collateral estoppel, a party is barred from re-litigating an issue if: (1) the issue at stake is identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *See, e.g., Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995); *see also Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31BRBS 109(CRT) (1st Cir. 1997).

The UK decision is an interim decision and did not decide the merits of claimant's tort claims. Although the breach of contract claims were dismissed against AG UK and AG PLC, and it was a final decision in that respect, the absence of a contract with claimant does not preclude a finding that an entity is claimant's "borrowing employer."

See Langfitt, 647 F.2d 1116, 45 BRBS 47(CRT); *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *White*, 222 F.3d 146, 34 BRBS 61(CRT). Moreover, the duty of care claims were not dismissed and were not litigated; there was no specific finding as to whether either entity was an "employer" under the UK law; and no party raised the issue of whether AG UK or AG PLC was an "employer" under the Act. As the prerequisites for applying either res judicata or collateral estoppel are absent, neither principle can be applied in this case, and the administrative law judge's reliance on the UK court's decision to find that AG PLC is not claimant's employer is improper. *See generally Acord*, 125 F.3d at 22, 31 BRBS at 112(CRT); *Holmes*, 37 BRBS 27; *Ortiz v. Todd Shipyards Corp*., 25 BRBS 228 (1991); *Smith*, 20 BRBS 142. Additionally, as claimant asserts, the administrative law judge's summary statement that AG PLC "clearly" was not a borrowing employer was made without explanation and without addressing any factors of the various employment relationship tests. Accordingly, we vacate the finding that AG PLC is a third party as well as the application of Section 33(g) to deny claimant benefits. On remand, the administrative law judge should determine which employment relationship test best applies to the facts herein, apply the test, and determine whether AG PLC and claimant had an employer-employee relationship.

If the administrative law judge determines that AG PLC is not an employer under one of the tests, he should then consider claimant's alternate argument that the three ArmorGroup entities acted as one, which the administrative law judge referenced but did not address. That is, on remand, the administrative law judge should address whether the AG corporate structure should be disregarded so as to consider all three entities as one single entity, making them all claimant's employers. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1983);[20] *Heavin v. Mobil Oil Exploration & Producing Southeast, Inc.*, 913 F.2d 178 (5th Cir. 1990); *Davidson v. Enstar Corp.*, 860 F.2d 167, *rev'g on reh'g* 848 F.2d 574 (5th Cir. 1988); *Haas v. 653 Leasing Co.*, 425 F.Supp. 1305 (D.C.Pa. 1977); *Claudio v. United States*, 907 F.Supp. 581 (E.D.N.Y.

[20]In *Copperweld*, a case involving the Sherman Antitrust Act, the Supreme Court stated that "[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary." That is:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Copperweld, 467 U.S. at 771.

1995); *Levine v. Lee's Pontiac*, 203 A.D.2d 259, 609 N.Y.S.2d 918 (N.Y.A.D. 1994). If he finds that AG PLC is a borrowing employer or acted as a single entity with its subsidiaries such that the corporate structure should be disregarded, then it is a statutory "employer" and claimant's unapproved settlement with it does not invoke Section 33(g) because it is not a third party. If he finds that AG PLC is not an employer, it is a third party and Section 33(g) applies to preclude further benefits.

If the administrative law judge finds that all three AG entities were claimant's employers, AG Jersey argues that claimant would obtain double recovery, as he would have the settlement funds as well as being entitled to benefits under the Act. Therefore, it asserts two defenses in the alternative: 1) it is entitled to a credit as its situation is analogous to that of a vessel owner and it should be treated as if it were a third party; and 2) claimant elected to pursue a remedy against his employers in tort, as permitted by the UK law, and, having selected this remedy, he is precluded from also claiming benefits under the Act. It was unnecessary for the administrative law judge to address these arguments previously. If, on remand, the administrative law judge finds that all three companies were claimant's employers, he should address AG Jersey's alternate defenses and determine whether it established its entitlement to a credit to prevent double recovery[21] and/or to preclude claimant's recovery of benefits due to his election of

[21]AG Jersey correctly states that Section 33(f) would not apply if there was no third-party settlement. *See Alexander v. Director, OWCP*, 897 F.3d 205, 36 BRBS 25(CRT) (9th Cir. 2002). AG Jersey's argument that its situation is analogous to that of a vessel owner, such that it should be treated as a third party, enabling application of Section 33(f), is unavailing. There is no basis for extending Section 5(b) beyond vessel owners. 33 U.S.C. §905(b); *see generally Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995). Moreover, while it appears none of the Act's other credit provisions is applicable, the administrative law judge should address the credit/double recovery argument and make findings. 33 U.S.C. §§903(e) (credit for payments under another workers' compensation law), 914(f) (credit for advance payments of compensation); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 522, 18 BRBS 45, 55(CRT) (5th Cir. 1986) (*en banc*) (credit for compensation paid for a prior injury to the same scheduled body part); *Lee v. The Boeing Co., Inc.*, 7 F.Supp.2d 617 (D.Md. 1998) (Section 3(e)); *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002) (Section 14(j)). Although double recovery is generally to be avoided, it is not absolutely prohibited by the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004).

remedies.[22] In this regard, the administrative law judge should also consider the Director's contentions: first, that employer has the burden to prove the existence of a third-party settlement, and, in this case, the terms and conditions of the settlement have not been disclosed; and, second, that, in certain circumstances, the DBA may not necessarily be an employee's exclusive remedy. *See* Dir. Brief at 9-11.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[22]AG Jersey argues that, if all three entities are claimant's employers immune from tort liability under the Act, 33 U.S.C. §905(a), then claimant's election to sue them in tort under UK law constitutes an election of remedies which precludes his recovery under the Act. AG Jersey cites *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000), in support of its assertion, in which the court held that a claimant's election of a remedy under the Federal Employers' Liability Act precluded his subsequent recovery under the Longshore Act. In order to preclude recovery under the Act on this ground, AG Jersey would have to show, and the administrative law judge would have to find, that claimant pursued a remedy in the UK court that was factually or legally inconsistent with his claim under the Act. *See generally Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *cert. denied*, 490 U.S. 1035 (1989).