G.I.K. (Widow of K.H.K.) Claimant-Respondent v. WASHINGTON GROUP INTERNATIONAL and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE Employer/Carrier-Petitioners	)	BRB No. 06-0983 DATE ISSUED: 08/29/2007
T.Y.K. (Widow of M.S.K.) Claimant-Respondent v. WASHINGTON GROUP INTERNATIONAL and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE Employer/Carrier-Petitioners	)	BRB No. 06-0984 DECISION and ORDER

Appeals of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Mun Su Park, Upper Tumon, Guam, for claimants.

Roger A. Levy and Michael T. Quinn (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer, Washington Group International (WGI), appeals the Decision and Order (2005-LHC-00027, 00028) of Administrative Law Judge Alexander Karst rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the DBA or Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

K.H.K. and M.S.K. (the decedents), South Korean citizens, were killed while working for Ohm Electric (Ohm) in Iraq on November 30, 2003.[1] Ohm, a company incorporated in South Korea, was engaged in a partnership agreement with Shiloh International Group (Shiloh), a Philippine-based contractor, to provide personnel for the purpose of surveying power transmission lines and towers in Iraq. Shiloh, in turn, was a subcontractor of WGI, the prime contractor on a reconstruction project that was sponsored and administered by the United States Army Corps of Engineers. On December 15, and 16, 2003, the survivors of K.H.K. and M.S.K (claimants) respectively executed contracts with Ohm wherein its president, Mr. Seo, agreed to pay "consolation money" in exchange for the survivors' agreement that they "shall no longer charge [Mr. Seo] of any civil or criminal liability [*sic*]." Decision and Order at 2. Specifically, M.S.K.'s surviving spouse and two daughters received 310,000,000 Korean Wan (roughly $310,000), and K.H.K.'s surviving spouse received 235,000,000 Korean Wan (roughly $235,000).

[1] Decedents died of gunshot wounds, the victims of an apparent ambush attack on a highway near Tikrit, Iraq. Employer's Exhibit (EX) 5.

Claimants subsequently filed claims seeking benefits under the DBA. WGI did not dispute that claimants are entitled to death benefits under the DBA, but argued that claimants forfeited their rights to any compensation under the Act pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g).[2] Alternatively, WGI argued that it is entitled to a credit under Sections 33(f), 3(e), or 14(j) of the Act, 33 U.S.C. §§933(f), 903(e), 914(j), for the payments claimants received from Ohm. The administrative law judge found that claimants' claims are not barred by Section 33(g), and that employer is not entitled to a credit under Sections 33(f), 3(e), or 14(j) of the Act. He thus concluded, based on the parties' stipulations, that claimants are entitled to death benefits, payable by WGI, pursuant to Section 9 of the Act, 33 U.S.C. §909.

On appeal, WGI challenges the administrative law judge's characterization of the payments received by claimants from Ohm, and his consequent findings that Sections 33(g), 33(f), 3(e) and 14(j), are inapplicable. Claimants respond, urging affirmance.

WGI contends that the administrative law judge did not adequately address the nature of the payments which claimants received from Ohm. WGI first contends that it has met the requirements of Section 33(g), or alternatively Section 33(f), as the agreements in question, negotiated and executed without its prior knowledge or approval, explicitly state that the compensation was paid in order to release Ohm from liability for any further legal obligation.

Section 33(a), 33 U.S.C. §933(a), provides that if an injured employee "determines that some person other than the employer . . . is liable in damages" for the same disability or death, he need not elect between his compensation remedy and a third-party civil suit. Section 33 provides a method designed to foreclose the injured employee from receiving a double recovery by obtaining both benefits under the Act and civil damages from a successful negligence suit against a third party. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *see also Redmond v. Sea Ray Boats*, 32 BRBS 1, *vacated in part on other grounds*, 32 BRBS 195 (1998). Thus, Section 33(f) provides a crediting for any recovery, and Section 33(g) bars a claimant's entitlement to compensation under the Act where he enters into a settlement with a third party under Section 33(a) for an amount less than his compensation entitlement without obtaining employer's prior written consent or obtains a settlement or judgment for an amount greater than or equal to his entitlement without notice to employer. 33 U.S.C. §933(f), (g) (1994); *see Cowart*, 505 U.S. at 409, 26 BRBS at 49(CRT); *Redmond*, 32 BRBS at 2.

[2] WGI is deemed the employer in this case due to the failure of its subcontractors, Shiloh and Ohm, to secure compensation. 33 U.S.C. §§904(a), 905.

In *Redmond*, a case cited by the administrative law judge, the claimant was injured while working at Sea Ray Boats (Sea Ray), where he had been sent through a temporary employment agency, Norrell Temporary Services (Norrell). Claimant filed a state workers' compensation claim against Norrell and a claim for benefits under the Act against Sea Ray. Thereafter, claimant and Norrell settled the state claim without the prior approval of Sea Ray. The administrative law judge found that Sea Ray was liable for claimant's benefits as a borrowing employer; however, she concluded that the Section 33(g) bar was applicable, as claimant settled a third-party claim with Norrell and did not obtain prior approval from Sea Ray. On appeal, the Board reversed the administrative law judge's finding that the Section 33(g) bar was applicable, holding that the state workers' compensation claim against Norrell was neither a third-party claim nor a suit for civil tort damages brought against a third party requiring employer's prior approval. Rather, the claim was for state workers' compensation benefits, *see* 33 U.S.C. §903(e),[3] and it was filed against claimant's nominal employer, Norrell.[4] *Redmond*, 32 BRBS at 2.

Similarly, the administrative law judge found in this case that the payments made by Ohm to claimants do not fall within the provisions of Section 33 as they were not obtained from a third party as a result of a civil suit for tort damages. As in *Redmond*, the claimants obtained payments from an entity that was decedent's employer. *See generally Redmond*, 32 BRBS 1. It is undisputed in the instant case that Ohm was the decedents' direct employer, and it therefore cannot be deemed a third party. *Id.* The fact that WGI is responsible for the payment of benefits in this case is wholly due to the failure of its subcontractors, Ohm and Shiloh, to secure the payment of compensation. *See* 33 U.S.C. §§904(a), 905(a); *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Servs., Inc. v. Director*, OWCP, 87 F.3d 774, 30 BRBS 62(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996). WGI's liability cannot alter the employment relationship between Ohm and the decedents. Section 33 is premised on a suit in damages against a party "other than employer." 33 U.S.C. §933(a). Thus, as it is undisputed that Ohm was decedents' employer in this case, the payments made by Ohm to claimants cannot, as a matter of law, fall with the provisions of Section 33, as they

[3] Employer was entitled to a Section 3(e) credit against the state settlement. *Redmond*, 32 BRBS at 2-3.

[4] The Board noted that an issue in the case was which employer was liable – Norrell, as claimant's nominal employer, or Sea Ray, the borrowing employer. Although Sea Ray was held liable, Norrell was an employer in the case.

were not received from a third party. As Section 33 as a whole is inapplicable, we affirm the administrative law judge's findings that subsections (g) and (f) are also inapplicable.[5]

WGI asserts, in the alternative, that if Ohm is considered decedents' employer, then it should be entitled to a credit under either Section 3(e) or Section 14(j). With regard to Section 3(e), employer contends that the amounts paid to the families by Ohm were in contemplation of its liability under the Korean workers' compensation structure, as the payments made were precisely what would have been owed under that scheme.

Section 3(e) of the Act, 33 U.S.C. §903(e), provides an employer liable for benefits under the Act with a credit against disability or death benefits the claimant receives under another workers' compensation law for the same injury.[6] *See, e.g., D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993);

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[5] WGI cites *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), for the proposition that an employer can be deemed a "third person" within the meaning of Section 33 when the employee recovers funds from the employer in other legal proceedings. In that case, Bundens argued that Section 33(f) did not apply because an employer cannot be a "third person" within the meaning of Section 33(f). The court defined the question as whether an employer who settles a negligence suit under Section 5(b), when it is acting in its capacity as a vessel owner, is considered a third person under Section 33(f). In resolving the issue, the court held that the employer is a third party whenever the employee recovers funds from the employer as vessel owner in other legal proceedings. *Bundens*, 46 F.3d at 303 29 BRBS at 69(CRT); *see* 33 U.S.C. §905(b); *Bockman v. Patton-Tully Transp. Co.*, ___ BRBS ___, BRB No. 06-0593 (Apr. 27, 2007), slip op. at 5. Thus, the underlying basis for the court's holding that the employer was a "third person" under the Act was its dual capacity as both employer and vessel owner under Section 5(b). *Id.* Consequently, WGI's reliance on *Bundens* to establish its entitlement to a credit under Section 33(f) is misplaced as the claimants did not receive any payments from any employer as a vessel owner.

[6] Section 3(e) of the Act 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, Appendix (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). Section 3(e) of the Act is incorporated into the Defense Base Act. *Lee v. Boeing Co., Inc.*, 7 F. Supp. 2d 617 (D. Md. 1998).

Shafer v. General Dynamics Corp., 23 BRBS 212 (1990); *see also Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). Based on the administrative law judge's findings, which are supported by substantial evidence, the settlements between claimants and Ohm are not subject to the credit provision of Section 3(e). The administrative law judge found there is no credible evidence to establish that the payments made to claimants by Ohm were based on Korean, or "any other workers' compensation law." *See* 33 U.S.C. §903(e). The administrative law judge acknowledged that the testimony of Mr. Conklin and certain letters from Mr. Lee, the president of Shiloh, characterized these payments as having been "based on the Industrial Accident Compensation Insurance Act" of Korea. EX 11. He nevertheless rationally rejected this evidence as establishing that Section 3(e) applies, finding that employer did not establish that Mr. Conklin and/or Mr. Lee are qualified as experts on "workers' compensation matters in Korea." The administrative law judge also found that the fact that claimants unsuccessfully sought benefits under the Korean Industrial Accident Compensation Insurance Act after having received the payments from Ohm indicates that the amounts received in those settlements were distinct from any workers' compensation payments. Indeed, the Seoul Administrative Court denied claimant's workers' compensation claims on the grounds that Ohm had not met the requirements for coverage of workers dispatched abroad. EX 13. The administrative law judge thus concluded that the denial of Korean workers' compensation on the grounds of a lack of coverage established that the payments from Ohm were not workers' compensation payments. Decision and Order at 6. As the administrative law judge's findings are rational and supported by substantial evidence, his characterization of the Ohm settlements as not being "pursuant to any other workers' compensation law" is affirmed. 33 U.S.C. §903(e); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986). Consequently, the administrative law judge's finding that WGI is not entitled to a credit for those amounts under Section 3(e) is affirmed.

WGI further argues that if Ohm made the payments, and Ohm was decedents' "employer," then WGI is entitled to a credit for the advance payments of compensation under Section 14(j). Section 14(j) permits an employer who has made advanced payments of compensation to be reimbursed out of any unpaid installments of compensation due.[7] 33 U.S.C. §914(j); *see Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002); *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992); *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006); *LaRosa v. King & Co.*, 40 BRBS 29 (2006). We need not address WGI's specific contention

[7] 33 U.S.C. §914(j) states:

> 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.

because the Board has consistently held that an employer will not receive a credit under Section 14(j) unless it can show the payments were intended as advance payments of compensation. *See* 33 U.S.C. §902(12);[8] *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Van Dyke v. Newport News Shipbuilding*, 8 BRBS 388, 396 (1978); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321, 326 (1976). *See also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). The record is devoid of any evidence that these payments were intended as advanced payments of compensation under the Act. In contrast, the administrative law judge identifies the payments as "consolation money" paid to claimants to dissuade them from pursuing civil or criminal suits against Ohm. Decision and Order at 2; *see also* CX 1 at 2. Accordingly, as employer has not established that the Ohm payments were intended as advanced payments of compensation under the Act, we affirm the administrative law judge's finding that WGI is not entitled to a credit

[8] 33 U.S.C. §902(12) defines compensation as "the money allowance payable to an employee or his dependents as provided for in this chapter, and includes funeral benefits provided therein." 33 U.S.C. §902(12).

pursuant to Section 14(j), as it is rational, supported by substantial evidence and is in accordance with law.[9] *Mijangos*, 19 BRBS at 21; *Van Dyke*, 8 BRBS at 396.

Accordingly, the administrative law judge's Decision and Order is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge

[9] We also note, in contrast to employer's assertion that fundamental fairness warrants its entitlement to a credit, Section 14(j) does not provide an offset based on equitable principles. *Liuzza v. Cooper/T. Smith Stevedoring Co., Inc.*, 35 BRBS 112 (2001), *aff'd*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). Furthermore, we note that while double recovery is to be avoided, it is not absolutely prohibited by the Act. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000).