BRB Nos 07-0492
and 07-0492A

| | | |
|---|---|---|
| C.S. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| INGRAM BARGE COMPANY | ) | |
| AS SUCCESSOR TO | ) | |
| | ) | |
| ORSOUTH TRANSPORT COMPANY | ) | DATE ISSUED: 06/26/2008 |
| | ) | |
| and | ) | |
| | ) | |
| CAPITAL MARINE SUPPLY, | ) | |
| INCORPORATED | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| SIGNAL MUTUAL INDEMNITY | ) | |
| ASSOCIATION, LIMITED | ) | |
| | ) | DECISION and ORDER on |
| Carrier-Respondent | ) | RECONSIDERATION |

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

Jeremiah H. Sprague and Timothy J. Falcon (Falcon Law Firm), Marrero, Louisiana, for claimant.

Andre J. Mouledoux, Derek M. Mercer, and Jacques P. Degruy (Mouledoux, Bland, Legrand & Brackett LLP), New Orleans, Louisiana, for employer.

Peter S. Koeppel and Maurice E. Bostick (Best Koeppel, APLC), New Orleans, Louisiana, for carrier.

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

PER CURIAM:

Employer has filed a timely motion for reconsideration of that part of the Board's Decision and Order in *C.S. v. Orsouth Transport Co.*, BRB Nos. 07-0492/A (Feb. 28, 2008), remanding the case to the administrative law judge for findings regarding which of claimant's three injuries is the cause of his current disability and to then consider the applicability of Section 33(g), 33 U.S.C. §933(g). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant responds in opposition to employer's motion. We deny employer's motion for reconsideration for the reasons stated herein.

To recapitulate, claimant sustained head injuries as a result of three distinct work accidents occurring on February 6, 2001, and March 2, 2001, while employer was self-insured, and on September 16, 2002, while employer was covered by Signal Mutual Indemnity Association (Signal). Claimant alleged that he has a psychologically disabling condition as a result of these accidents which prevents him from returning to work. He thus filed a claim seeking permanent total disability and medical benefits under the Act. Claimant also filed a lawsuit in federal district court against Capital Marine Supply (Capital Marine), AEP Elmwood (AEP), Ingram Towing, and employer, for damages under the Jones Act, general maritime law, and Section 5(b) of the Act, 33 U.S.C. §905(b). The district court granted summary judgment for defendants Capital Marine, Ingram Towing, and employer, on the basis that claimant was not a seaman, thereby leaving the February 6, 2001, incident against AEP as the sole cause of action in district court.

On May 16, 2005, claimant and employer executed a settlement agreement in which claimant agreed to release all of his claims relating to past Longshore disability and medical benefits. As part of this agreement, claimant signed a formal release that included all three injuries against all of the defendants, including the vessel M/V MISSISSIPPI STAR, which was owned by Capital Marine. In exchange for claimant's release, employer agreed to pay claimant $86,044.12 in past compensation benefits, and $21,346.75 in past medical expenses.[1] Claimant obtained employer's approval of the settlement agreement but did not obtain Signal's approval. The parties also agreed to

[1] We note that the parties did not attempt to have this agreement approved, as required, pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). *See* 33 U.S.C. §916.

proceed with the Longshore claim, with employer providing claimant medical benefits and continued disability benefits at a rate of $842.50 per week, until such time as a decision was issued.

The administrative law judge found, relevant to the issue raised by employer on reconsideration, that claimant is not entitled to any disability benefits related to the February 6, and March 2, 2001, accidents as neither incident resulted in an inability of claimant to return to his usual employment.[2] Additionally, the administrative law judge ostensibly found, based on the record as a whole, that claimant's current condition, as it relates to his ability to work, is not a direct result or natural progression of his two 2001 work accidents, nor was his current condition substantially worsened by those incidents. Moreover, the administrative law judge found that Section 33(g) bars claimant's recovery for benefits related to the September 16, 2002, incident, thus rendering moot any discussion as to whether claimant's current disabling condition is due to the September 16, 2002, accident. The administrative law judge nevertheless found claimant entitled to medical benefits for ongoing treatment related to the February 6, and March 2, 2001, work accidents.

On claimant's appeal of the administrative law judge's application of the Section 33(g) bar, the Board stated that liability, if any, for claimant's disability and medical benefits from the time of his third accident on September 16, 2002, rests on a determination as to whether the claimant's condition after that accident is the result of the natural progression, or the aggravation, of a prior injury.[3] The Board thus remanded the case to the administrative law judge for findings, first, regarding the responsible carrier

[2] Significantly, these findings relate only to periods after the injury occurred. They do not relate to the *cause* of any disability claimant may have after the third injury. *See* discussion *infra*. The Board did not disturb these findings or remand the case for any further discussion of this particular issue.

[3] If claimant's disability resulted from the natural progression of the first injury and would have occurred notwithstanding the second injury, then claimant's employer, and its carrier, at the time of the first injury is responsible. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981). If his employment thereafter aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, claimant has sustained a new injury and the employer, and its carrier, at that time is the responsible for the payment of benefits thereafter. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

issue, and then, if necessary, as to the applicability of Section 33(g) bar as it pertains to Signal's liability for any benefits related to the third accident. If claimant's disability after his 2002 incident resulted from either of the first two injuries, *i.e.*, the initial injury sustained on February 6, 2001, or the second injury sustained on March 2, 2001, then employer, as a self-insured entity, would remain liable for such compensation as Section 33(g) is inapplicable because employer provided prior written approval of the settlement agreement. However, if claimant's current disability is due to the third incident, then the Section 33(g) bar is potentially applicable, subject to the administrative law judge's resolution, on remand, of claimant's contentions regarding the applicability of Sections 33(a) and 5(b), 33 U.S.C. §§933(a), 905(b), and whether he settled his claim for an amount less than to which he is entitled to under the Act.[4]

Employer argues, in its motion for reconsideration, that the issue of whether claimant suffered any disability in connection with his accidents of February 6, and March 2, 2001, was properly addressed by the administrative law judge and was not challenged on appeal. In this regard, employer maintains that claimant's argument on appeal was limited to "the very narrow issue" of whether Section 33(g) barred claimant's entitlement to future medical and disability benefits only with respect to the September 16, 2002, accident. As such, employer contends that the Board exceeded its limited scope of review in remanding the case for a determination of disability with respect to the first two accidents. Employer thus requests that the Board's decision be modified to vacate that portion remanding on the disability issue.

Employer's contentions lack merit. The Board did not remand this case, as employer suggests, for findings as to claimant's entitlement to disability benefits following each of the first two injuries. Rather, the Board remanded for findings as to whether either or both of the first two injuries is the cause of the disability after the third injury. The administrative law judge specifically declined to address this issue. The Board observed, in addressing claimant's contentions on appeal, that in order for Section 33(g) to apply "the disability for which claimant seeks benefits under the Act must be the same as that for which he settled his third-party claim." *C.S.*, slip op. at 5. As this case involves three distinct traumatic injuries, and given that employer was self-insured at the

[4] The Board held that the administrative law judge must re-evaluate, in terms of Sections 33(a) and 5(b), whether the evidence establishes that any third-party is potentially liable to both claimant and employer/Signal for the September 16, 2002, accident. If so, the administrative law judge must then consider the applicability of the Section 33(g) bar. However, if the administrative law judge finds that there is no third party potentially liable to claimant and employer/Signal for the September 16, 2002, accident, then Section 33 is inapplicable with regard to that accident. *C.S.*, slip op. at 9.

time of the February 6, and March 2, 2001, accidents, and covered by Signal at the time of the September 16, 2002, accident, the Board held that the "applicability of Section 33(a), and thus Section 33(g), requires an initial determination regarding the cause of claimant's *current disability* and identification of the responsible employer." *Id.* (emphasis added).

The administrative law judge, however, "considered the applicability of Section 33(g) prior to addressing the causation/responsible employer issue." *Id.* The Board thus held that since the administrative law judge did not fully address the "potentially dispositive" responsible carrier which is "relevant to the threshold issue regarding the applicability of Section 33," his application of the Section 33(g) bar must be vacated and the case remanded for "specific findings regarding whether claimant is disabled, which injury is the cause for the disability, and which carrier therefore is potentially liable for benefits."[5] *C.S.*, slip op. at 6. As the Section 33(g) issue raised by claimant on appeal must be addressed within the proper statutory framework, the Board did not exceed its scope of review in addressing which injury is the cause of claimant's current disability and remanding for findings of fact regarding this issue.

[5] In this regard, the Board specifically instructed the administrative law judge that if, on remand, he determines that claimant's *current disability* resulted from the natural progression of either of the first two injuries, *i.e.*, the initial injury sustained on February 6, 2001, or the second injury sustained on March 2, 2001, then employer, as a self-insured entity, would remain liable for such compensation as Section 33(g) is inapplicable. However, if, on remand, the administrative law judge finds that claimant's *current disability* is due to the third incident, then Section 33(g) may apply as Signal, the responsible carrier at the time of that injury, did not give its prior written approval of the third-party settlement. The administrative law judge was then to address the remaining issues.

Accordingly, employer's motion for reconsideration is denied. The Board's decision is thus affirmed, and the case is remanded for further consideration consistent with that opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge