BRB No. 04-0793A

EDWARD ST. AMANT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Mar 2, 2005
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Kevin C. Glavin (Cutliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-2102) of Administrative Law Judge Janice K. Bullard 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*. (the Act). 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).

Claimant filed a claim under the Act for asbestosis and chronic obstructive pulmonary disease, which he alleged was due, at least in part, to his work-related exposures to asbestos and other lung irritants. Claimant retired from the shipyard in 1991. The administrative law judge invoked and found rebutted the Section 20(a) presumption. 33 U.S.C. §920(a). Upon weighing the evidence as a whole, the administrative law judge found that claimant's pulmonary condition is work-related. As claimant is a voluntary retiree, he must establish that he has a permanent respiratory

impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* in order to be entitled to benefits. 33 U.S.C. §§902(10), 908(c)(23). The administrative law judge rejected the opinion of Dr. Teiger that claimant has a 50 percent respiratory impairment; the administrative law judge also found that claimant did not establish his need for future medical care. Thus, she denied benefits.[1]

Employer contended that Section 33(g)(1), 33 U.S.C. §933(g)(1), bars claimant's entitlement to benefits as claimant entered into a third-party settlement without employer's prior written approval. Claimant filed claims and/or lawsuits against three asbestos manufacturers. Employer gave its approval of the $1,900 settlement with Met Life, EX 7, and the $585 settlement with Eagle Picher. EX 6. At issue before the administrative law judge was the "settlement" of $172.50 with the H.K. Porter Trust. It is not clear from the record when claimant received this payment.[2] However, a January 9, 2004, letter to District Director Richard Robilotti from claimant's counsel includes the accounting of claimant's settlement with H.K. Porter. Enclosed with the letter were three LS-33 forms. The first form allegedly authorizing settlement was signed by Douglas Peachy, counsel for employer, on December 23, 2003 and by Mr. Embry on January 9, 2004 (both signatures post-dated the formal hearing). The second form did not contain a signature from Mr. Peachy, but was signed by claimant on October 10, 2002. A third LS-33 form relating to the H.K. Porter matter contains only claimant's signature. Apparently because no one could produce a single form that had all of the required signatures, the parties submitted various affidavits to the administrative law judge. Claimant's evidence attempted to establish that employer had indeed approved the H.K. Porter settlement and employer's evidence attempted to establish that it had not approved it. *See* CX 9; EX 8.

The administrative law judge found that claimant was a "person entitled to compensation" because Dr. Tsiongas diagnosed asbestosis on August 10, 2001.[3] The

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[1] Claimant appealed these findings, BRB No. 04-0793, but subsequently moved for modification. By Order dated October 20, 2004, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings. 33 U.S.C. §922.

[2] A November 3, 1999 letter to Gene Netze of Electric Boat from claimant's counsel, Stephen Embry, states that it "should be taken as notice pursuant to 33 U.S.C. 933 of our intention to enter into settlements on the following claims regarding the H.K. Porter bankruptcy." The letter states that it will treat employer's silence as authority to proceed with settlements. Claimant's name, however, is not listed on this document. CX 8.

[3] Given our disposition of this case, we need not address the propriety of this finding. In *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd on recon.*

administrative law judge further found that if claimant had been awarded compensation, it would have been in an amount greater than his third-party recoveries. The administrative law judge found that employer approved the settlements with Met Life and Eagle Picher. The administrative law judge then considered the various LS-33 forms and affidavits submitted in connection with the H.K. Porter "settlement." The administrative law judge credited a combination of this evidence to find that employer agreed to this settlement, and that Section 33(g) therefore does not bar claimant's claim.

On appeal, employer contends that the administrative law judge erred in finding that it approved the H.K. Porter settlement. Employer contends that claimant's only evidence of an approval is an LS-33 form signed by Mr. Peachy after the formal hearing, and that the administrative law judge erred in finding that employer approved the settlement prior to its consummation.

Pursuant to Section 33(g)(1) of the Act, a "person entitled to compensation" is required to obtain employer's prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than that to which the claimant would be entitled under the Act. *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bundens v. J.E. Brenneman Co.,* 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Gladney v. Ingalls Shipbuilding, Inc*., 30 BRBS 25 (1996) (McGranery, J., concurring in result only). The claimant need only notify the employer under Section 33(g)(2) if he obtains a judgment against the third party or if he settles his third-party claims for an amount greater than that to which he is entitled under the Act. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Bundens,* 46 F.3d 292, 29 BRBS 52(CRT).

We need not address employer's specific contentions, as claimant, in his response brief, correctly avers that the funds claimant received from the H.K. Porter Trust were not in "settlement" of a third-party claim.[4] Claimant put into evidence a document concerning the "H.K. Porter Company, Inc. Asbestos Trust" approved by a U.S. Bankruptcy Court. CX 10. As of July 28, 1998, the Trust assumed liability for all

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en banc, 30 BRBS 25 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part), however, the Board held that a diagnosis of asbestosis does not make a retiree a "person entitled to compensation" within the meaning of *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992).

[4] The Board will address contentions raised in a response brief that provide an alternative avenue for affirming the administrative law judge's ultimate finding. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129 (3d Cir. 1987); *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283 (1998).

asbestos claims against H.K. Porter. Expedited claims against the Trust would be paid at 4.6 percent of their liquidated value. Relevant to the instant case, a "non-malignancy claim" with a liquidated value of $3,750, would pay a claimant $172.50, which is the amount claimant received in this case. Claimants who wanted to individually pursue a non-expedited claim had the opportunity to do so pursuant to alternative dispute methods, but would have to wait until all expedited claims were paid. CX 10.

The Board held in *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), that the receipt of a liquidated amount from an asbestos trust fund implemented by a bankruptcy court is not a "settlement." At issue in *Williams* were the Amatex and Johns Manville Trusts from which the claimant had received funds. The bankruptcy proceedings of those companies resulted in the creation of trusts with certain funds available to pay claims at a liquidated amount. Central to the basis for the trusts is that individual claimants could not negotiate a settlement based on the individual facts of their cases.

In *Williams*, the Board discussed the Supreme Court's decision in *Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). In *Banks*, the widow and minor children of a deceased longshoreman obtained a $30,000 jury verdict in their third-party claim. The judge informed the parties he would grant the defendant's motion for a new trial unless the plaintiffs accepted a remittitur of $11,000. Without consulting the employer, the plaintiffs accepted the remittitur, and the court entered judgment for $19,000. *Banks*, 390 U.S. at 460-461. When the plaintiffs sought benefits under the Act, the employer disputed their entitlement based on their failure to get written approval prior to accepting an amount less than the judgment. The Supreme Court stated that a remittitur is not the equivalent of a mutual agreement among the parties but is "a judicial determination of recoverable damages[.]" *Id.* at 467. The Court declared that the protection supplied by Section 33(g) of the Act to an employer is not required when a fact-finder independently evaluates a third-party claim and awards damages; the amount of the reduced award was determined solely by the judge and therefore was a "judgment" which did not require employer's prior written approval. *Id.*; *compare with Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Brown, J., concurring and dissenting) (claimant obtained a jury verdict; thereafter he negotiated and accepted an amount less than the verdict without the employer's approval, invoking Section 33(g)(1)), and *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996) (Rule 68 Offer of Judgment is "tantamount to a formal settlement agreement").

Based on *Banks*, in *Williams* the Board held that the payments made to the claimant were similar to a judgment or the remittitur, as the Trusts sent payments to claimant and other plaintiffs based on bankruptcy reorganization plans which had been deemed fair and approved by the bankruptcy court. *Williams*, 35 BRBS at 97, discussing *In re Joint Eastern and Southern District Asbestos Litigation*, 14 F.3d 151 (2^{d} Cir. 1994);

Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988); *In re Amatex Corp*., 755 F.2d 1034 (3d Cir. 1985); *In re Dow Corning Corp*., 211 B.R. 545 (Bankr.E.D. Mich. 1997); *In re the Celotex Corp.*, 204 B.R. 586, 620 (Bankr.M.D. Fla. 1996). In *Williams*, the claimant either could have accepted the amount offered and consider the case resolved, or she could decline the amounts and be placed at the end of the lists of the Trusts' "creditors." She was not able to negotiate for a greater amount, as her liquidated damage had been determined by the bankruptcy court. The Board held that the absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements supported the conclusion that the Amatex and Manville disbursements should not be considered settlements, but, rather, should be likened to "judgments." *Williams*, 35 BRBS at 97. Judgments are not subject to the Section 33(g)(1) approval requirement; only notice to employer under Section 33(g)(2) is required. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992).

We hold that Section 33(g)(1) is not applicable in this case because claimant did not obtain a "settlement" from the H.K. Porter Trust. Rather, claimant obtained liquidated damages of a pre-determined amount pursuant to a Trust plan approved by the bankruptcy court. *Williams,* 35 BRBS at 97. The bankruptcy documents in evidence specify a liquidated amount for various types of claims, such as claimant's claim for a non-malignant condition. CX 10. All claimants with a non-malignant condition receive the same amount - $172.50. There is no possibility of individual negotiation or compromise. Therefore, pursuant to *Williams*, claimant's recovery from H.K. Porter was not a "settlement," and the provisions of Section 33(g)(1) are not applicable. Claimant was not required to obtain employer's prior written consent. The notice provision of Section 33(g)(2) is applicable to a "judgment." *Cowart,* 505 U.S. 469, 26 BRBS 49(CRT). Employer had notice of claimant's recovery prior to its making any payments to claimant or the agency's announcing an award. *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 15(CRT), 24 BRBS 49(CRT) (9th Cir. 1990); *see also Bundens*, 46 F.3d 292, 29 BRBS 52(CRT). Therefore, we affirm the administrative law judge's finding that claimant's compensation claim is not barred by Section 33(g), albeit on grounds other than those utilized by the administrative law judge.

Claimant's counsel has filed a petition for an attorney's fee of $3,780 for work performed before the Board. Employer objects only on the ground that claimant has not yet received any benefits under the Act.

We disallow all time requested prior to July 8, 2004, when the first notice of appeal was filed. We also disallow the service performed on August 30, 2004, as it involved a telephone call to OWCP. In addition, we disallow all services performed in furtherance of claimant's appeal which was dismissed for modification proceedings. If claimant succeeds on modification in obtaining an award of benefits, counsel may re-file

his fee petition for the services related to his initial appeal. *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993).

Claimant has succeeded in defending the finding that his claim is not barred pursuant to Section 33(g). Thus, he is entitled to a fee for services related to employer's cross-appeal. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 43, 35 BRBS 41(CRT) (2nd Cir. 2001). We award claimant an attorney's fee of $757.50 for this work.[5] As claimant has not yet received an award of benefits, however, this fee award is contingent upon claimant's success in his motion for modification. *Eifler v. Peabody Coal Co.*, 13 F.3d 236, 27 BRBS 168(CRT) (7th Cir. 1993); *Director, OWCP v. Baca*, 927 F.2d 1122 (10th Cir. 1991); *Warren v. Ingalls Shipbuilding, Inc*, 31 BRBS 1 (1997).

Accordingly, that portion of the administrative law judge's Decision and Order finding that claimant's compensation claim is not barred by Section 33(g) is affirmed. Claimant's counsel is awarded an attorney's fee of $757.50 for successfully defending the finding that his claim is not barred, subject to his obtaining an award of benefits on modification.

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

[5] This represents the services performed by Mr. Embry on August 2, 2004, and all services performed from September 1 through September 14, 2004.