BRB No. 05-0543

WALTER J. MARMILLION	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A.M.E. TEMPORARY SERVICES	)	DATE ISSUED: 03/23/2006
	)	
and	)	
	)	
SUPERIOR NATIONAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jeffrey E. Faludi, Jr., and Jerry L. Hermannn (Kopfler, Hermann & Faludi), Houma, Louisiana, for claimant.

Timothy B. Guillory (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2003-LHC-2359) of Administrative Law Judge C. Richard Avery 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).

This case is before the Board for the second time. To recapitulate, claimant suffered a crush injury to his arm in a work-related accident on April 18, 2000; this injury required several operations. Claimant was employed by A.M.E. Temporary Services (A.M.E.), who had contracted claimant's services to ADM/Growmark (ADM). ADM loaded and unloaded grain barges on the Mississippi River. Following claimant's injury, A.M.E. paid some benefits, and claimant filed a claim under the Act naming A.M.E. as his employer. In September 2000, benefits ceased, and medical providers began to bill claimant. Claimant's counsel was informed by employer's counsel that A.M.E.'s carrier had gone out of business, and that A.M.E. did not have reserves in place to make further payments to claimant.

Claimant subsequently filed a suit in state court under the Jones Act and general maritime law against A.M.E. and ADM, as well as against Faith Towing (Faith), the owner of the tugboat M/V Faith.[1] Claimant alleged that A.M.E. and ADM were owners *pro hac vice* of the Barge #K-407, on which the injury occurred, and of the M/V Faith. Claimant stated he later amended his suit to allege a Section 5(b) cause of action against A.M.E. and ADM. 33 U.S.C. §905(b). The claim against Faith was based on its ownership of the tugboat chartered by A.M.E and ADM for use to maneuver grain barges. The suit against Faith was settled on September 12, 2001, for $1,500, and was subsequently dismissed on the parties' motion. The suit against A.M.E. and ADM proceeded to trial, and resulted in the dismissal of claimant's claims.

Employer filed a motion for summary decision with the administrative law judge seeking to bar claimant's entitlement to benefits pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Employer attached to its motion claimant's admission that he had entered into a settlement agreement with Faith without obtaining the approval of A.M.E. Claimant opposed employer's motion on the ground that Section 33 is applicable only when claimant settles with a "third person" without employer's approval. Claimant alleged that the Jones Act suit in which Faith was a defendant necessarily required that Faith be considered one of claimant's "employers," and not a third party. Claimant further averred that employer acted in bad faith by informing claimant that carrier was defunct and then informing him, after the lawsuits were terminated, that there was indeed a carrier on the risk.

[1] Claimant stated in the third-party suit, *inter alia*, that he was a deck hand and member of the crew of the tug M/V Faith, his duties included aiding in navigating and tying barges, and he was on the M/V Faith on the date of his injury. Claimant alleged in the suit, *inter alia*, that the defendants failed to provide a safe place to work, failed to warn of defect or ruin of vessel, failed to provide an adequate crew, and specifically, that Faith failed to provide a seaworthy vessel, which was a proximate cause of his injuries. Employer's Post-Remand Brief, EX 1.

The administrative law judge granted employer's motion for summary decision. The administrative law judge rejected claimant's contention that Faith was one of claimant's employers and therefore was not a "third party." The administrative law judge also rejected claimant's "bad faith" contention. Lastly, the administrative law judge rejected the contention that A.M.E. had participated in the settlement of the suit against Faith. The administrative law judge found that the settlement was for less than claimant's compensation entitlement and that Section 33(g)(1), (2), bars claimant's entitlement to further compensation and medical benefits. Claimant appealed the administrative law judge's denial of the claim to the Board.

The Board remanded the case for the administrative law judge to reconsider the applicability of Section 33(g). *Marmillion v. A.M.E. Temporary Services*, BRB No. 04-0272 (Dec. 13, 2004)(unpublished) (Smith, J., concurring). The Board stated that the administrative law judge must first determine whether claimant's third-party suit against Faith falls within the scope of Section 33(a), *i.e.*, whether Faith was potentially liable to both claimant and employer for the work injury. If the suit against Faith does not fall within the scope of Section 33(a), claimant's claim cannot be barred pursuant to Section 33(g). The Board rejected claimant's contention based on employer's "bad faith" in advising him that carrier was out of business and that it could not pay compensation inasmuch as equitable considerations generally are not applicable to the Section 33(g) inquiry and the doctrine of equitable estoppel is inapplicable to this case. The Board also remanded for the administrative law judge to address the applicability of *Meaux v. Frank's Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (2001). Finally, the Board rejected claimant's contention that, pursuant to Section 7(h), 33 U.S.C. §907(h), employer remains liable for medical benefits even if Section 33(g) is applicable because its liability for medical benefits arose prior to the third-party settlement.

On remand, the administrative law judge found that claimant's third-party suit falls within the scope of Section 33(a) as Faith was potentially liable to both claimant and employer. The administrative law judge relied on claimant's pleadings alleging negligence against Faith and on the fact that a $1,500 settlement was paid by Faith. Decision and Order on Remand at 3. The administrative law judge found *Meaux*, 35 BRBS 17, inapplicable to this case inasmuch as claimant failed to get approval for the third-party settlement with Faith from either employer or carrier. Thus, the administrative law judge again concluded that claimant forfeited his benefits under the Act pursuant to Section 33(g).

On appeal, claimant contends that employer failed to show that Faith was a "potentially liable" third party pursuant to Section 33(a). Claimant also argues that, pursuant to *Meaux*, Section 33(g) is inapplicable because, at the time of the third-party settlement, carrier was insolvent and employer refused to pay benefits under the Act. Employer responds, urging affirmance of the denial of benefits.

Section 33(a) of the Act states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a). In order for Section 33 as a whole to apply, the entity against whom the lawsuit is filed must be potentially liable to both claimant and employer for the compensable work-related injury. *See, e.g.,* 33 U.S.C. §933(b); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). For example, the Board has held that Section 33(a) does not apply where the third-party recovery was for a crush injury and the claim under the Act was for hearing loss, as the claims were not for the same disability. *Harms v. Stevedoring Services of America*, 25 BRBS 375 (1992) (Smith, J., dissenting on other grounds), *vacated on other grounds mem.*, 17 F.3d 396 (9th Cir. 1994)(table). Similarly, where claimant settled with third-party asbestos manufacturers but his compensable disability under the aggravation rule is due to chronic obstructive pulmonary disease, the third-party suit is not subject to Section 33 because the asbestos manufacturers are not potentially liable to the employer who did not expose claimant to asbestos, but only to other pulmonary irritants. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom., Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); *see also Richardson v. Newport News Shipbuilding & Dry Dock Co.* 39 BRBS 74 (2005). Section 33(g) cannot apply to a settlement of a lawsuit that does not fall within the scope of Section 33(a) of the Act, because the purpose of Section 33(g) is to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *See, e.g., Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986).

Claimant argues that, notwithstanding his suing Faith in tort, facts revealed in discovery show that Faith could not have been found liable for claimant's injuries. Therefore, claimant contends that Faith was not "potentially liable" to both claimant and employer. Claimant avers that he never worked for Faith, that he was on a grain barge and not on the M/V Faith at the time of his work accident, that the M/V Faith was not connected to the grain barge or to the crane/work barge when claimant was injured, and that neither the M/V Faith nor a member of her crew was involved in the work activities that resulted in claimant's injury. In essence, claimant argues that he filed a nuisance suit against Faith, and as such, Section 33 should not apply to his Longshore Act claim.

On remand, the administrative law judge first found that Faith was a "third party" because it was not claimant's employer. The administrative law judge further found that because claimant alleged negligence on the part of Faith in the accident that led to

claimant's injury, Faith was potentially liable to claimant, as well as to A.M.E., as the suit could have been assigned to A.M.E. had claimant not settled with Faith. Decision and Order on Remand at 3. The administrative law judge found that Faith's potential liability also was established by the fact of claimant's settlement with Faith.[2] *Id*. at 3.

We hold that, notwithstanding the merits of a particular third-party suit or the plaintiff's rationale for inclusion of a particular defendant in the suit, where claimant settles a suit arising from the same injury as under the Act, the administrative law judge is not required to look behind the pleadings and result in order to ascertain whether such a third party is in fact liable to both claimant and the employer. Determining whether a third-party suit which claimant chooses to settle is actually meritorious is beyond the scope of the administrative law judge's authority. *See generally Equitable Equip. Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), *aff'g* 32 BRBS 200 (1998). In the absence of a judgment that the third party is not liable to the claimant, *see Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997), it is sufficient for purposes of Section 33(a) that the claimant filed a suit naming the third party as a defendant for the same disabling injury at issue in the compensation claim and obtained a settlement from that defendant. In this case, claimant's suit against Faith alleged facts that, if accepted by the court, could establish Faith's liability to both claimant and employer. *See* n. 1, *supra.* Accordingly, we affirm the administrative law judge's finding that Faith was potentially liable to claimant and employer under Section 33(a). Therefore, the Section 33(g) bar is potentially applicable in this case.

Section 33(g) requires the "person entitled to compensation" to obtain the written approval of employer and carrier prior to entering into a settlement with a third party for an amount less than the claimant's compensation entitlement. 33 U.S.C. §933(g)(1). It is undisputed that claimant is a "person entitled to compensation" and that the settlement with Faith was for less than his compensation entitlement. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002). Claimant contends that he was not required to obtain prior written consent of the settlement with Faith because the facts herein are akin to those in *Meaux*, 35 BRBS 17.

[2] In *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997), the Board held that where claimant sustained an adverse judgment in his third-party action, Section 33(g) is inapplicable as claimant could not have bargained away funds to which employer was entitled. The administrative law judge found that this situation is not applicable herein, noting that the fact that claimant proceeded to trial against A.M.E. and ADM and lost does not establish that he also would have lost in his suit against Faith had the case been adjudicated on its merits. Decision and Order on Remand at 3 n.1.

In *Meaux*, the claimant entered into a third-party settlement and obtained his employer's approval thereof. The claimant had been advised prior to entering into the settlement that employer's carrier was insolvent, and, in addition, claimant had no knowledge that another carrier was potentially liable for his longshore claim until many years after the settlement was effected. In this circumstance, the Board held that the employer was essentially both employer and carrier, and as claimant obtained the employer's approval of the third-party settlement, the Board rejected the carrier's contention that the claimant's claim was barred pursuant to Section 33(g) because claimant had not obtained its consent as well. *Meaux*, 35 BRBS at 20-21.

On remand, the administrative law judge found that *Meaux* is distinguishable in that claimant did not seek or obtain approval from his employer, A.M.E., of the third-party settlement with Faith. Despite its assertion to claimant of an inability to pay benefits, there is no evidence that A.M.E. was insolvent or that claimant was unable to contact employer to seek its approval. An employer remains primarily liable for workers' compensation benefits if its carrier becomes insolvent. 33 U.S.C. §904; *see B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989). As the administrative law judge's basis for distinguishing *Meaux* is rational,[3] we affirm his finding that Section 33(g) bars claimant's claim as claimant did not obtain employer's written consent prior to entering into the settlement with Faith for an amount less than his compensation entitlement. *Mapp v. Transocean Offshore U.S.A.*, 38 BRBS 43 (2004); *Esposito*, 36 BRBS 10.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

[3] The administrative law judge also quoted the Board's first decision in this case noting that, "[a]t some point after claimant filed suit against Faith Towing, it appears claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the Longshore Act claim." Decision and Order on Remand at 4, *quoting Marmillion*, slip op. at 6. It is unclear if the administrative law judge was suggesting that claimant should also have obtained carrier's approval. In his brief to the administrative law judge on remand, claimant stated that he did not obtain information about new insurance coverage until after he settled with Faith. Cl. Brief on Remand at 7-8. As claimant's failure to obtain the employer's consent to the settlement is alone sufficient to invoke Section 33(g), we need not further address the significance of claimant's failure to obtain a carrier's approval as well.

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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