BRB No. 09-0663

CHARLES HONAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAR COM, INCORPORATED	)	DATE ISSUED: 03/11/2010
	)	
and	)	
	)	
ACE/ESIS	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Claimant's Motion for Summary Decision and Awarding Benefits and Attorney Fees of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

George J. Wall, Portland, Oregon, for claimant.

Christopher L. Zaunbrecher (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Claimant's Motion for Summary Decision and Awarding Benefits and Attorney Fees (2008-LHC-1169) of Administrative Law Judge Gerald M. Etchingham 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).

On October 11, 2000, claimant suffered a serious head injury when a nitrogen-charged hydraulic cylinder discharged and forced claimant's wrench into his head. He underwent brain surgery and remains at risk for seizures. Decision and Order (July 14, 2003) at 2. Administrative Law Judge Jarvis awarded claimant temporary total disability benefits, medical benefits, and interest. *Id.* at 5-6. In September 2007, employer unilaterally ceased paying benefits, contending claimant failed to notify it of, or obtain prior written approval for, third-party settlements. Cl. Exs. 4-6. Claimant filed a motion for summary decision, averring that there were no third-party settlements and thus no violation of Section 33(g), 33 U.S.C. §933(g), and that his benefits should be reinstated. Employer opposed the motion and also moved for summary decision.[1]

Administrative Law Judge Etchingham (the administrative law judge) found that claimant filed civil actions against defendants Schrader-Bridgeport International, Inc., and Velocity Hydraulics. Decision and Order (April 27, 2009) (hereinafter Decision and Order).[2] He also found that there was a final judgment dismissing the claim in favor of Schrader-Bridgeport in August 2003, which was affirmed in April 2004, and that there was a stipulation of dismissal in favor of Velocity Hydraulics in October 2003. The administrative law judge further found that claimant had not notified employer of either dismissal. Decision and Order at 3-4. However, because employer failed to establish that claimant entered into any settlements with either third-party defendant, or that there was a judgment in favor of claimant, the administrative law judge found that neither the notice nor the prior written approval requirements of Section 33(g) or Section 702.281(a)(3) of the regulations, 20 C.F.R. §702.281(a)(3), applies to this case. *Id.* at 6-8. The administrative law judge also concluded that because employer was working with claimant in the early investigations as to the viability of a third-party action, employer waived the notice requirement of Section 702.281(a)(1) of the regulations, 20 C.F.R. §702.281(a)(1). However, he found claimant had violated the notice provision of Section 702.281(a)(2), 20 C.F.R. §702.281(a)(2), but he deemed this violation insufficient alone to trigger the forfeiture provisions of either Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2), or Section 702.281(b) of the regulations, 20 C.F.R. §702.281(b), because there was no prejudice to employer. *Id.* at 9-12. Further, the administrative law judge found that employer did not file a motion for modification of the previous award prior to terminating benefits, and even if modification was timely requested, employer did not present evidence sufficient to warrant modification. As he found that employer is still obligated to pay benefits pursuant to the 2003 award, the administrative law judge found

[1]The parties agreed to forego a hearing and have the matter resolved on the record.

[2]Schrader-Bridgeport manufactured the cylinder and air valve and Velocity Hydraulics repaired/maintained the equipment. Claimant asserted a defective product and negligence claim against Schrader-Bridgeport and a negligence claim against Velocity Hydraulics. *See* Emp. Exs. a-e.

employer liable for a Section 14(f), 33 U.S.C. §914(f), assessment on benefits due and unpaid. Decision and Order at 12. The administrative law judge thus granted claimant's motion for summary decision. *Id.* at 13.

Employer appeals the administrative law judge's decision. It contends the administrative law judge erred in concluding that the forfeiture provisions of Section 33(g)(2) do not apply in this case. It also contends the administrative law judge erred in failing to permit modification of the prior award, in reinstating claimant's benefits, and in holding it liable for a Section 14(f) assessment. Therefore, employer argues that the administrative law judge erred in granting claimant's motion for summary decision and, instead, should have granted its motion for summary decision. Claimant responds, arguing that as he did not enter into any third-party settlements and there were no judgments favorable to him, Section 33(g) forfeiture is inapplicable. He contends the administrative law judge properly found that employer should not have terminated his benefits and, therefore, that employer is liable for a Section 14(f) assessment.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), (d), 18.41(a). In this case, the administrative law judge effectively found that there are no genuine issues of material fact and claimant is entitled to summary decision as a matter of law. The pertinent facts in this case are undisputed. Specifically, it is undisputed that claimant filed third-party actions but that the claims against both defendants ultimately were dismissed, and there were no settlements or judgments resolving the civil cases in claimant's favor. Additionally, it is undisputed that employer unilaterally terminated the payment of claimant's temporary total disability benefits in September 2007. Therefore, the legal issue presented involves the application of Section 33(g) and Section 702.281 to these undisputed facts.

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 related to his work-related injuries. In order to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C. §933(f), a claimant, depending on the circumstances, must either give the employer notice of a settlement with a third party or a judgment entered against a third party, or he must obtain his employer's or carrier's prior written approval of the third-party

settlement.[3] Pursuant to Section 33(g)(1), prior written approval is necessary when the person entitled to compensation enters into a settlement with a third party for less than the amount for which the employer is liable under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(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). The Supreme Court held in *Cowart* that Section 33(g)(2) requires a person entitled to compensation to provide notice of the termination of the third-party proceedings to his employer in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). Section 33(g)(2) further states that if claimant fails to obtain approval, where required, or provide the required notice then all rights to compensation and medical benefits are barred. By its plain language, Section 33(g)(1), (2), does not apply here as it is undisputed that claimant did not obtain a settlement or judgment against a third party.

[3]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 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.

The regulation implementing Section 33(g) is 20 C.F.R. §702.281. Section 702.281(a) states:

> Every person claiming benefits under this Act (or the representative) *shall promptly notify* the employer and the district director when:
>
> (1) *A claim is made that someone other than the employer . . . is liable in damages* to the claimant because of the injury or death and identify such party by name and address.
>
> (2) *Legal action is instituted* by the claimant or the representative against some person or party other than the employer . . . on the ground that such other person is liable in damages to the claimant on account of the compensable injury and/or death; specify the amount of damages claimed and identify the person or party by name and address.
>
> (3) Any settlement, compromise or any adjudication of such claim has been effected and report the terms, conditions and amounts of such resolution of claim.

20 C.F.R. §702.281(a) (emphasis added). Section 702.281(b) reiterates the statutory language of Section 33(g)(1) that a claimant must obtain prior written approval of a settlement for less than the compensation the person is entitled to under the Act. It further states that failure to obtain prior written approval results in the forfeiture of disability and medical benefits. 20 C.F.R. §702.281(b).[4] It is undisputed in this case that claimant did not notify employer or the district director when he instituted legal proceedings against the third parties, nor did he notify them of the dismissal of the tort claims. Employer argues that claimant thus failed to comply with Section 702.281(a), and this failure warrants the forfeiture of his benefits pursuant to Section 33(g)(2).

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[4]Section 702.281(b) provides in pertinent part:

> Where the claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled under this Act, the person . . . must obtain the prior, written approval of the settlement from the employer and the employer's carrier before the settlement is executed. Failure to do so relieves the employer and/or carrier of liability for compensation described in section 33(f) of [the] Act . . . and for medical benefits otherwise due under section 7. . . .

Claimant responds, arguing that the regulation is invalid to the extent the statute and the regulation conflict.

As an initial matter, we reject claimant's contention that the regulation at Section 702.281(a) must be invalidated as inconsistent with the Act. Section 39(a) of the Act, 33 U.S.C. §939(a), gives the Secretary the authority to make rules and regulations, and the agency's regulatory interpretation of the statute is entitled to "considerable deference." *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991). The Secretary need only adopt a permissible interpretation of the statute for the regulation to be sustained, and regulations must be sustained unless they are unreasonable or plainly inconsistent with the statute. *Delaware River Stevedores, Inc. v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3d Cir. 2006).

Section 702.281(a) requires more of a claimant than does Section 33(g); therefore, we must address whether there is a conflict between Section 33(g) and Section 702.281(a). Specifically, Section 702.281(a) states that a claimant must give notice to his employer and the district director when he makes a claim that someone other than the employer is liable for his injuries, when he institutes legal action against that party, and when there has been a settlement, compromise, or adjudication that resolves the claim.[5] 20 C.F.R.§702.281(a). Section 33(g)(2), however, requires only that a claimant give the employer notice when he settles the third-party claim for an amount that exceeds the employer's liability under the Act or he obtains a judgment against the third-party defendant. 33 U.S.C. §933(g)(2); *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). This subsection also states the penalty for failing to obtain notice or approval in these specific circumstances. *Id.* Section 702.281(b) of the Act reiterates the Section 33(g) language as to when prior written approval is required and states the resultant penalty for failure to obtain that approval. As we have explained, these provisions are not applicable here.

In contrast, Section 702.281(a) states no penalty for violation of its notice requirements. The statute contains no provision that notice is due to any party or to the district director when third-party legal action is initiated or terminated by dismissal against the claimant. Thus, although the regulation adds notification requirements not set

[5]Prior to its amendment in 1984, Section 33(g) contained only the provision now designated as Section 33(g)(1). 33 U.S.C. §933(g) (1982). Prior to the 1984 Amendment to Section 33(g), the language of Section 702.281(a) was contained in Section 702.281, 20 C.F.R. §702.281 (1983). The current language differs from the former only in that a reference at the end to Section 33(g) was removed. Following the 1984 Amendment to Section 33(g), Section 702.281(b) was added. *See* 50 Fed. Reg. 384-01 (1985); *see also* 51 Fed. Reg. 4270-01 (1986); 42 Fed. Reg. 45300 (1977) (commentary).

forth in the statute, it imposes no penalty for a claimant's failure to give that notice.[6] Because Section 702.281(a) does not impose a penalty for failure to comply with its extra-statutory notice requirements, we reject claimant's assertion that the regulation conflicts with the Act. *See DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT); *cf. Ins. Co. of North America v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983). As the regulation is not plainly inconsistent with the statute, it is a valid regulation. *DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT).

That the regulation is valid does not alter the result in this case. Although claimant did not give notice when he instituted the third-party claims or when the claims against the defendants were dismissed, there is nothing in the statute or regulations stating a claim is barred by such a failure, and the administrative law judge properly found claimant's right to benefits was not affected. Neither Section 33(g) nor Section 702.281(a) contains a penalty or forfeiture provision for failing to give notice of the institution of a claim or the termination of a claim by dismissal against the claimant without settlement. Therefore, we affirm the administrative law judge's conclusion that claimant's non-compliance is without consequence. Absent a settlement or judgment *against a third party*, the forfeiture provision of Section 33(g) is not applicable. *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Consequently, we affirm the administrative law judge's decision granting claimant's motion for summary decision.[7]

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[6]As Section 33(g) and Section 702.281(b) are punitive, it is in a claimant's best interest not to proceed in third-party litigation in secret. Given that the notice provisions of Section 702.281(a) existed prior to the imposition of any notice requirement in the Act, *see* n.5, *supra*, it is reasonable to interpret Section 702.281 as providing for the earliest possible notice while penalizing only the conduct which violates the Act.

[7]Employer argues that claimant's failure to comply with the regulation prejudiced its subrogation rights and that the administrative law judge erred in finding otherwise. Contrary to employer's argument, it is not prejudiced by claimant's failure to prosecute an apparently groundless claim. *Rosario v. M.I. Stevedores*, 17 BRBS 150, 152 (1985). In this regard, we note that employer participated in the initial investigation and concluded that the statute of limitations had run on the claims. Further, employer has not demonstrated or explained what the prejudice might be. Given the holding herein, we need not further address the administrative law judge's finding that employer "participated in" the third party claims, obviating the requirement that claimant give notice or obtain approval. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring).

We also reject employer's assertion that the administrative law judge erred in failing to modify the 2003 award of benefits. The administrative law judge correctly found that employer did not file a motion for modification of the 2003 decision. 33 U.S.C. §922; *see generally Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, as the forfeiture provisions of Section 33(g) are inapplicable, there is no basis for modifying the prior decision, *i.e.*, no change in condition or mistake in the determination of a fact. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *A.S. [Schweiger] v. Advanced American Diving*, 43 BRBS 49 (2009) (McGranery, J., dissenting) (no change in condition); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (no mistake in fact). Because the 2003 decision was not modified, it is still in effect, requiring employer to pay claimant temporary total disability and medical benefits.[8] Moreover, employer's improper unilateral termination of benefits subjects it to a Section 14(f) assessment. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986).

In this regard, while employer challenges the administrative law judge's award of a Section 14(f) assessment,[9] employer has presented no arguments nor cited authority establishing that the assessment was incorrect. Employer states only that because the administrative law judge erred in finding that claimant is entitled to benefits as awarded in the prior decision, he erred in awarding the Section 14(f) assessment. Emp. Brief at 3, 9. This contention is without merit in view of our affirmance of the administrative law judge's findings that claimant's benefits are not subject to forfeiture and employer's unilateral termination of benefits was improper. *See also West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125, 127 n.3 (1988) (Board declined to address inadequately briefed challenge to Section 14(f) assessment); *Shoemaker*, 20 BRBS 214 (party failed to discuss relevant law and evidence). We, therefore, affirm the administrative law judge's finding that the prior award remains in effect and that claimant is entitled to the additional assessment pursuant to Section 14(f).

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[8]Permanency was not raised as an issue in this case.

[9]Section 14(f) states:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

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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REGINA C. McGRANERY
Administrative Appeals Judge