U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0279
and 14-0279A

DAVID G. NEWTON-SEALEY Claimant-Petitioner Cross-Respondent v. ARMORGROUP SERVICES (JERSEY), LIMITED and FIDELITY AND CASUALTY COMPANY OF NEW YORK c/o CNA GLOBAL Employer/Carrier- Respondents Cross-Petitioners	DATE ISSUED: May 6, 2015 DECISION and ORDER

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

Gary B. Pitts and Joel S. Mills (Pitts & Mills), Houston, Texas, for claimant.

Michael W. Thomas and Edwin B. Barnes (Thomas, Quinn & Krieger, LLP), San Francisco, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer (AG Jersey) cross-appeals, the Decision and Order on Remand (2011-LDA-00387) of Administrative Law Judge Patrick M. Rosenow 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.*, as extended by the

Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act or the DBA). 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 is the second time this case has come before the Board. The underlying facts of this case are not in dispute, and the parties so stipulated; nevertheless, a review of the facts is warranted. Claimant was hired to provide security for engineers working for Bechtel Corporation in Iraq.[1] He escorted them to and from construction sites and was injured as he employed defensive maneuvers on March 23, 2004; his vehicle rolled over after it was struck by a hostile's car. Claimant sustained serious injuries to his neck, shoulder, back, chest, and head, as well as a traumatic brain injury with brain stem and frontal lobe dysfunction. AG Jersey and its DBA carrier (CNA) paid claimant temporary total disability and medical benefits under the DBA,[2] and the parties agreed that claimant remained temporarily totally disabled as of March 5, 2012, when the stipulations were signed.

On April 30, 2007, claimant, a British citizen, filed negligence and breach of contract lawsuits in the United Kingdom (UK) against three defendants:[3] ArmorGroup Services (Jersey) Limited (AG Jersey), ArmorGroup Services Limited (AG UK), and ArmorGroup International, PLC (AG PLC).[4] On February 14, 2008, a British court

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[1] Claimant signed a one-year contract and commenced work on May 20, 2003. Had he not been injured, his contract could have been renewable until the end of the Bechtel contract in October 2006.

[2] Although the exact dates of payments are unclear, it appears AG Jersey and CNA both paid claimant benefits at different times. JXs 31-33, 35. In claimant's 2010 deposition, he stated that CNA's payments stopped in January 2010. JX 6 at 108-109.

[3] UK law permits an injured employee to sue his employer for breach of contract and negligence/duty of care in tort.

[4] AG PLC was the parent/holding company and sole shareholder of all AG subsidiaries, and Christopher Beese was one of four directors on the Board of Directors of AG PLC. JX 7. AG UK was an indirect wholly-owned subsidiary of AG PLC, and it contracted with Bechtel to provide security services. AG UK obtained the DBA insurance. Mr. Beese was the Chief Administrative Officer of AG UK. JX 7, 24. The offices for AG UK and AG PLC are located at the same address in London. JXs 7, 17, 37. AG Jersey was an indirect wholly-owned subsidiary of AG PLC. It provided the manpower to meet the obligations of the "Group companies" under contracts throughout the world, and it contracted with AG UK to do its recruitment and interviewing. Ian

issued an "Approved Judgment," finding "there is no real prospect" of claimant's establishing the existence of an employment contract with AG UK or AG PLC, as his only contract was with AG Jersey. The court thus dismissed AG UK and AG PLC from the breach of contract claim. However, the court found there was a "special relationship" among claimant, AG UK and AG PLC, such that AG UK and AG PLC could have foreseen the dangers and therefore had a "special responsibility" to claimant. Therefore, the court did not dismiss them from the duty of care claim. JX 17 at 6, 9-12; *Newton-Sealey v. ArmorGroup Services, Ltd. et al.*, [2008] EWHC 233 (QB) (accessed at www.bailii.org).

Following the UK court's decision, on December 16, 2009, claimant and the three defendants entered into a confidential settlement agreement. JX 18 (cover and signature pages only).[5] It is undisputed that the amount of the tort settlement was less than the amount claimant would have received under the Act and that claimant did not obtain prior written approval from CNA, which was not a party to the settlement. Upon learning of the settlement, CNA asserted that AG UK and AG PLC were not claimant's employers and, thus, were "third parties." It invoked the Section 33(g), 33 U.S.C. §933(g), bar, and ceased payments to claimant. JX 24; Stipulations.

The issue before the administrative law judge was whether any of the AG entities involved in the settlement was a "third party" within the meaning of the Act or whether they could all be considered claimant's "employers."[6] In his initial decision, the

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Dulake was an executive Director on the Board of Directors for AG Jersey. The offices for this company are on the island of Jersey in the English Channel off the coast of France. JXs 1, 7-8.

[5] In May 2008, well after claimant's injury but prior to the settlement, G4S PLC acquired the entire shareholding of AG PLC. As a consequence, at the time of the settlement, G4S controlled the ArmorGroup entities in their entirety. AG PLC became "ArmorGroup International, Ltd." and became a private company. AG Jersey was renamed "G4S International Employment Services, Ltd." JX 8 at 2. AG UK became "G4S Risk Management, Ltd." JXs 17-18. Thus, the settlement was with the G4S entities, and representatives of each company, including Mr. Dulake, signed the agreement. JX 18. For consistency, the "AG" references have been used throughout the administrative proceedings.

[6] As noted in the Board's prior decision, AG UK cannot be deemed claimant's employer on the basis that it secured DBA insurance for AG Jersey. 33 U.S.C. §§904(a), 905(a); *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21, 25 n.17 (2013).

administrative law judge found: AG Jersey was claimant's employer by virtue of the actual employment contract between them; AG UK was a borrowing employer by virtue of claimant's having been recruited, hired, and assigned duties by AG UK; and, AG PLC was a distinct entity and, therefore, a third party to the settlement by virtue of the decision rendered by the UK court. Accordingly, the administrative law judge found that claimant settled a third-party claim without prior written approval of CNA. Therefore, he found claimant's DBA claim barred by Section 33(g). Decision and Order at 15-16.

Claimant appealed, and AG Jersey cross-appealed, the administrative law judge's decision. The Board vacated that decision as to AG UK because the administrative law judge did not address which borrowed employee test is best suited to the facts of this case, and he did not explain his findings in terms of the test factors. The Board vacated the administrative law judge's decision as to AG PLC because he did not apply any borrowed employee test, but instead found it was not claimant's employer by relying on the UK court's determination that there was no contract between claimant and AG PLC. The Board determined that neither *res judicata* nor collateral estoppel can be applied to the relationship between claimant and AG PLC. Therefore, the Board remanded the case for the administrative law judge to address all of the borrowed employee tests and to determine which is most appropriate for the facts of this case. If the administrative law judge found that AG UK and/or AG PLC were not employers under the chosen test, then he must address whether the three companies acted as a single entity such that the corporate structure should be disregarded and all three should be considered claimant's employer, making none a "third party" for purposes of the Act. *Newton-Sealey v. ArmorGroup* (*Jersey*) *Services, Ltd.*, 47 BRBS 21 (2013).

On remand, after considering all the borrowed employee tests, the administrative law judge found that neither AG UK nor AG PLC was claimant's borrowing employer. Decision and Order on Rem. at 23. Therefore, he addressed whether the three companies could be considered as a single entity such that all were claimant's employer and none was a third party. In applying "the law cited by the Board," the administrative law judge found that "AG UK and AG Jersey were at the very least engaged in a joint venture to provide security for Bechtel." *Id.* at 24; *see Heavin v. Mobil Oil Exploration & Producing Southeast, Inc.*, 913 F.2d 178 (5th Cir. 1990). However, with regard to AG PLC, the administrative law judge found that it was a separate company that did not act as a single entity with the others. Consequently, he found that claimant settled in tort with a third party, and he applied Section 33(g) to bar the claim for benefits. Decision and Order on Rem. at 25. Claimant appeals, and AG Jersey responds. Claimant filed a reply brief. BRB No. 14-0279. AG Jersey cross-appeals, and claimant has not

responded.[7] BRB No. 14-0279A.

Claimant contends the administrative law judge erred in finding that neither AG UK nor AG PLC was his borrowing employer. He also contends the administrative law judge erred in finding that the three companies did not act as a single entity under *Claudio v. United States*, 907 F.Supp. 581 (E.D.N.Y. 1995). Claimant alleges the relationship among these three companies is one that warrants treating them as a single entity. In its cross-appeal, AG Jersey contends the administrative law judge erred in finding that AG UK and AG Jersey were in a joint venture. It also contends the administrative law judge erred in not placing the burden of proof of showing a single entity on claimant, as he is the party seeking to disturb the legal corporate status of the companies.

Pursuant to Section 33(a) of the Act, 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, under differing circumstances, must either give his employer notice of a settlement with a third party or a judgment in his favor, or he must obtain his employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g).[8] Pursuant to Section 33(g)(1), prior written approval of the settlement is

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[7] Although the Director, Office of Workers' Compensation Programs, participated before the administrative law judge on remand and urged him to find that the three entities should be treated as one, he did not file a brief before the Board in these appeals.

[8] 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.
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> (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

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. 33 U.S.C. §933(g)(1); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 26 BRBS 49, 53(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); 20 C.F.R. §702.281. As Section 33(g) is an affirmative defense, the employer bears the burden of proving that the claimant entered into a fully-executed settlement with a third party without obtaining prior written approval from it and its carrier.[9] *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Failure to obtain prior written approval, when required to do so, results in the forfeiture of disability and medical benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b).

Claimant acknowledges that: he is a "person entitled to compensation;" he entered into a settlement with the three defendants in 2009 for the exact injuries for which he would be entitled to benefits under the Act; and he settled those claims for an amount less than the amount to which he would be entitled under the Act without obtaining prior written approval from CNA.[10] Thus, if any of the defendant AG entities is a "third person" under the Act, Section 33(g)(1) would apply to bar claimant's claim under the Act.[11]

> 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.

[9] As the plain language of Section 33(g)(1) states that an employer is liable for compensation "only if written approval of the settlement is obtained from *the employer and the employer's carrier*, before the settlement is executed," the Act requires the claimant to obtain the prior written approval of both the employer and its carrier. *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004).

[10] Claimant testified in his March 2010 deposition that he netted £55,000 in the settlement. JX 6 at 111. According to the parties' stipulations, this equated to $89,329.35 at the time of the settlement.

[11] Section 2(1) of the Act, 33 U.S.C. §902(1), provides: "The term 'person' means individual, partnership, corporation, or association." *See generally Milam v. Mason Technologies*, 34 BRBS 168 (2000) (McGranery, J., dissenting from the holding that the U.S. is not a "person").

No party disputes the administrative law judge's finding that AG Jersey is claimant's employer, as the employment contract establishes. Decision and Order on Rem. at 21; JX 1. As AG Jersey is not a third party, its involvement in the unapproved settlement does not invoke the Section 33(g) bar. The question in this case is whether AG UK and AG PLC also can be considered claimant's "employers"[12] or whether at least one of them was a third party with which claimant settled his UK tort suit.

Borrowing Employer

The administrative law judge determined that the "relative nature of the work" test[13] is most appropriate for AG UK because the test is based on identifying the work of the employer. The administrative law judge found that "AG UK was in the business of managing its contract with AG Jersey to provide security to Bechtel and find and vet potential employees pursuant to its contract with AG Jersey[, and] AG Jersey was in the business of supplying security to Bechtel." He also found that "the nature of Claimant's work was not to help AG UK manage its contract with AG Jersey or to help AG UK meet its hire and vet obligations, but rather to help AG Jersey supply security to Bechtel." Under this test, he found "AG Jersey, not AG UK, was Claimant's employer." Decision and Order on Rem. at 21; *see American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Thus, he concluded, AG UK was not a borrowing employer. Decision and Order on Rem. at 21.

We reject claimant's contention that the administrative law judge erred in utilizing the relative nature of the work test to find that AG UK is not a borrowing employer. The administrative law judge's finding is rational and supported by substantial evidence. That the administrative law judge weighed the evidence differently on remand than he did in his initial decision does not make his subsequent decision erroneous, as the Board remanded the case for reconsideration of this issue. As AG UK's work involved

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[12] There are situations where a claimant may have more than one "employer" under the Act. *Fisher v. Halliburton*, 703 F.Supp.2d 639 (S.D. Texas 2010), *vacated on other grounds*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012) (under relative nature of the work test multiple defendants were found to be the claimant's employers); *Claudio*, 907 F.Supp. 581 (two companies so enmeshed they were considered one entity); *see also Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980) (relative nature of the work test applied).

[13] The "relative nature of the work" test requires a two part analysis, examining (1) the nature of the claimant's work and (2) the relation of that work to the regular business of the employer. *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356.

contracting, risk management, recruiting and hiring for AG Jersey, and AG Jersey's work involved the actual supply of the security personnel, such as claimant, the administrative law judge rationally found that the relative nature of the work establishes that AG UK was not claimant's borrowing employer. We affirm his finding. *Haynie v. Tideland Welding Service*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dept. of Labor*, 797 F.2d 975 (5th Cir. 1986).

The administrative law judge applied the *Ruiz* test to determine that AG PLC is not claimant's borrowing employer.[14] He found that AG PLC was a holding company which: was not involved in the Bechtel contract; did not exert operational control over claimant in Iraq; did not provide claimant tools and equipment; did not pay claimant his wages; and could not fire claimant. Decision and Order on Rem. at 22-23. We reject claimant's assertion that this conclusion is in error. Because no fixed test is required, and because no one element is determinative, it is for the administrative law judge to decide which borrowed employee test works best with the facts of a case and to weigh those factors. As the administrative law judge stated, many of the factors of other tests are included in the *Ruiz* test. *Id*. The administrative law judge's finding that AG PLC was not claimant's borrowing employer is rational and supported by substantial evidence. The Board cannot apply the facts to other tests to attempt to reach a different conclusion. *See Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997). We affirm the finding that AG PLC was not claimant's borrowing employer.

Single Entity

Burden of Proof

We reject AG Jersey's contention that the administrative law judge erroneously relieved claimant of the burden of proving that the three companies should be treated as a single entity. The parties stipulated as to the compensability of claimant's injuries, and there is no question his claim comes within the provisions of the Act. Stipulations; JX 8.

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[14] *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *see also Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The *Ruiz-Gaudet* test considers nine factors for determining if an employee is a borrowed servant, such as who has control over the employee and his work, who can hire, pay, or fire him, and was there an agreement between the two employers. The principal focus of the *Ruiz-Gaudet* test is whether the employer was responsible for the working conditions experienced by the employee and the risks inherent therein, and whether the employment with the employer was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357.

AG Jersey/CNA is attempting to bar claimant's entitlement under the Act because of claimant's tort settlement. In order to avoid liability, Section 33(g) must apply, and, as Section 33(g) is an affirmative defense, *the employer* bears the burden of proving that the claimant entered into a: 1) fully-executed settlement; 2) with a third person; 3) without obtaining prior written approval of the employer and its carrier. *Newton-Sealey*, 47 BRBS at 23; *Flanagan*, 33 BRBS 209. Contrary to AG Jersey's assertion, it, as the proponent of this defense, must establish that the elements are met and, in particular in this case, that claimant's settlement was *with a third person* so as to bar claimant's claim. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Analysis

Claimant contends the administrative law judge's conclusions that AG PLC is a "third party" and that the three companies should not be considered a single entity are in error. Decision and Order on Rem. at 24. Under his single-entity analysis, the administrative law judge identified *Claudio*, 907 F.Supp. 581, as the case providing the most guidance. He found that: 1) the entities were "kept distinct for tax purposes;" 2) nothing established that AG PLC was anything other than a holding company; 3) "there was minor sharing" of employees; 4) each subsidiary had an independent board of directors; 5) AG PLC was not involved in the Bechtel contract; 6) each company had a separate address, phone number, office, personnel; and 7) AG PLC did not participate in the operations of AG UK or AG Jersey and was not their "alter ego." Accordingly, he concluded that AG PLC was a "third party" such that Section 33(g) applies to bar claimant's benefits. Decision and Order on Rem. at 24-25.[15]

Claimant contends that, under *Claudio*, the administrative law judge should have found the AG companies acted as a single entity because they worked together for a common goal, there was more than "minor sharing" of employees in light of the extensive intermingling and common management, everyone regularly used the term "ArmorGroup" to represent the entire company, and the distinction among the individual companies was only for tax purposes. Relying on the law set forth previously by the Board, claimant asserts that the administrative law judge should have found the companies acted in concert and are a "single entity" for purposes of the Act.

[15] The administrative law judge stated: "Though this outcome is arguably inequitable, undeniably harsh, and may not even pass muster under a paternalistic 'spirit of the law' analysis, I find that the clear language of the Act and controlling case law and applicable agency interpretations compels it." Decision and Order on Rem. at 25. He noted however: "It is unlikely that Congress intended Section 33(g) to protect employers from employees' settlements with companies within the same corporate family." *Id.*

It is axiomatic that, under various types of laws, there may be situations where the corporate status of a group of companies may be disregarded such that they are considered to have worked or behaved as a single entity. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1983) (Sherman Anti-Trust Act);[16] *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965) (NLRA); *Lihli Fashions Corp., Inc. v. Nat'l Labor Relations Board*, 80 F.3d 743 (2d Cir. 1996) (NLRA); *Arculeo v. On-Site Sales & Marketing, LLC*, 425 F.3d 193 (2d Cir. 2005) (Title VII – civil rights discrimination); *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000) (ADA). Although the tests may be fashioned to cater to the specific laws at issue, they are effectively a "single-entity test," and the issue requires consideration of the realities of the entities' substances, and not their forms. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 195 (2010); *Copperweld*, 467 U.S. at 772. This analysis has been applied to determine if several companies are a single entity for the purposes of tort immunity under the Act. *See*, *e.g.*, *Claudio*, 907 F.Supp. 581. "[T]here are many times when separate corporate existence is disregarded in favor of the reality of viewing the corporate organizations in question as a single entity."[17] *Claudio*, 907 F.Supp. at 588; *see also Davidson v. Enstar Corp.*, 860 F.2d 167 (5th Cir. 1988) (even absent contractual language forming a joint venture, realities made the companies members of a joint venture and "employers" under the Act entitled to tort immunity). However, upon further reflection, we need not address the propriety of the administrative law judge's single-entity analysis in this case, as we hold that employer has failed to establish that, at the time of the settlement, one of the entities was a "third party."

As stated above, Section 33(g) is an affirmative defense for which the employer bears the burden of establishing that the elements thereof have been satisfied. Because claimant stipulated to most of the Section 33(g) elements in this case, AG Jersey was left

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[16] In *Copperweld*, the Supreme Court stated that a parent company and its wholly-owned subsidiary "are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Copperweld*, 467 U.S. at 771.

[17] In *Claudio*, two related companies started as separate businesses but later commingled to the point where they acted as a single entity: they were run by the same person, they shared the same offices, had the same address, phone number and fax number, and shared costs and profits, and customers and employees considered them as one company. As the two companies operated as a single entity, the court found they were both the claimant's employers under the Act and were immune to tort action for the employee's work injuries. *Claudio*, 907 F.Supp. at 585-586.

with only one element to prove: that claimant settled his tort claim with a "third person." With the burden on AG Jersey, we start with the presumption that the named companies are all "employers" until proven otherwise. *See Fisher v. Halliburton*, 703 F.Supp.2d 639, 664 (S.D. Texas 2010), *vacated on other grounds*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012) ("Because the act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results,' the court presumes that all named defendants are employers under the act." (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953))).[18] Under Section 33(g), the determination of the status of a party to a settlement is to be made at the time of the settlement. *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (1997).

At the time of claimant's tort settlement in December 2009, all AG entities had been bought by G4S. *See* n. 5, *supra*. The record sheds very little light on the structure of, and relationship among, the G4S companies after the acquisition, other than that there appears to be some similarity to the previous AG companies because the parties agreed to continue using the AG names.[19] Indeed, we know even less about the G4S companies because, for example, the record contains information only about the management and boards of directors of the AG companies. There is no information in the record about the structure of the G4S entities as of the date of claimant's settlement.

Claimant and his co-workers discussed what they knew of the companies at the time they worked for the AG companies. JXs 10-16. Mr. Beese's testimony, while informative as to the background and structure of the AG companies, was dated June 20, 2007, before both the G4S acquisition and the settlement. JX 7. Mr. Dulake, whose statement was taken in December 2008 after the acquisition but before the settlement, explained:

> In May 2008, G4S PLC ("G4S") acquired the entire shareholding of AG PLC. ArmorGroup is thus entirely controlled by G4S. Since the acquisition, G4S has embarked upon a corporate restructuring and re-branding process. As a result: AG PLC has now been re-registered as a

[18] *Fisher* involved a question of whether the defendants were "employers" such that they were immune from tort suits – the court determined it was unnecessary to use the *Claudio* single entity test and instead used its relative nature of the work test to determine the defendants were "employers."

[19] Mr. Dulake specifically noted in his statement that the parties to the UK tort suit agreed to continue to use the AG names in documents and correspondence. JX 8 at 2. The parties also continued to use the AG names in the administrative proceedings.

> private company: "ArmorGroup International Ltd"; and AG Jersey has been renamed "G4S International Employment Services Ltd."

JX 8 at 2.[20] Given that G4S "embarked upon a corporate restructuring" process, and the lack of information about the G4S companies overall, we cannot ascertain the relationships among the G4S entities as of the date of claimant's settlement in 2009. The only post-settlement statement about G4S was AG Jersey's assertion in its reply brief before the administrative law judge, dated March 23, 2012.[21] Separate signature lines on the settlement agreement are not sufficient to establish the existence of a third party, as reliance on such evidence would improperly raise form over substance. *See American Needle*, 560 U.S. at 195; *Copperweld*, 467 U.S. at 772. AG Jersey has not put forth substantial evidence to establish that at least one of its related companies was a "third party" as of the date of their settlement with claimant. 33 U.S.C. §933(g); *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). Accordingly, we reverse the administrative law judge's finding that AG PLC was a "third person" with which claimant settled his tort suit. As claimant did not enter into a "third-party settlement," we reverse the administrative law judge's finding that Section 33(g) bars claimant's receipt of benefits under the Act.[22]

Exclusivity

Because the administrative law judge found the Section 33(g) bar applicable, he did not address two related issues raised by the parties; nevertheless, as they are legal

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[20] We know that AG UK also was renamed because of its signature line on the settlement document. JX 18.

[21] AG Jersey argued:

> [E]ven when AG PLC, with all of the subsidiary companies, was taken over by G4S, corporate distinctions were maintained. The settlement agreement lists three separate G4S companies, corresponding to the prior identities of AG Jersey, AG UK and AG PLC. (JTX 18) Each company executed the settlement agreement in their own name and through their own corporate officer/representative. (JTX 18) Both before and after the takeover, companies within the ArmorGroup and G4S structure maintained separate identities.

Br. at 13.

[22] In light of our decision, it is unnecessary to address AG Jersey's argument on cross-appeal that AG UK is not in a joint venture with AG Jersey.

issues, we shall address them.[23] First, we address AG Jersey's argument that the DBA provides the exclusive source of an employer's liability for its employee's work-place injuries, 33 U.S.C. §905(a); 42 U.S.C. §1651(c), and that by electing to pursue a remedy in tort in the UK, claimant foreclosed his entitlement to benefits under the DBA. Claimant asserts he did not pursue inconsistent claims, so the election of remedies defense is inapplicable. The parties use the doctrines of "exclusivity" and "election of remedies" interchangeably. While the two concepts are similar, they are distinct, and the only potentially applicable concept in this case is "exclusivity;" that is, claimant's pursuit of the same claim in different forums.[24] The inquiry in this case concerns the relationship between foreign law and the Act. AG Jersey asserts that the Act's remedy is precluded because claimant chose to pursue and resolve the tort suit first.[25]

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[23] The Board acknowledged both issues in footnotes in its original decision, *Newton-Sealey*, 47 BRBS at 27 n.21-22, and stated that the administrative law judge should address these issues if he found the three entities to be a single entity. On further reflection, the Board concludes these issues are matters of law, such that the case need not be remanded for further findings of fact.

[24] The election of remedies doctrine addresses the pursuit of inconsistent claims. Generally, in order to apply the election of remedies doctrine, it would have to be shown that the claims being pursued are factually or legally inconsistent with each other. *Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000). The doctrine "has been considered in determining whether rights in one statute may be pursued cumulatively with those granted in another statute." *Id.*, 204 F.3d at 143, 34 BRBS at 7(CRT). Although precluding a claim due to the election of remedies is not favored, the court applied the doctrine in *Artis* because the claimant had already obtained a remedy for his work injuries under the Federal Employer's Liability Act, claiming his rights as a railroad worker. The court would not permit him to obtain a double recovery for the same injuries by later claiming he was a maritime worker under the Longshore Act, as the two claims were inconsistent. *Id.*, 204 F.3d at 145-146, 34 BRBS at 8-9(CRT). In this case, the facts and legal principles in the DBA case and the UK case are the same, and there was no attempt to pursue inconsistent claims.

[25] Regardless of the chronology of the claims, in the United States, a tort suit would be dismissed. *See* discussion *infra*.

Section 5(a) of the Act states in pertinent part:

> The *liability of an employer* prescribed in section 904 of this title *shall be exclusive and in place of all other liability of such employer to the employee*, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty *on account of such injury* or death[.]

33 U.S.C. §905(a) (emphasis added). Section 1651(c) of the DBA provides in pertinent part:

> The *liability of an employer*, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter *shall be exclusive and in place of all other liability of such employer*, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) *coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction*, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. §1651(c) (emphasis added). Generally speaking, AG Jersey is correct that the Act is an employer's exclusive liability on account of a work injury covered by the Act. *Fisher v. Halliburton*, 667 F.3d 602, 45 BRBS 95(CRT) (5th Cir.), *cert. denied*, 133 S.Ct. 427 (2012); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). Thus, a claimant may not also sue his employer in tort for damages for his work injuries. *Fisher*, 667 F.3d 602, 45 BRBS 95(CRT); *see also Sickle v. Torres Advanced Enterprise Solutions, L.L.C.*, 17 F.Supp.3d 10 (D.D.C. 2013) (DBA pre-empts common-law state tort claims); *Vance v. CHF Int'l*, 914 F.Supp.2d 669 (D. Md. 2012) (DBA precludes tort claims under Maryland law); *Berven v. Fluor Corp., Ltd.*, 171 F.Supp. 89 (D.N.Y. 1959) (DBA is plaintiff's exclusive remedy and U.S. court will not enforce a claim based on foreign law).[26]

However, the facts here are distinguishable from the above cases on two very critical points: claimant is not an American citizen, and he is not seeking enforcement of a foreign law in a U.S. court. Rather, claimant, a British citizen, has certain rights granted by his home country, and the question is whether, having availed himself of those

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[26] The plaintiff sought to enforce a claim based on the law of Saudi Arabia where he was injured. The court stated: it is "the public policy of the United States that the rights of plaintiff and defendant in this case shall be determined by [the DBA]." *Berven*, 171 F.Supp. at 90.

rights, he is now precluded from seeking his rights under the American law which covered his employment. We think not.

Under the laws of the UK, claimant has a right to pursue *both* a local workers' compensation claim and a tort remedy against his employer. Pursuit of one does not exclude the other, and there is no employer tort immunity.[27] It is questionable whether the UK court was required to enforce the DBA's exclusivity provision. *See generally Laker Airways Ltd. v. Sabena, Belgian World Airlines*, *et al.*, 731 F.2d 909 (D.C. Cir. 1984) (under international law, territoriality and nationality can give rise to concurrent jurisdiction); *Dow Jones & Co., Inc. v. Harrods, Ltd.*, 237 F.Supp.2d 394 (S.D.N.Y. 2002) (same). In any event, it is the responsibility of those in the DBA scheme to ascertain its applicability, and it is in the other forum where the exclusivity of the DBA remedy is to be raised. *See Vance*, 914 F.Supp.2d 669. That is, in knowing that the Act is to be an employer's exclusive source of liability for injuries befalling its workers, it is the employer who must raise and plead this defense before the courts in the foreign claims. A foreign court's decision cannot negate a claimant's right to compensation under the DBA. Therefore, we hold that claimant's pursuit of his rights under the UK injured-worker laws in his home country, and his resultant tort settlement, cannot preclude him from pursuing his claim under the Act and obtaining benefits if the claim is otherwise compensable. Consequently, under the facts of this case, AG Jersey may be held liable under the DBA. *See generally Lee v. The Boeing Co., Inc.*, 7 F.Supp.2d 617, 622 (D. Md. 1998) ("[a]lthough the DBA may be an employer's exclusive liability, it is not necessarily an employee's exclusive remedy").[28]

Credit

AG Jersey next asserts that it should be granted a credit for payments to claimant under the settlement because they were for the same injuries covered by the Act. The Act contains several statutory provisions which permit an employer to receive a credit for payments made against its liability for benefits under the Act. 33 U.S.C. §§903(e), 914(j), 922, 933(f). The party claiming the credit bears the burden of proof on the allocation of the settlement/payments. *Barscz v. Director, OWCP*, 486 F.3d 744, 41

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[27] Lewis, Richard, Employer's Liability and Workers' Compensation: England and Wales (Oct. 20, 2010), http://ssrn.com/abstract=1695088 (accessed May 1, 2015).

[28] Although *Lee* is also distinguishable, as the claimant was an American citizen, the pertinent aspect of the case is that the claimant was entitled to pursue claims under both the DBA and the Saudi law. It was determined later that the Saudi law was a "workers' compensation" law and, thus, the employer was entitled to a credit for benefits paid under Section 3(e) of the Act, 33 U.S.C. §903(e).

BRBS 17(CRT) (2d Cir. 2007); *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991).

While the parties stipulated that the settlement proceeds from the UK tort suit were paid to claimant for the same injuries for which he is claiming benefits under the Act, AG Jersey has not established that any of the Act's credit provisions applies to allow it an offset. In order to invoke the Section 3(e) credit, an employer must show that it paid benefits to the claimant for the same injury under another workers' compensation plan or the Jones Act. 33 U.S.C. §903(e); *Barscz*, 486 F.3d 744, 41 BRBS 17(CRT); *Lee*, 7 F.Supp.2d 617. In order to obtain a credit under Section 14(j) against its continuing liability for benefits for the same disability, the employer must establish that its prior payments to the claimant were advanced payments of compensation. 33 U.S.C. §914(j); *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *LaRosa v. King & Co.*, 40 BRBS 29 (2006). In order to obtain a credit against its continuing liability for payments for the same or a different disability, after the claimant's award was reduced or terminated via modification under Section 22, an employer must establish that the result of the modification is that it previously overpaid benefits but remains liable for additional benefits. 33 U.S.C. §922; *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). In order to receive an offset under Section 33(f), an employer must establish that a "third party" paid the claimant settlement or judgment proceeds for his injury. 33 U.S.C. §933(f); *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001); *Force*, 938 F.2d 981, 25 BRBS 13(CRT). Finally, in order to apply the extra-statutory credit doctrine of *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*), the employer must show it paid benefits for a scheduled disability to a claimant who sustained a second, aggravating injury to the same body part; the employer may credit the amount paid for the prior injury against its scheduled liability for the second injury.

AG Jersey has not established the applicability of any credit doctrine in this case: it has not shown that there was a workers' compensation or Jones Act payment; that there was a reduction in benefits due to modification; that there was a third-party payment; or that there was an injury under the schedule for which prior payments were made. AG Jersey also has not shown that the settlement payment was an advanced payment of compensation, as the details of the settlement have not been divulged. As none of the existing credit provisions has been shown to apply, a suggestion has been made to create another extra-statutory credit in order to prevent claimant from receiving double recovery for his injuries. Despite these unique circumstances, we decline the suggestion. Although double recovery is generally to be avoided, it is not prohibited under the Act. *Yates*, 519 U.S. 248, 31 BRBS 5(CRT); *New Orleans Stevedores v. Ibos*, 317 F.3d 480,

36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

Yates involved the question of whether a widow forfeits her right to death benefits if she settles a pre-death third-party claim. The Supreme Court held that, as the employee was still alive at the time of the settlement, the future widow was not a "person entitled to compensation" under Section 33(g) of the Act, and her claim was not barred by her failure to obtain prior written approval of the settlement. With regard to double recovery, the Court stated:

> We agree that the Act generally reflects a policy of avoiding double recovery. But section 903(e) is of fairly recent vintage, Pub. L. 98-426, 98 Stat. 1640; *E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1350 [27 BRBS 41(CRT) (9th Cir. 1993)] ("Prior to [enactment of] section 903(e), the credit doctrine allowed offset of benefits against LHWCA awards *only if* prior benefits were awarded under the LHWCA") (emphasis added), and its reach is not all-inclusive. *See*, *e. g.*, *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125 [21 BRBS 130(CRT) (9th Cir. 1998)] (allowing double recovery of veterans disability benefits and LHWCA benefits); *Brown v. Forest Oil Corp.*, 29 F.3d 966, 971 [28 BRBS 78(CRT) (5th Cir. 1994)] ("Although admittedly the LHWCA has a general policy to avoid double recoveries, we have also noted that limitations on employee recovery are not favored absent statutory authority") (footnote omitted). Because the prohibition against double recovery is not absolute, we do not find the possibility of such recovery in this context to be so absurd or glaringly unjust as to warrant a departure from the plain language of the statute. *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) (plain language controls unless it leads to results that are "'absurd or glaringly unjust'").

Yates, 519 U.S. at 261, 31 BRBS at 10(CRT). In *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit relied on *Yates* and held that a "person entitled to compensation" under Section 33(f) should be the same as in Section 33(g). The court stated:

> We conclude that an interpretation of § 33 of the LHWCA that permits double recovery is not an absurd result so as to influence us to depart from the plain meaning of the statute. [citing and quoting *Yates*]. Consequently, the [*Yates*] Court "[did] not find the possibility of [double] recovery in this context [i.e., 33(f) and (g)] to be so absurd or glaringly unjust as to warrant a departure from the plain language of the statute." *Id.* Accordingly, we will not look beyond the plain meaning of the statute simply because under

some scenarios a claimant may recover twice under the same claim.

Taylor, 201 F.3d at 1241, 33 BRBS at 201-202(CRT) (some citations and quotations omitted).

Claimant's double recovery here is not "absurd" in light of the fact that he has two remedies available to him. One remedy is based on his right as a British citizen to sue his employer in tort, and one remedy is based on his status as an employee subject to the DBA. There is no statutory provision in the Act or the DBA preventing claimant from both recoveries.[29] Because double recovery is not such an absurd result that we should look beyond the statute, we decline to create another extra-statutory credit provision. *See Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (court declined to create extra-statutory credit to avoid double recovery where claimant settled longshore claims with other potentially responsible employers). Accordingly, we hold that AG Jersey is not entitled to a credit for payments to claimant pursuant to the tort settlement.

[29] We reject AG Jersey's argument that we should prevent the double recovery in this case because it would give, unjustly, a UK worker greater rights than an American worker. The rights of foreign nationals under the Act are not always the same as those of American citizens and residents. *See* 42 U.S.C. §1652(b) (benefits for foreign nationals may be commuted); 33 U.S.C. §909(g); *Omar v. Al Masar Transp. Co.*, 46 BRBS 21 (2012); *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001).

Accordingly, we reverse the administrative law judge's application of the Section 33(g) bar. We hold that claimant's recovery under the DBA is not precluded by the doctrines of election or exclusivity of remedies. Claimant's recovery under the DBA is not to be diminished by any credit for his recovery in tort. The case is remanded to the administrative law judge for consideration of any other remaining issues.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge