BRB No. 97-0336

BRIAN T. GREMILLION	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GULF COAST CATERING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order -- Denying Motion to Dismiss of Edward Terhune Miller and the Decision and Order awarding benefits of Richard K. Malamphy, Administrative Law Judges, United States Department of Labor.

Marvin L. Jeffers, Metairie, Louisiana, for claimant.

Patrick H. Patrick (Trinchard & Trinchard), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer/Carrier[1] appeals the Order -- Denying Motion to Dismiss of Administrative Law Judge Edward Terhune Miller and the Decision and Order awarding benefits (93-LHC-2716) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

[1]Employer Gulf Coast Catering Cmpany is no longer in business. This litigation has been prosecuted by its insurance carrier, Liberty Mutual Insurance Company.

Claimant injured his back on May 17, 1988, in the course of his employment with Gulf Coast Catering Company, while assisting three co-workers in moving a three hundred pound ice maker on the quarterboat housing barge Q/B/ MINDY, which was located at the Chevron, U.S.A. compressor station at Timbalier Bay. *See* JX-1. He filed an action in the United States District Court for the Eastern District of Louisiana against employer and third parties[2] seeking damages under the Jones Act, 46 U.S.C. §688, and "maintenance and cure"[3] under general maritime law. Claimant also filed a separate action in state court. Employer voluntarily paid claimant $25,000 in maintenance and cure after initiation of the suit, and intervened in the litigation to recover its $25,000 voluntary payment. Employer was also named in this third-party litigation as a defendant.

Claimant reached a settlement with the third-party defendants, and pursuant to this accord, employer waived its right to reimbursement of the $25,000 it paid claimant as "maintenance and cure" out of the $55,000 to be received from the other third-party defendants. Employer also agreed to dismiss its intervention in the lawsuit. Claimant, in return, agreed to dismiss his claims for maintenance and cure, punitive damages and attorneys fees/costs against employer. Employer for its part retained the right to a credit against any additional compensation that claimant might receive, including benefits payable under the Act, in the amount of $25,000 it had advanced as "maintenance and cure," plus the proceeds of the settlement with the other third-party defendants, $55,000, for a total of $80,000. *See* JX-1.

Claimant, along with the third-party defendants, jointly moved to dismiss the federal action as to the third parties, and employer joined in this motion by moving to dismiss its intervention. The district court denied this motion for lack of jurisdiction. On employer's

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[2]Claimant sued, *inter alia*, O.I.S.-Mobile Lab, Inc., Patrick Picou, Picou Inspection Company, and Doerle's Quarterboats.

[3]"Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. "Cure" is the right to necessary medical services. Only "seamen" can assert the right to maintenance and cure, but the legal test for seaman status in maintenance and cure actions is the same as the inquiry for standing under the Jones Act. *See Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499-1500 (5th Cir.1995) (*en banc*), *cert. denied*, 116 S.Ct. 706 (1996).

motion, the district court granted summary judgment against claimant on the maritime and Jones Act claims, ruling that claimant was not a seaman because the barge on which he was injured was not a "vessel." This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990).

Claimant then filed this claim for benefits under the Act, and employer moved to dismiss the claim under Section 33(g), 33 U.S.C. §933(g), because the aforementioned settlement was obtained without its prior written approval. Employer's motion was denied by interlocutory order. Citing the Board's decision in *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), Judge Miller reasoned that employer's participation in the lawsuit precluded application of Section 33(g). The administrative law judge also determined in the alternative that Section 33(g) did not apply because claimant was not a "person entitled to compensation" at the time of the settlement because he had settled the third-party litigation before filing his claim under the Act. After a formal hearing on the merits, Judge Malamphy awarded claimant temporary total disability benefits from May 17, 1988 and continuing. He also granted employer a credit in the amount of $28,283.02 pursuant to Section 33(f), 33 U.S.C. §933(f). The administrative law judge refused to disturb the previous ruling on employer's motion to dismiss under Section 33(g) and this appeal followed.

On appeal, employer challenges the ruling that Section 33(g) does not bar this claim.[4] Employer further avers that the administrative law judge erred in granting it a credit for an amount less than was provided in the third-party settlement agreement. Employer also contests the administrative law judge's findings on the merits, asserting that claimant is not, in any event, totally disabled. Claimant responds, urging affirmance of the administrative law judges' decisions.

Employer specifically contends that claimant's failure to obtain prior written approval of the third-party settlement forecloses his longshore claim pursuant to Section 33(g). Employer relies upon Fifth Circuit authority, which it asserts dictates a strict application of Section 33(g) without exception, *see Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *aff'd on other grounds,* 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986), and contends that the administrative law judge erred in concluding otherwise. Employer further contests the administrative law judge's reliance on the Board's decision in *Deville*, 26 BRBS at 123. We affirm the administrative law judge's finding that employer's participation in the third-party suit amounted to a constructive approval of the settlement.

Section 33(g)(1) requires that a "person entitled to compensation" obtain his employer's written approval prior to entering into a third-party settlement for less than the

[4]Employer's challenge to the interlocutory order denying its motion to dismiss is reviewable on employer's appeal of the final Decision and Order. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944, 25 BRBS 78, 80(CRT) (5th Cir. 1991); *Rochester v. George Washington University*, 30 BRBS 233, 235 (1997).

amount to which he is entitled under the Act. Pursuant to Section 33(g)(2), the employee forfeits his right to future compensation if, *inter alia*, no written approval is obtained as required by Section 33(g)(1). A claimant need only notify his employer under Section 33(g)(2) if he obtains a judgment against the third parties or if he settles the litigation for an amount greater than that to which he is entitled under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996)(Smith and Brown, JJ., separately concurring and dissenting).

Initially, we reverse the administrative law judge's determination that claimant, at the time of the settlement, was not a "person entitled to compensation" because he had not yet filed a claim for benefits under the Act. In *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 117 S.Ct. 796, 31 BRBS 5(CRT) (1997)[*Yates*], the Supreme Court reiterated that a "person entitled to compensation" means only that the person satisfies the prerequisites attached to the right to compensation regardless of whether the right "has been acknowledged or adjudicated." 117 S.Ct. at 801, 31 BRBS at 8(CRT), *citing Cowart*, 505 U.S. at 477, 26 BRBS at 51(CRT). Thus, claimant became a "person entitled to compensation" at the time he suffered his work-related injury, and the administrative law judge erred in reaching a contrary conclusion.

We are not persuaded, however, that the administrative law judge erred in finding that Section 33(g) did not bar the claim due to employer's full involvement in the third- party litigation. Employer is correct that, in cases decided prior to the Supreme Court's decision in *Cowart,* the United States Court of Appeals for the Fifth Circuit interpreted the language of Section 33(g) strictly. In *Collier*, the employee sued the owner of a drilling rig where he was injured. He settled this action without the approval of his employer, which raised his failure to obtain prior written approval of the settlement as a defense to the longshore claim pursuant to Section 33(g). In reversing the award, the court of appeals characterized the "unqualified" language of the approval requirement of Section 33(g) as "brutally direct" and "mandatory" in nature. 784 F.2d at 647, 18 BRBS at 72(CRT). The court subsequently underscored what it characterized as the mandatory and unambiguous language of Section 33(g) in its decision in *Cowart*, 927 F.2d at 828, 24 BRBS at 93(CRT), stating that the language of Section 33(g)(1) contained "no exception" to its approval requirement. *See Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991). The Supreme Court, in affirming the Fifth Circuit's holding that the claim was barred in *Cowart*, however, noted that the statute provides two exceptions to the written approval requirement: where the claimant settles a third-party suit for an amount greater than his compensation entitlement and where claimant obtains a judgment against a third party. The court also declined to address the effect of employer's participation in the third-party litigation in that case because it had not been included in the question on which *certiorari* was granted. *Cowart*, 505 U.S. at 483, 26 BRBS at 53 (CRT).

Subsequent to the Supreme Court's decision, the Board held in *Deville,* 26 BRBS at 123, a case which arose in the Fifth Circuit, that an employer's participation in third-party litigation was sufficient to preclude the application of Section 33(g)(1). That employer intervened in the third-party suit on the side of the claimant, appeared at the hearing, and

contributed to the settlement agreement which provided for its offset. Further, the Board held that even if Section 33(g)(1) did apply, the employer gave written approval prior to the execution of the settlement by being an actual signatory to the agreement. *Id.* at 131-132. The Board's decision in *Deville* followed *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (1992), *cert. denied*, 507 U.S. 984 (1993), in which the Fourth Circuit ruled that when an employer is a co-plaintiff that fully participates in the third-party settlement process and reaches it own settlement with the third party, Section 33(g) is inapplicable. The court reasoned that "the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly ensured, by its own action, the protection of its offset rights." *Sellman*, 954 F.2d at 242, 25 BRBS at 106(CRT). In affirming the Board on this point, the court distinguished the case from one in which the employer participated in the third-party suit yet opposed the settlement. 954 F.2d at 243 n.2, 25 BRBS at 106 n.2(CRT).

We conclude that the administrative law judge's finding that employer participated in the third-party litigation to the degree that rendered Section 33(g) inapplicable is supported by substantial evidence and accords with applicable law. Employer, through its carrier in this case, participated in the third-party litigation both as a party-defendant and intervenor.[5] Although only claimant and his spouse signed the Release in the third-party suit, employer subsequently joined in the Joint Motion for Partial Dismissal with Prejudice. The Release executed by claimant recites that

> [i]t is agreed *among the parties* that Liberty Mutual Insurance Company and Gulf Coast Catering Company waive their rights to reimbursement ... in connection with the settlement herein, and to dismiss its intervention in the aforementioned lawsuit.

JX-1 at 6 (emphasis added). Claimant in return agreed to drop his suit against employer. *Id*. Significantly, the Release continues that employer retains its rights to a credit "in the amount previously paid ($25,000) and in the amount of the proceeds of the settlement, ... $55,000, for a total credit of $80,000." JX-1 at 6-7. Thus, employer specifically benefits from the accord by avoiding potential exposure to tort and Jones Act liability, and protects its potential credit, based on the gross amount of the settlement proceeds, against any "additional compensation" to which claimant "may be entitled in the future." JX-1 at 6-7.

[5]We note that the United States Court of Appeals for the Third Circuit has stated that an employer sued under the Jones Act or as vessel owner is considered to be a "third party" for purposes of Section 33. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

Indeed, employer, on appeal, relies on the provision of the settlement which in its view dictates that the amount of its credit should be greater than that provided by the administrative law judge. Er. Br. at 11; *see* discussion, *infra*. In short, employer acted directly to "ensure[], by its own action, the protection of its offset rights." *Sellman*, 954 F.2d at 242, 25 BRBS at 106(CRT); *Deville*, 26 BRBS at 131.

We conclude that the Board's decisions in *Perez v. International Terminal Operating* Co., BRBS , BRB No. 97-0261 (Sept. 26, 1997) (Smith, J., concurring), and *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996)(Smith and Brown, JJ., separately concurring and dissenting), do not compel a different result. The administrative law judges in these cases applied Section 33(g) to bar claimants' entitlement to compensation because of the employees' failure to obtain written approval of third-party settlements. In *Pool,* the Board noted that the employer "through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process." Its carrier's counsel was present when two "satisfactions of judgment" were executed, but that representative refused to sign either document and indeed "took steps to distance himself from the settlement negotiations." *Pool*, 30 BRBS at 188. In affirming the administrative law judge's application of Section 33(g), the Board upheld the findings that employer's "participation ... via [its] carrier's actions," was insufficient to preclude the application of Section 33(g)(1), "[a]s carrier did not appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so." *Id*. Similarly, in *Perez,* the employer was impleaded into the third-party suit by the defendant, and employer specifically stated that its agreement, during settlement negotiations, to compromise its lien was not to be construed as approval of the settlement. Thus, despite their participation in the third-party suits, the employers in *Pool* and *Perez* declined to give approval, *see generally Sellman,* 954 F.2d at 243 n.2, 25 BRBS at 106 n.2 (CRT), and Section 33(g) was not rendered inapplicable by virtue of the employers' participation. In contrast, in the case at bar, employer was both a defendant and an intervenor, and the Release recited the agreement of all the parties by which employer avoided further liability. Moreover, employer joined in the Joint Motion for Partial Dismissal, and it never averred that its participation in the settlement negotiations should not be construed as approval. *See generally Deville*, 26 BRBS at 131. Accordingly, we affirm the administrative law judge's ruling that Section 33(g) does not bar the instant claim.

In addition, we agree with our concurring colleague that the administrative law judge's finding that Section 33(g) is not a bar may also be affirmed on an alternate ground. The settlement agreed to by the parties in this case was not the basis for dismissal of the third-party litigation by the district court. Instead, the court denied the motion to dismiss, finding it lacked jurisdiction inasmuch as claimant was not a seaman because the Q/B/MINDY was not a vessel. The court thus granted summary judgment in favor of all defendants. This decision was affirmed on appeal to the United States Courts of Appeals for the Fifth Circuit, with the court stating that "recovery of damages thus is not available to Gremillion as a seaman," and that "the remaining negligence claims raised herein on appeal lack merit." *Gremillion*, 904 F.2d at 294. Claimant thus obtained an adverse judgment on the merits. Having no entitlement on his claims against the defendants, he

could not bargain away funds to which employer was entitled. In view of the judgment of the courts on the merits of his third party claims, Section 33(g) does not apply.

Employer next asserts that Judge Malamphy erred in limiting the amount of its credit under Section 33(f) to the net amount of claimant's recovery. Employer's argument has merit in view of the specific terms of the release signed by claimant. We therefore vacate the administrative law judge's holding that employer's credit is limited to the net amount of claimant's settlement and remand this case for the administrative law judge to reconsider this issue.

Both Sections 3(e) and 33(f), 33 U.S.C. §§903(e), 933(f), provide that an employer's offset is limited to the net amount of the recovery for the same injury, disability or death which is the subject of the claim under the Longshore Act.[6] A settlement may in certain cases provide "a contractual basis for requiring a credit," *St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397, 400 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987). The accord, however, must "clearly and unambiguously" demonstrate an intent to grant employer a credit which exceeds the net amount received by claimant from the settlement. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 65 F.3d 460, 466, 29 BRBS 113, 117-118 (CRT)(5th Cir. 1995), *aff'd*, 117 S.Ct. 796, 31 BRBS 5(CRT) (1997).

In this instance, the Release appears to grant employer an offset which exceeds claimant's net settlement recovery, as it provides that

> IT IS EXPRESSLY UNDERSTOOD AND AGREED that Liberty Mutual Insurance Company and Gulf Coast Catering Company specifically retain, and do not waive, the right to a credit, in connection with any additional

[6]Section 3(e) provides a credit for "amounts paid to an employee." Section 33(f) provides for a credit based on the "net amount." *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Jenkins v. Norfolk & Western Railway Co.*, 30 BRBS 109 (1996). The "maintenance and cure" advanced by employer at the initial stages of the third-party litigation does not fall under Section 3(e) because it is not a payment made under the Jones Act or any other state workers' compensation law. *See* n. 3. It nevertheless forms the basis of a credit under Section 33(f). *See generally Jenkins,* 30 BRBS at 111.

> compensation and/or medical benefits to which Brian T. Gremillion may be entitled in the future, whether such benefits may be owed pursuant to any state or federal law, including, but not limited to, the Jones Act, 46 U.S.C. Section 688, the General Maritime Law, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et. seq., or the Louisiana State Workers' Compensation Act, in the amount previously paid ($25,000) and in the amount of the proceeds of the settlement, to-wit, $55,000, for a total credit of $80,000.

JX-1 at 6-7 (emphasis added). This language could provide a contractual basis for a credit in the amount of $80,000 if the administrative law judge finds it clearly and unambiguously demonstrates such an intent, *Cf. Yates*, 65 F.3d at 466, 29 BRBS at 118(CRT) ("settlement instrument does not evidence an intent to grant Ingalls a set-off in derogation of §33(f) of the Act with sufficient clarity to permit enforcement."). Accordingly, the administrative law judge's ruling limiting employer's credit to the net amount of claimant's settlement recovery is vacated, and the case is remanded for reconsideration of this issue consistent with this opinion.

We turn next to employer's challenge to the administrative law judge's award of benefits for total disability. We agree that the findings with respect to the extent of claimant's disability cannot be affirmed. While the administrative law judge extensively listed the pertinent evidence which outlines the course of claimant's back disability, "non-organic" pain and psychiatric difficulties, he did not render adequate findings of fact and conclusions of law with respect to the conflicting evidence of record.[7]

Despite extensive evidence in the record regarding claimant's disability, the administrative law judge stated only:

> As Ms. Favaloro has noted, the medical opinions range from one extreme to the other regarding the physical restrictions since the injury in 1988.

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[7]Numerous physicians examined claimant. Dr. Razza found objective indications to explain claimant's pain, and agreed with a surgical option for an anterior lumbar discectomy and fusion. JX-17. A number of experts opined that a "non-organic" basis existed for claimant's persistent complaints of pain. Dr. Schumacher saw no objective indications of an abnormal disc. JX-7. Dr. Laborda suspected a non-organic basis for claimant's pain. JX-8. In 1989, Dr. Latour diagnosed an "adjustment disorder" related to claimant's 1988 injury. JX-21. Dr. Blackburn in 1989 agreed with the diagnosis of adjustment disorder. JX-9; *see also* JX-6. Dr. Fields opined in 1994 that claimant's disability "is total and unchanged from ... 1988." JX-22. Dr. Shepherd, who examined claimant in 1988 and also reviewed his medical records, has consistently asserted that claimant is not disabled. He testified that he could not explain claimant's complaints of pain, and opined that claimant could go back to work. JX-32. A vocational counselor, Ms. Favaloro, testified that medical opinions regarding claimant's disability ran to either extreme.

Even if the undersigned could asses the physical restrictions, such as light work with minimal bending, there would remain the question of assessing psychiatric impairment which physicians such as Dr. Latour relate to the injury.

> Based on the status of the evidence, this ALJ is unable to conclude that the Employer has shown that the claimant can return to his previous work or any other employment.
>
> Thus, I conclude that the Claimant has been temporarily totally disabled since the injury in May 1988.

Decision and Order at 10-11. The administrative law judge did not explicitly state that claimant is unable to return to his former longshore work, and thus that he established a *prima facie* case for total disability. *See Mijangos*, 948 F.2d at 944, 25 BRBS at 80(CRT). Nor did he specify how employer failed to meet its burden of demonstrating the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156, 163 (5th Cir. 1981). The administrative law judge, for example, cited employer's vocational expert, Ms. Favaloro, only for the proposition that there is a conflict in the opinions regarding the extent of claimant's disability. *See* Decision and Order at 10. This witness, however, testified that she found a number of positions which in her opinion would lie within claimant's restrictions on climbing, lifting and bending. *See* Tr. at 91-98. Given this record, we are unable to conclude whether the administrative law judge "simply disregarded significant probative evidence or reasonably failed to credit it." *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir. 1997). Because the administrative law judge must in the first instance resolve these conflicts and explain what evidence he weighed and why, consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), *see McCurley v. Kiewest Co*., 22 BRBS 115 (1989), and because the Board cannot render more specific findings to supplement the administrative law judge's Decision and Order, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982), we vacate the administrative law judge's findings with respect to the extent of claimant's disability, and remand this case to the administrative law judge for reconsideration of this issue.

To conclude, we affirm the administrative law judge's finding that this claim is not barred pursuant to Section 33(g). We vacate the administrative law judge's determination that employer is limited to a credit of $28,283.02, and remand for consideration of whether employer is entitled to a credit of $80,000 pursuant to the terms of the contractual agreement. Finally, we vacate the administrative law judge's findings with respect to the

extent of claimant's disability, and remand the case for the administrative law judge to render adequate findings of fact and conclusions of law after reviewing all relevant evidence with respect to the extent of claimant's disability.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I agree with the result reached by the majority that the instant claim is not barred pursuant to Section 33(g), but I disagree with their reasoning. I believe the Board need not reach the issue regarding the extent of employer's participation that would take this claim out of the reach of Section 33(g). I would hold Section 33(g) inapplicable because the third-party litigation was terminated by summary judgment, which was affirmed by the United States Courts of Appeals for the Fifth Circuit on the basis that the barge where claimant was injured was not a vessel and thus claimant was not a seaman under the Jones Act. Because of the district court's ruling against him on the Jones Act and general maritime claims, claimant was not entitled to any recovery as a result of that litigation. Therefore no "settlement" under Section 33(g) occurred in this case.

As a result, I too would affirm the finding that Section 33(g) does not bar this claim, because that provision does not come into play. In all other respects, I concur with the majority in this case.

JAMES F. BROWN
Administrative Appeals Judge