BRB No. 03-0505

GERALD A. KELLY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RED FOX COMPANIES OF NEW IBERIA, INCORPORATED	)	DATE ISSUED: April 22, 2004
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

William M. Detweiler, Metairie, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision (2002-LHC-2917) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured during the course of his employment, and he received medical and disability benefits under the Act from employer's carrier. On January 19, 2001, claimant filed a tort suit against Diamond Offshore Drilling, Incorporated (Diamond Offshore) and employer. Carrier filed a motion to intervene in the civil suit to protect its interests. In June 2001, claimant and the court were notified that action against employer was prohibited because of its status in bankruptcy proceedings, and employer was dismissed from the civil proceedings. At a hearing in January 2002, carrier's counsel advised claimant and the court that employer had contractually waived its right of subrogation as to Diamond Offshore. Carrier, therefore, filed a motion to dismiss its intervention, and this motion was granted on March 4, 2002. Thereafter, claimant and Diamond Offshore settled the claim for the gross amount of $25,000, and the court issued a Full and Final Release and dismissed the tort suit. Carrier subsequently terminated all benefits under the Act because claimant failed to obtain its prior written approval of the settlement pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1).

In a conference call conducted on March 31, 2003, with the administrative law judge, the parties agreed that carrier had paid claimant medical expenses in the amount of $13,311.58 and disability compensation in the amount of $99,286.32 prior to terminating benefits in 2002. Because claimant's third-party settlement was for an amount less than the disability compensation to which he is entitled under the Act, and because he did not obtain employer's prior written approval of the settlement, the administrative law judge subsequently granted employer's motion for summary decision and dismissed claimant's claim for benefits. Claimant appeals the decision, and employer responds, urging affirmance.

Section 33(g)(1) of the Act states:

> 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.

33 U.S.C. §933(g)(1). If a claimant is a "person entitled to compensation," he must obtain prior written approval of a third-party settlement if the gross proceeds of the

aggregate settlements are for an amount less than the disability compensation to which he would be entitled under the Act. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *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); *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in result only). If he fails to obtain the required approval, the claimant forfeits his entitlement to disability and medical benefits under the Act. 33 U.S.C. §933(g)(1), (2); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Esposito*, 36 BRBS at 14. The claimant need only notify the employer under Section 33(g)(2) if he obtains a judgment against the third parties or if he settles the third-party claim for an amount greater than or equal to that which he is entitled to receive under the Act. 33 U.S.C. §933(g)(2); *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT).

In this case, claimant settled his third-party claim for $25,000. Previously, he had received in excess of $99,000 in disability benefits under the Act; therefore, claimant clearly settled his tort claim for less than the amount to which he is entitled under the Act, making Section 33(g)(1) applicable. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). In order to retain entitlement under the Act, claimant must have obtained prior written approval of the settlement. It is undisputed that claimant did not obtain such approval. Nevertheless, he raises two theories which he asserts demonstrate that Section 33(g)(1) does not bar his claim.

First, claimant argues that carrier acquiesced in the settlement because its counsel was "aware of" and "participated in" the settlement discussions. Carrier disputes this assertion, arguing that it was not involved in the settlement process and only received notice after the settlement was completed. While direct participation the third-party settlement process by an employer or carrier may render the Section 33(g)(1) bar inapplicable, *see I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *aff'd in pert. part and vacated on other grounds on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (1992), *cert. denied*, 507 U.S. 984 (1993); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring); *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), mere involvement in or knowledge of a third-party action is not sufficient to affect the applicability of Section 33(g)(1). *Esposito*, 36 BRBS at 13; *Perez v. International Terminal Operating Co.*, 31 BRBS 114 (1997) (Smith, J., concurring); *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith and Brown, JJ., concurring and dissenting). Even accepting claimant's version that the settlement and its provisions were discussed with counsel for carrier prior to the execution of the agreement, mere knowledge does not reach the level of involvement necessary to demonstrate approval of the settlement. *Esposito*, 36 BRBS 13-14. When a third-party claim is being settled for less than a claimant's longshore entitlement, mere

"acquiescence" or "awareness" of the settlement is insufficient to render Section 33(g) inapplicable or satisfied. *Id.*; *Pool*, 30 BRBS at 188.

Next, claimant argues that employer's waiver of its subrogation rights in its contract with Diamond Offshore leaves carrier without lien rights against the settlement proceeds. Without such rights, claimant asserts that carrier cannot invoke the protections of Section 33(g). We disagree. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that subrogation rights are but one of the interests employer or carrier has in a settlement between an injured employee and a third-party. *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163(CRT) (5th Cir. 1988); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). The employer and carrier also have a right to offset the amount of the settlement against the obligation for future payments, and this right is separate from the right of subrogation. *Id.*; *see also* 33 U.S.C. §933(f); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993). Thus, the absence of a lien right in this case does not render Section 33(g)(1) inapplicable.

As Section 33(g)(1) is applicable in this case, the administrative law judge properly found that claimant's failure to obtain carrier's prior written approval of his settlement with Diamond Offshore results in a forfeiture of all disability and medical benefits under the Act. *Esposito*, 36 BRBS at 16. Therefore, we affirm the administrative law judge's grant of summary decision and dismissal of claimant's claim.[1]

[1]Claimant also alleges that he was denied due process as a result of carrier's late notice of the termination of benefits under the Act and that the administrative law judge should have given his claim equitable consideration. Claimant's argument is rejected. Carrier is obliged to file a form pursuant to 33 U.S.C. §914(c) if and when it suspends or terminates benefits; there is no requirement that notice of such suspension must occur within a limited period after claimant settles his third-party claim. Additionally, claims under the Act are controlled by the provisions of the Act and are not claims in equity; therefore, the administrative law judge need not give them "equitable consideration." *See generally Taylor v. Plant Shipyard Corp.*, 32 BRBS 155 (1998) (Hall, J., concurring in pertinent part), *rev'd on other grounds Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000).

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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BETTY JEAN HALL
Administrative Appeals Judge