U.S. Department of Labor

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

BRB No. 15-0194

SUZANNE QUIROZ-GREENE (Widow of LEJON C. GREENE)	)	
Claimant-Respondent	)	
v.	)	
BAE SYSTEMS SAN FRANCISCO SHIP REPAIR	)	DATE ISSUED: Apr. 18, 2016
and	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Motion for Summary Decision, the Order Continuing Hearing, Modifying Pre-Hearing Deadlines, and Denying Motion for Reconsideration, and the Order on Motion to Exclude Expert Witnesses of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

John R. Wallace (Brayton Purcell LLP), Novato, California, for claimant.

Frank B. Hugg, Oakland, California, for employer/carrier.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order Denying Motion for Summary Decision, the Order Continuing Hearing, Modifying Pre-Hearing Deadlines, and Denying Motion for Reconsideration, and the Order on Motion to Exclude Expert Witnesses (2013-LHC-01612) of Administrative Law Judge Christopher Larsen 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 if they are rational, supported by substantial evidence, and 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 2, 2010, claimant's husband, LeJon C. Green (decedent), who had worked for employer as a marine carpenter, died from lung cancer.[1] On September 1, 2011, claimant filed wrongful death civil actions against various third parties, namely asbestos manufacturers, distributors, and related entities, on behalf of herself and her then-minor daughter, Serena, alleging that her husband's death was due to asbestos exposure. Claimant subsequently settled some of these third-party claims.[2] Claimant signed the documents in allegedly different capacities such as "claimant," "Representative of the Injured Party/Decedent," and "Guardian ad Litem." Claimant also entered into a group of settlements wherein she signed as "Guardian ad Litem for Serena Greene, Successor-in-Interest."[3]

On May 25, 2012, after she filed her civil actions but before she signed the first release, claimant filed a claim under the Act on her own behalf seeking death benefits pursuant to Section 9, 33 U.S.C. §909. Claimant averred that decedent's death was due exposure to asbestos and other toxins during the course of his employment with employer. On June 5, 2014, the administrative law judge granted employer's motion to

[1] As there has not yet been a formal hearing, the history of this case has been gleaned from the parties' briefs and attachments thereto.

[2] Employer contends that claimant signed 16 settlement releases.

[3] It appears that some of the released third-party defendants paid sums into claimant's attorney's trust account, while other settlements resulted in deposits totaling $315,637.18 into a "blocked account" payable only to Serena when she turned 18.

join claimant's daughter as a party to claimant's longshore claim.[4] The administrative law judge subsequently appointed Serena's older half-sister, claimant's daughter from another marriage, as her guardian ad litem. On January 10, 2015, Serena turned 18.

In January 2015, employer filed a motion for summary decision with the administrative law judge, asserting that the claim for death benefits is barred pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Specifically, employer contended that both claimant and her daughter are "persons entitled to compensation" who entered into unapproved third-party settlements. In an Order Denying Motion for Summary Decision issued January 27, 2015, the administrative law judge denied employer's motion, finding that the case presents genuine issues of material fact as to who actually released her claims in four of the settlements and as to Serena's ratification of her mother's settling on her behalf. The administrative law judge further found, however, that claimant had acted only as her daughter's guardian ad litem when she settled some of the third-party suits, and that, consequently, apportioning the proceeds of such settlements is unnecessary because Serena was the sole beneficiary of the settlements. The administrative law judge found that, as Serena had attained her majority and it was unclear whether she had accepted the actions claimant had undertaken on her behalf, it could not be determined whether Serena's right to compensation under the Act is barred by Section 33(g).

Employer sought reconsideration of the administrative law judge's denial of its motion for summary decision. In an Order dated February 4, 2015, the administrative law judge summarily denied employer's motion for reconsideration and rescheduled the formal hearing from February 16, 2015 to May 5-6, 2015.

In support of its position that Section 33(g) bars the payment of benefits to claimant and Serena, employer sought to introduce expert testimony as to how the settlement proceeds were apportioned between claimant and Serena. In response, claimant filed a motion to exclude employer's experts on the grounds of late disclosure; three of these witnesses apparently were prepared to testify as to the general apportionment of third-party wrongful death settlements. In an Order on Motion to

[4] This action was proper. Section 9(b) of the Act, 33 U.S.C. §909(b), provides for the payment of one death benefit where, as in this case, a decedent is survived by a spouse and a child; that benefit is apportioned between decedent's survivors. *See Hawkins v. Harbert Int'l, Inc.*, 33 BRBS 198 (1999); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986); *see also Valdez v. Crosby & Overton*, 34 BRBS 69, *aff'd on recon.*, 34 BRBS 185 (2000). A "child" is entitled to death benefits until her 18th birthday, unless she was wholly dependent upon the employee and incapable of self-support due to a disability, or unless she was a full-time student under the age of 23. 33 U.S.C. §902(14), (18).

Exclude Expert Witnesses dated February 10, 2015, the administrative law judge found that his prior continuance rendered the claimant's "late disclosure" argument moot. With regard to the expert witnesses, the administrative law judge found that because he had already ruled that claimant had settled some of the third-party settlements only on behalf of her daughter, evidence as to apportionment of the proceeds is unnecessary. Consequently, the administrative law judge granted claimant's motion to exclude employer's three expert witnesses.[5]

Employer appealed the administrative law judge's three Orders to the Board, contending the administrative law judge erred in denying its motion for summary decision. Alternatively, employer argued that the administrative law judge's rulings deprived it of due process of law. Specifically, employer averred that the administrative law judge effectively prevented it from attempting to establish that the death benefits claim is barred by Section 33(g) and the apportionment of any Section 33(f), 33 U.S.C. §933(f), credit to which it may be entitled. Claimant, in responding to employer's appeal, urged the Board to dismiss employer's appeal on the basis that the administrative law judge's Orders are interlocutory.

In an Order issued on April 24, 2015, the Board acknowledged the interlocutory nature of the administrative law judge's Orders but, on the information presented by the parties, stated that it may be necessary for the Board to direct the course of the adjudicatory process in this case. The Board therefore denied claimant's motion to dismiss employer's appeal on the basis of its interlocutory nature, granted employer's motion to hold the administrative law judge's scheduled hearing in abeyance, accepted employer's appeal, and ordered the parties to file briefs.

Employer, in support of its appeal, filed a brief challenging the administrative law judge's denial of its motion for summary decision and, alternatively, arguing that the case should be remanded for consideration of the applicability of Section 33(f), (g) of the Act to the claim for death benefits. Claimant filed a response brief opposing employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a response brief urging the Board to affirm the administrative law judge's denial of employer's motion for summary decision and to remand the case for the administrative law judge to fully discuss the applicability of Section 33(f), (g) to the death benefits claim. Claimant filed a brief in response to the Director's brief. Employer also filed a reply brief adopting "in all respects" the Director's response brief.

[5] The administrative law judge denied claimant's motion as to the employer's fourth witness, a physician, finding that the parties had already taken the doctor's deposition.

INTERLOCUTORY APPEAL

Initially, we reject claimant's contention that the Board should not review the administrative law judge's Orders at this time because employer's appeal is interlocutory in nature. While the Board does not ordinarily undertake interlocutory review, it has the discretion to do so because it is not bound by formal rules of procedure. 33 U.S.C. §923(a). Thus, the Board will grant interlocutory review of a non-final order if it is necessary to direct the course of the adjudicatory process, *L.D. [Dale] v. Northrop Grumman Ship Systems, Inc.*, 42 BRBS 1, *recon. denied*, 42 BRBS 46 (2008), or if a party establishes it has been denied due process of law. *Niazy v. The Capital Hilton Hotel*, 19 BRBS 266 (1987). In this case, employer alleges the administrative law judge made findings that deny it due process of law, contending the administrative law judge preemptively ruled that claimant settled some of the third-party actions only on Serena's behalf and failed to allow it to offer evidence on issues on which it bears the burden of proof. Given the significance and complexity of the issues presented, we will address employer's interlocutory appeal at this juncture. *See generally Hardgrove v. Coast Guard Exch. System*, 37 BRBS 21 (2003).

MOTION FOR SUMMARY DECISION

Employer challenges the administrative law judge's denial of its motion for summary decision. 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 matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine*, 294 F.3d 55 (2d Cir. 2002); 29 C.F.R. §§18.40, 18.41 (2014) (amended 2015). In his January 27, 2015 Order, the administrative law judge rationally found there are genuine issues of material fact with regard to four of the settlements signed by claimant.[6] The administrative law judge also rationally found there are genuine issues of material fact with respect to whether Serena accepted settlement proceeds upon turning age 18, thereby ratifying settlements that claimant entered into on Serena's behalf. Consequently, the administrative law judge properly denied employer's motion for summary decision, and we affirm this finding. *Tisdale v. American Logistics Services*, 44 BRBS 29 (2010); *Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010). However, as we will next discuss, the administrative law judge erred in making additional findings of fact adverse to employer with respect to the settlements without giving the parties the opportunity to offer documentary and testimonial evidence into evidence.

[6] The administrative law judge found that issues of fact exist as to the capacity in which claimant settled four of the third-party suits. Order Denying Motion for Summary Decision at 5; *see* n. 12, *infra*.

APPLICABILITY OF SECTION 33

Employer asserts the administrative law judge erred in finding that claimant settled third-party suits only on behalf of Serena, and in depriving employer of its right to present evidence on an issue on which employer has the burden of proof. Employer asserts the administrative law judge should be directed to receive into evidence the reports and testimony of employer's witnesses regarding the apportionment of the settlements at issue. The Director contends that the Section 33 analysis undertaken by the administrative law judge "contains errors and misstatements that may taint his future consideration of the issues" on remand. Dir. Br. at 2. Stating that the seminal issue before the administrative law judge is whose tort claims were resolved by the releases signed by claimant, the Director urges the Board to "remand the case with instructions for the ALJ to look closely at the language of all the releases and apply California state and Longshore Act precedent to determine the effect, if any, of Section 33 on this case." *Id.* at 23.

Section 33 of the Act is generally designed to foreclose a claimant from receiving double recoveries where she receives both benefits under the Act and civil damages from successful negligence actions, to ensure that employer's rights are protected in a third-party settlement, and to prevent a claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled. *See I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *modified on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Pursuant to Section 33(a) of the Act, 33 U.S.C. §933(a), a "person entitled to compensation" (PETC) under the Act, such as claimant herein, may proceed in tort against a third party if she determines that a third party may be liable for damages for a work-related death. *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (5th Cir. 1997).

In order to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act pursuant to Section 33(f), 33 U.S.C. §933(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third-party or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. Specifically, Section 33(g)(1) provides a bar to the claimant's receipt of compensation under the Act where the PETC enters into a third-party settlement for an amount less than her compensation entitlement without obtaining the employer's and carrier's prior written consent.[7] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT)

[7] Section 33(g), 33 U.S.C. §933(g), 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

(1992). Pursuant to Section 33(g)(2), a claimant is required to provide notice to employer, but is not required to obtain prior written approval, in two instances: (1) where the claimant obtains a judgment, rather than a settlement against a third party; or (2) where the claimant settles the third-party action for an amount greater than or equal to employer's liability under the Act.[8] *Id.*; *see Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996). In order to determine if the prior written approval provision applies, the administrative law judge must compare each PETC's aggregate, gross third-party settlement recoveries against her likely lifetime compensation entitlement.[9] *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994).

> (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.

[8] The Board held in *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), that a claimant's acceptance of payments from an asbestos trust fund is akin to a "judgment" rather than a "settlement" because of the absence of a compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements. Thus, only the Section 33(g)(2) notice provision applies to such payments. We agree with the Director that the administrative law judge should address on remand whether any of the releases are subject to the *Williams* holding.

[9] The Section 33(g) bar is an affirmative defense, placing the burden on the employer of proving that the claimant entered into fully executed settlements without prior written approval. *See Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997).

Where settlements involve more than one PETC, a determination must be made as to how to apportion the settlement recovery among the persons entitled to compensation. *See Bundens*, 46 F.3d 292, 29 BRBS 52(CRT). In such cases, the employer bears the burden of proving the apportionment of a settlement between each PETC. *See Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Flanagan v. McAllister Bros., Inc.*, 33 BRBS 209 (1999); *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). Only after such an apportionment has been determined can it be ascertained if Section 33(g)(1) or (2) applies to either PETC, and if the employer is entitled to an offset against benefits due under the Act to either PETC, pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f).[10] *See Bundens*, 46 F.3d 292, 29 BRBS 52(CRT).

We agree with employer and the Director that the administrative law judge erred in ruling, at a preliminary stage, that as a matter of fact claimant entered into some of the third-party settlements only as Serena's guardian. *See* Order Denying Motion for Summary Decision at 2-3; Order Denying Reconsideration at 3. In granting claimant's motion to exclude employer's expert witnesses, the administrative law judge stated he had "already ruled" that claimant had settled Serena's claims and that Serena's settlements did not affect claimant's right to benefits under the Act. *See* Order on Motion to Exclude Expert Witnesses at 2. As employer's witnesses would apparently opine that some portion of Serena's settlements should be apportioned to claimant, the administrative law judge concluded that their opinions are not relevant to the remaining issues.

As the Director properly notes, the administrative law judge's ruling appears to be based only on the signature line of each document, some of which contain hand-written

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[10] Section 33(f) states:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney fees).

33 U.S.C. §933(f). Section 33(f) therefore allows an employer a credit against benefits due for the net amount recovered by a PETC from third-party proceeds recovered for the same injury or death. *See Gilliland v. E.J. Bartells Co.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001).

notations. However, the signature line is not necessarily determinative of the parties' objective intent in settling. *See Sebastian Int'l, Inc. v. Peck*, 240 Cal.Rptr. 911 (Cal. Dist. App. 1987). The administrative law judge is required to address each release as a whole in order to determine whose rights were settled.[11] *See* Restatement (Second) of Contracts § 202 (1981). Thus, we vacate the administrative law judge's finding that claimant's settlement of the some of the third-party actions were solely on Serena's behalf. The administrative law judge on remand must reconsider all of the settlements in order to determine whose third-party claims were resolved.

We also agree with employer and the Director that the administrative law judge abused his discretion in prohibiting employer from presenting evidence as to the possible apportionment of the settlement proceeds. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). The issue of apportionment may arise if any settlement settled claims of both claimant and Serena, but the agreement did not specify how to apportion the proceeds between the two of them. *See* n.11, *supra.* In turn, this issue affects the amount of the aggregate, gross third-party settlements of each PETC under Section 33(g) and the net amount of an offset due employer under Section 33(f). *See Bundens*, 46 F.3d 292, 29 BRBS 52(CRT). These are issues on which employer bears the burden of proof and the administrative law judge's ruling erroneously deprived it of the opportunity to submit evidence. *Force*, 938 F.2d 981, 25 BRBS 13(CRT).

In *Force*, the Ninth Circuit held that an employer's right to offset settlement proceeds against its liability for benefits under the Act requires the employer to establish the apportionment of the settlement proceeds among the "persons entitled to compensation." Acknowledging that the task of determining apportionment is a difficult one, the court stated:

> In making the apportionment determination, therefore, the ALJ must be wary of an apportionment suggested by the settling parties or their counsel.

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[11] We note that the parol evidence rule provides that when the parties to a contract put their agreement in writing in a manner so that the terms of the agreement are certain, those terms cannot be varied on the basis of extrinsic evidence, unless the agreement is only partially integrated or is ambiguous. Then, additional terms not inconsistent with the written terms or the construction of the terms may be established by extrinsic evidence. In *Sellman*, the Board affirmed the administrative law judge's resort to extrinsic evidence to determine if the employer waived its Section 33(f) lien, as he rationally found that the third-party settlements were not fully integrated and were ambiguous. *Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990), *aff'd in part and rev'd in part*, 954 F.2d 239, 25 BRBS 101(CRT), *modified in part on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Thus, the face of the document controls unless the document is ambiguous as to its terms.

> Instead, the ALJ should look to such objective factors as how the settlement sum was actually distributed among the family members, and the going rate for settlements or judgments for the same types of injuries. Ultimately, this is the type of issue that cannot be resolved with scalpel-like precision and we will accord considerable deference to the ALJ's determination, based on the record and the ALJ's own judgment and experience.

Id., 938 F.2d at 986, 25 BRBS at 20(CRT).[12] Additionally the court held that the employer bears the burden of proof regarding the apportionment of a settlement that covers multiple parties, and that the employer therefore must be given the opportunity to submit evidence to meet its burden. *Id*. As this case arises within the jurisdiction of the Ninth Circuit, the holding in *Force* is controlling. Thus, in accordance with the Ninth Circuit's decision in *Force*, we vacate the administrative law judge's Order granting claimant's motion to exclude employer's witnesses. On remand, the administrative law judge must allow employer the opportunity to submit evidence in order to meet its burden of proof on the issue of apportionment. *Id*.; *see also* 20 C.F.R. §702.338.

Accordingly, the administrative law judge's denial of employer's motion for summary decision is affirmed as it relates to four settlements claimant purportedly settled on her own behalf and as to Serena's ratification of any settlements entered into on her behalf during her minority. However, we vacate the administrative law judge's finding that claimant settled some of the third-party claims only on behalf of Serena. We remand the case for the administrative law judge to address the issues on which he denied summary decision, as well as each settlement to determine whose claim was settled, the apportionment of the settlements as necessary, and the applicability of Section 33(f), (g) to claimant's and Serena's entitlement to death benefits. We also vacate the administrative law judge's Order Granting Motion to Exclude Expert Witnesses to the extent it prohibits employer from offering evidence on issues on which it has the burden of proof.

[12] The court further stated, "The task is even more difficult where some of the settlement parties are unemancipated minors: amounts purportedly paid to them may reflect tax or estate law considerations rather than economic reality." *Force*, 938 F.2d at 986, 25 BRBS at 20(CRT).

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge