

MARY SUE HUTCHISON)	
(widow of RAY HUTCHISON))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
PETROLEUM HELICOPTERS,)	
INCORPORATED)	DATE ISSUED:_____
)	
and)	
)	
AMERICAN HOME)	
ASSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph L. Waitz (Waitz & Downer), Houma, Louisiana, for claimant.

Kathleen K. Charvet and S. Suzanne Mahoney (McGlinchey Stafford, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Order Denying Motion for Reconsideration (1996-LHC-1090) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq.* (the Act).¹ We must affirm the administrative law

¹We deny claimant's motion for oral argument. 20 C.F.R. §§802.303, 802.306.

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).

Decedent died in a helicopter crash over the Gulf of Mexico during the course of his employment in 1978. Employer voluntarily initiated payment of death benefits to claimant, decedent's widow, and her children. In 1981, claimant settled a third-party claim. Employer ceased paying benefits the following day. In 1989, claimant inquired as to the status of her case with the Department of Labor. In 1991, in response to a Congressional inquiry, the district director wrote that the case was closed by virtue of the third-party settlement and that claimant was not entitled to additional benefits. The case came before an administrative law judge in 1997, and he granted employer's motion for summary judgment, applying the Section 33(g), 33 U.S.C. §933(g), forfeiture provision, as claimant failed to obtain employer's prior written approval of her 1981 settlement. In 1998, the Board vacated the administrative law judge's decision. *Hutchison v. ``Petroleum Helicopters, Inc.*, BRB No. 97-1576 (Aug. 12, 1998). The Board held that the administrative law judge misapplied the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), and that he must address claimant's contention that employer's participation in the third-party proceedings rendered Section 33(g) inapplicable. *Hutchison*, slip op. at 5. Additionally, the Board held that the administrative law judge must address employer's alternate argument that claimant did not file a timely claim for benefits. *Id.* at 5-6.

On remand, the administrative law judge addressed the issue of whether employer's participation in the third-party proceedings amounted to a constructive approval of the third-party settlement, as well as the issue of whether a timely claim had been filed. The administrative law judge found that employer's participation in the civil suit did not amount to approval of the 1981 settlement between claimant and the third-party tortfeasor, as employer filed suit in federal court merely to ensure recovery of the compensation it had paid to claimant. Decision and Order on Remand at 4. Moreover, the administrative law judge found that the settlement proceeds claimant obtained were greater than the amount due her under the Act. *Id.* at 5. Finally, notwithstanding the applicability of Section 33(f), (g), 33 U.S.C. §933(f), (g), he denied the claim for benefits as being untimely, as the death occurred in 1978, the last payment of benefits was in 1981, and there was no evidence that a timely claim had been filed within one year of either date. Decision and Order on Remand at 6; *see also* 33 U.S.C. §913(a).

Claimant appeals the administrative law judge's decision on remand, contending he erred in finding that employer's participation in the third-party settlement was insufficient to eliminate the need for prior written approval required by Section 33(g)(1), 33 U.S.C. §933(g)(1). Specifically, she argues that *I.T.O Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7(CRT) (1992), *cert. denied*, 507 U.S. 984 (1993), controls, making

prior written approval of her third-party settlement unnecessary in light of employer's participation in those proceedings. Claimant also refers to a 1981 letter, stating that the language therein preserved her rights to a future claim for compensation. In response, employer argues that *Sellman* was incorrectly decided, is distinguishable and is not controlling, as employer did not participate in claimant's settlement negotiations. Moreover, employer asserts that there was no timely claim filed, therefore, the decision should be affirmed on that basis.

By virtue of claimant's assertion that she "complied" and "preserve[d] her rights" to future compensation, we interpret claimant's brief as challenging the administrative law judge's decision that her claim was untimely filed. However, in light of the facts herein, we affirm the administrative law judge's decision and hold that the claim for benefits was not filed in a timely manner. In the Board's previous decision, it advised the administrative law judge to determine whether a claim had been filed within one year of the death (1978) or the cessation of voluntary payments (1981). The administrative law judge found there was no evidence of a timely claim having been filed.² On appeal, claimant alleges only that a 1981 letter to employer complies with the requirement for filing a claim.³ While the Board and the courts have been liberal in determining what constitutes a claim, one factor has been constant: the "claim" must be filed with the district director. 33 U.S.C. §913(a); *ManSHIP v. Norfolk & W. Ry. Co.*, 30 BRBS 175 (1996); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); 20 C.F.R. §702.221. The letter upon which claimant relies was a communication between claimant and employer, and it was not filed with the district director. Therefore, it does not constitute a claim. *Id.*; cf. *Downey v. General Dynamics Corp.*, 22 BRBS 203 (1989) (audiogram submitted to administrative law judge permitted as new claim, as purpose behind filing requirement was fulfilled). Moreover, the 1981 letter merely referenced a *possible* claim if claimant should "at some time in the future be eligible." Cl. Ex. G. Such notice of a possible future claim does not assert an immediate right to compensation under the Act. See *Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989) (Lawrence, J., dissenting); see also *Greathouse v. Newport News Shipbuilding & Dry Dock Co.*, 146 F.3d 224, 32 BRBS 102(CRT) (4th Cir. 1998) (actual intent to seek

²There was no claim filed in 1978 after the accident because employer began making voluntary payments, and claimant made no inquiry into a claim until 1989.

³On January 21, 1981, claimant's attorney guaranteed the transmittal of settlement funds to reimburse employer for compensation paid. Cl. Ex. G. That letter states in pertinent part:

Based upon this guarantee of full payment to American Home, I request endorsement of the settlement funds. We are reserving the widow's rights to further compensation should she at some time in the future be eligible.

compensation must be shown); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 30 BRBS 6(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996) (letter failed to show actual intent to seek compensation under either 33 U.S.C. §922 or 33 U.S.C. §913). Even assuming, *arguendo*, the letter constituted an agreement between claimant and employer reserving claimant's future rights to compensation, the Act provides the exclusive remedy for decedent's injuries, 33 U.S.C. §905, and claimant would need to file a timely claim in accordance with the provisions of the Act in order to assert any right to compensation. Consequently, we reject claimant's allegation, and we affirm the administrative law judge's finding that there was no timely claim filed, as such finding is rational and is supported by the evidence of record.⁴

Accordingly, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴In light of our conclusion, we need not address claimant's Section 33(g) arguments. However, because no party challenged the finding that the gross settlement proceeds exceeded the amount to which claimant would be due under the Act, the Section 33(g)(1) requirement for prior written approval is inapplicable, and claimant's arguments in this regard are moot. *See generally Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994).