

BRB Nos. 03-0228  
and 03-0228A

TOM MAYS	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: <u>Nov. 25, 2003</u>
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Claimant's Motion for Reconsideration, Dismissing Employer's Motion for Section 33(g) Relief, Granting Employer Section 33(f) Relief and Denying Claimant's Request for Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

James C. Ferguson, Baton Rouge, Louisiana, for claimant.

Christopher M. Landry and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2002-LHC-914) 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.* (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).

This case is before the Board for a third time. To briefly reiterate the facts and procedural history, claimant, while working for employer on March 18, 1991, sustained a blow to the head and a fracture of the right cheek when he was kicked during an altercation. Claimant was initially treated for his injuries by Dr. McKeon, and surgery was performed on March 20, 1991. Claimant was referred to Dr. Leftwich, an ophthalmologist, for additional treatment for his sight-related problems. After treating claimant in March and April 1991, Dr. Leftwich concluded that there was no disability from an ophthalmic standpoint. Claimant thereafter sought additional medical treatment with Dr. Sabatier because of continued pain and trouble with his eyesight. On May 29, 1991, Dr. McKeon stated that claimant could return to work on a restricted basis as of the date of his last examination, April 12, 1991.<sup>1</sup> Following an examination of claimant on July 15, 1991, Dr. Sabatier concurred with Dr. McKeon's work restrictions and informed claimant that he would not participate in further examinations. Claimant sought additional treatment with Dr. Patterson, a family practitioner near his new home in Mer Rouge, Louisiana, treatment for his physical complaints from Dr. Hubli, and underwent pain treatment at the Louisiana State University Medical Center. Claimant also sought psychiatric treatment for depression from Drs. Ware, Stephens, Baker and Roniger, commencing in February 1992.

Employer voluntarily paid claimant temporary total disability compensation and medical expenses from the date of injury until August 6, 1991, at which time claimant did not comply with employer's request that he return to work immediately based on his release to work by Drs. McKeon and Sabatier. Emp. Ex. 11 at 103. Claimant sought continuing benefits under the Act.

In the initial decision and order in this case, Administrative Law Judge Kerr found that claimant was able to perform his usual work as a welder, and thus denied any additional disability benefits. Judge Kerr also determined that claimant is not entitled to reimbursement for the medical treatment procured after August 6, 1991, as it was unauthorized. In addition, Judge Kerr found that claimant failed to show good cause for the request for a change in physicians and that he had not been denied additional treatment.

Claimant appealed this decision to the Board. In its decision dated May 3, 1999, the Board initially affirmed Judge Kerr's denial of additional disability benefits, and the finding that employer refused claimant's request to change physicians. *Mays v. Avondale*

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<sup>1</sup> On July 12, 1991, Dr. McKeon filled out a work restriction form, indicating that claimant could continuously sit, walk, lift, bend, squat, climb, kneel, twist and stand, and restricting claimant's lifting to a maximum of 75 pounds.

*Industries, Inc.*, BRB No. 98-1084 (May 3, 1999)(unpub.). The Board held, however, that Judge Kerr's analysis regarding the compensability of the medical expenses incurred by claimant since August 6, 1991, was flawed as he denied the claim for said benefits based on his finding that claimant's care was unauthorized, without considering the reasonableness or necessity of the treatment procured. Thus, the Board vacated the denial of medical benefits incurred after August 6, 1991, and remanded the case for consideration of the necessity and reasonableness of the medical expenses sought by claimant.

On remand, Judge Kerr found that because qualified physicians stated that claimant's treatment subsequent to August 6, 1991, was for a work-related condition, the treatment is reasonable and necessary, and thus compensable under the Act. Accordingly, he awarded medical benefits for the treatment procured by claimant subsequent to August 6, 1991, at the LSU Medical Center and with Drs. Patterson, Hubli, Ware, Stephens, Baker and Roniger. Moreover, Judge Kerr determined that employer is liable for future treatment resulting from claimant's work-related injury.

Employer appealed Judge Kerr's Decision and Order on Remand. By Order dated April 3, 2000, the Board dismissed employer's appeal as untimely. Upon employer's motion for reconsideration, the Board reinstated employer's appeal on the docket in an Order dated June 5, 2000. By Order dated October 13, 2000, the Board noted claimant's motion to remand the case for action on his modification petition but stated that employer's appeal would still be considered as it dealt with a different issue than claimant's motion for modification. However, the case file thereafter was inadvertently misplaced. Pursuant to the terms of Pub. L. No. 106-554, 114 Stat. 2763, the Board should have issued its decision on employer's appeal on or before June 4, 2001, within one year of the reinstatement of the appeal on June 5, 2000. Accordingly, Judge Kerr's Decision and Order on Remand Awarding Benefits was deemed affirmed as of June 5, 2001. *See* 33 U.S.C. §921(c); 20 C.F.R. §802.406. In addition, the Board reviewed employer's contentions on appeal and held that the decision should be affirmed on the merits as well. *See Mays v. Avondale Industries, Inc.*, BRB No. 00-0557 (July 11, 2001).

Meanwhile, claimant filed a third-party suit in Louisiana state court against the aggressor in the altercation which caused his injuries, and the aggressor's employer. In January 2000, claimant signed a settlement agreement in that suit for \$60,000, without employer's approval.<sup>2</sup> Subsequently, claimant refused to execute the settlement. However, the third-party defendants successfully petitioned the state court to compel

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<sup>2</sup> Employer participated in the settlement process and agreed to waive its right of intervention, but was unwilling to approve any settlement.

claimant's signature on the settlement documents. *Mays v. Gliott*, No. 430-626 (La. Dist. Ct. Aug. 4, 2000). The decision was upheld by the state appellate court on April 24, 2001, *Mays v. Gliott*, No. 00-CA-1809, 793 So.2d 574 (La. Ct. App. 2001)(table), and the Louisiana Supreme Court denied claimant's writ of appeal. *Mays v. Gliott*, 795 So.2d 1195, *recon denied*, 798 So.2d 955 (La. 2001). On February 3, 2000, employer sought modification of the award of medical benefits under the Act based on Section 33(g), 33 U.S.C. §933(g), as claimant did not obtain employer's approval prior to entering into the settlement agreement.

After the Louisiana Supreme Court denied claimant's writ of appeal, Administrative Law Judge Kennington (the administrative law judge) issued his Order Granting Employer's Petition for Section 33(g) Relief and Terminating Claimant's Rights to Additional Compensation and Medical Benefits under the Act. In this decision, the administrative law judge found that claimant is a "person entitled to compensation" as he is entitled to medical benefits. The administrative law judge found that claimant entered into an agreement to settle a third-party claim without employer's approval for an amount less than his entitlement to compensation and medical benefits under the Act. He also found that although claimant tried to rescind the settlement agreement, the state court found that a settlement had been reached and enforced it. Thus, as employer did not approve the settlement, even constructively, the administrative law judge held that employer is not liable for claimant's future medical benefits under the Act pursuant to Section 33(g).

Claimant filed a motion for reconsideration, which the administrative law judge granted. He reiterated his finding that claimant was afforded the opportunity to litigate the issue of whether a third-party settlement was entered into before the state court and the court found that he did. Thus, the administrative law judge concluded that he is precluded from relitigating the issue pursuant to the doctrine of *res judicata*. However, the administrative law judge agreed with claimant's contention that he erred in finding that a comparison pursuant to Section 33(g)(1) between the settlement amount and claimant's entitlement under the Act includes medical benefits, and that as it has been determined that claimant was not entitled to any additional compensation under the Act, Section 33(g)(1) is inapplicable in the instant case. Moreover, the administrative law judge found that as employer intervened in claimant's third-party lawsuit and was privy to the settlement negotiations, it had proper notice under the Act pursuant to Section 33(g)(2). Thus, the administrative law judge found that claimant is not barred from receiving future medical benefits pursuant to Section 33(g) in the instant case. The administrative law judge then found that as the amount of medical benefits owed to a claimant may be offset under Section 33(f), employer is entitled to a lien and a credit for any amounts paid or due claimant for medical benefits under the Act out of the proceeds of his third-party settlement. Finally, the administrative law judge denied claimant's

motion for modification on the issue of whether a mistake in fact was made regarding his entitlement to additional compensation benefits as he found the motion was not timely filed pursuant to Section 22, 33 U.S.C. §922.

On appeal, employer contends that claimant was a “person entitled to compensation” at the time of the settlement agreement as he was receiving medical benefits and that, as the \$60,000 settlement is less than claimant would be entitled to under the Act, both compensation and medical benefits should be forfeited pursuant to Section 33(g). Claimant contends in response and in his cross-appeal that he did not enter into a third-party settlement agreement and that the administrative law judge erred in finding that the state court decision precludes the administrative law judge from finding that claimant did not settle this case. Thus, claimant contends that Sections 33(g) and (f) do not apply. In addition, claimant contends that the administrative law judge erred in finding that his motion for modification was not filed in a timely manner.

### Collateral Estoppel

Initially, we address claimant’s contentions regarding whether the administrative law judge erred in finding that the state court’s decision that a settlement was properly entered into precludes litigation of that issue, as the existence of a valid settlement agreement controls the other issues in this case. Claimant contends that his attorney settled the third-party case without his consent and “perpetrated a fraud upon the Court.” In order for collateral estoppel to act as a bar to relitigation of the same issue, there must be final judgment on the prior claim. In the present case, claimant appealed the adverse state decision to the Louisiana Supreme Court, which denied claimant’s writ of appeal. Therefore, there has been a final judgment under the state law. Factual findings of a state court are entitled to collateral estoppel effect in federal administrative tribunals. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828(CRT) (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). The doctrine of collateral estoppel bars relitigation of a particular factual issue that was necessarily litigated and actually decided in a previous suit. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31BRBS 109(CRT) (1<sup>st</sup> Cir. 1997); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286, 291 (1994); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5<sup>th</sup> Cir. 1992). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first, and was reached after a full and fair opportunity between the parties to litigate the issue. *Acord*, 125 F.3d at 22, 31 BRBS at 112 (CRT).

The issue before the state court regarding claimant's third-party case was whether the parties entered into an enforceable agreement. Specifically, claimant argued that fraud had been committed by counsel, but claimant's former attorney countered that claimant's allegations against him were false. The trial court found that the parties entered into an enforceable agreement, after rejecting claimant's version of the facts. *Mays v. Gliott*, No. 430-626 (La. Dist. Ct. Aug. 4, 2000). In addition, the appellate court found no merit in claimant's contention that the terms of the settlement agreement were not met. *Mays v. Gliott*, No. 00-CA-1809, slip op. at 3-4. On appeal, claimant raises the same arguments regarding the merits of his case as he did before the state courts, which have already been considered and rejected by those courts. As the issue under consideration in the instant case is the same as the one in the state cases, the issue was actually litigated, and the determination of the issue in the prior litigation was a critical and necessary part of the final judgment in the earlier action, we affirm the administrative law judge's finding that claimant is collaterally estopped from asserting that he did not enter into a settlement with a third-party defendant. See *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156 (La. 1978)( Louisiana's doctrine of *res judicata* precludes litigation of the object of the judgment when there is an identity of the parties, the "cause," and the thing demanded). As a valid settlement exists, we now address employer's contentions with regard to the applicability of Section 33(g).

### Section 33

Employer contends that claimant was a "person entitled to compensation" pursuant to Section 33(g) at the time of the third-party settlement, as claimant was receiving medical benefits at that time, and thus is barred from further benefits pursuant to Section 33(g)(2). The Act provides for the forfeiture of benefits under the written approval requirement of Section 33(g)(1), 33 U.S.C. §933(g)(1).<sup>3</sup> Section 33 of the Act

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<sup>3</sup> Section 33(g) of the Act provides:

(1) If the person entitled to compensation . . . 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 . . . 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 . . . .

addresses situations in which an employee is injured during the course of his employment, and a third party is liable in damages. 33 U.S.C. §933(a). Section 33 permits the employee to file suit against a third party while also pursuing compensation under the Act and contains provisions designed to prevent injured employees from receiving double recoveries where they are entitled to both benefits under the Act and civil damages from a successful suit. See 33 U.S.C. §933(e), (f), (g). If a “person entitled to compensation” enters into a third-party settlement, without his employer’s prior written approval, for an amount less than his compensation entitlement, all compensation and medical benefits are barred. 33 U.S.C. §933(g); *Esposito v. Sea-Land Service*, 36 BRBS 10 (2002). The Board has held that in considering whether a claimant is “a person entitled to compensation” under Section 33(g)(1), the term “compensation” refers to periodic disability benefits and not to payments for medical treatment under Section 7, 33 U.S.C. §907. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff’d and modified on recon. en banc*, 30 BRBS 5 (1996)(Brown and McGranery, JJ., concurring in part and dissenting in part). The Board held that this construction is consistent with the decisions of the Supreme Court and Ninth Circuit, respectively, in *Marshall v. Pletz*, 317 U.S. 383 (1943), and *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 15 (CRT), 24 BRBS 49(CRT) (9<sup>th</sup> Cir. 1990), interpreting the term “compensation” as meaning periodic disability benefits in varying contexts. See *Harris*, 28 BRBS at 264; see also *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4<sup>th</sup> Cir. 1998)(Fourth Circuit held that medical benefits are not to be included in the comparison between the amount of compensation entitlement and the amount of the third-party settlement).

In the present case, employer contends that the administrative law judge erred in finding that Section 33(g) does not apply as claimant was receiving medical benefits at the time of the third-party settlement and he was entitled to compensation benefits under the Act, which were already paid. In the original decision, Judge Kerr found that claimant was entitled to temporary total disability benefits due to his work-related injury for a period from March 1991 to July 1991, at which time claimant could return to his former employment. Employer voluntarily paid temporary total disability benefits for

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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 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.

33 U.S.C. §933(g)(1), (2)(1994).

this period in the amount of \$5,514.68. The denial of additional disability benefits was affirmed by the Board on appeal. Although employer is correct that claimant was a “person entitled to compensation” at the time of the settlement, the amount of the compensation due to claimant under the Act, \$5,514.68, is less than the gross amount of the third-party settlement, \$60,000. Therefore, we hold that the settlement was for amount greater than employer’s liability under the Act, and Section 33(g)(1) does not apply. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Jones v. St. John Stevedoring Co.*, 18 BRBS 68 (1986), *aff’d and rev’d sub nom. St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5<sup>th</sup> Cir.), *cert. denied*, 484 U.S. 976 (1987); *see also Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff’d in part and rev’d in part* 46 F.3d 292, 29 BRBS 52(CRT) (3<sup>d</sup> Cir. 1995). In addition, we hold that, contrary to employer’s contention on appeal, the administrative law judge properly found that claimant’s entitlement to medical benefits at the time of the third-party settlements cannot be added to his compensation for purposes of comparison with the gross third-party settlement proceeds pursuant to Section 33(g)(1), and thus Section 33(g)(1) is inapplicable.<sup>4</sup> *See Harris*, 28 BRBS at 264; *see also Brown & Root*, 162 F.3d 813, 32 BRBS 205(CRT).

Even though the claim is not barred under Section 33(g), the administrative law judge correctly found that employer is entitled to offset medical benefits due under the Act against the net amount of the third-party recovery pursuant to Section 33(f) of the

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<sup>4</sup> As employer correctly asserts, if Section 33(g)(1) is applicable, both disability and medical benefits are forfeited pursuant to Section 33(g)(2). *See Esposito v. Sea-Land Service*, 36 BRBS 10 (2002). However, as we affirm the administrative law judge’s finding that Section 33(g)(1) is inapplicable in the present case, and employer does not contest the administrative law judge’s finding that employer had sufficient notice of the settlement under Section 33(g)(2), we hold that claimant has not forfeited his entitlement to medical benefits.

Act, 33 U.S.C. §933(f).<sup>5</sup> Section 33(f) provides a credit, for the “amount...payable on account of such injury” and the credit is not limited to “compensation.” Thus, the administrative law judge in the instant case properly found that employer is entitled to a lien and a credit for any amounts due claimant for medical benefits under the Act out of the net proceeds of the third-party settlement. *O’Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997)(Brown, J., dissenting on other grounds), *rev’d on other grounds sub nom. Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998); *see also Harris*, 28 BRBS at 269.

### Modification of Disability Claim

Claimant contends on cross-appeal that the administrative law judge erred in rejecting his motion for modification and contends that the evidence supports a finding of continuing disability. Section 22 provides the only means for changing otherwise final compensation orders. 33 U.S.C. §922. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass’n, Inc.*, 390 U.S. 459, *reh’g denied*, 391 U.S. 929 (1968); *see Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

In the present case, employer voluntarily paid claimant temporary total disability benefits from March 11, 1991 through August 8, 1991, but claimant sought further disability benefits under the Act. In his original decision, Judge Kerr found that claimant did not establish that he could not return to his former employment as a welder. Therefore, he denied additional compensation benefits, and the Board affirmed this finding on appeal. *See Mays v. Avondale Industries, Inc.*, BRB No. 98-1084 (May 3, 1999)(unpub.). However, the Board remanded the case for reconsideration of claimant’s

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<sup>5</sup> Section 33(f), 33 U.S.C. §933(f), provides:

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’s fees).

entitlement to further medical benefits. On remand, Judge Kerr found that employer is liable for future medical treatment resulting from claimant's work-related injury. Employer appealed this decision and the Board administratively affirmed the award of medical benefits on June 5, 2001. Thus, as the claim remained open on July 31, 2000, when claimant filed his modification request, we reverse the administrative law judge's finding that claimant's motion was untimely filed. Contrary to the administrative law judge's finding, the issue of claimant's entitlement to disability benefits did not become final after the Board issued its decision in May 1999. As the case was remanded to the administrative law judge, the claim remained open for purposes of Section 22 until such time the time for all appeals was extinguished. *See* 33 U.S.C. §921(c); 20 C.F.R. §802.406; *see generally Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5<sup>th</sup> Cir. 1984) (*en banc*)(where Board remands a case to administrative law judge, decision is not appealable to court of appeals). Therefore, we remand the case for consideration of claimant's contentions on modification. *See generally Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7<sup>th</sup> Cir. 2002). If, on remand, the administrative law judge finds that claimant is entitled to any further periods of disability compensation, he must consider whether the total of claimant's lifetime compensation benefits is greater than the gross third-party settlement proceeds, and thus subject to forfeiture pursuant to Section 33(g). *See Linton v. Container Stevedoring Co.*, 28 BRBS at 282 (1994).

Accordingly, the administrative law judge finding that the state court's decision on the issue of whether claimant entered into a third-party settlement is to be given preclusive effect is affirmed. In addition, the administrative law judge's finding that Section 33(g) is not applicable in the instant case is affirmed. The administrative law judge's application of Section 33(f) is affirmed. The administrative law judge's denial of claimant's petition for modification on the basis that it was untimely filed is vacated, and the case is remanded for consideration of claimant's modification petition.

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