

P. A.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELLER & COMPANY)	DATE ISSUED: 11/23/2007
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Granting Employer/Carrier’s Second Motion for Summary Decision of Steven L. Purcell, Administrative Law Judge, United States Department of Labor.

P.A., Rockledge, Florida, *pro se*.

Lawrance B. Craig, III (Valle, Craig & Vazquez, P.A.), Miami, Florida, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Employer/Carrier’s Second Motion for Summary Decision (2005-LHC-2220) of Administrative Law Judge Stephen L. Purcell 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge’s findings of fact and conclusions of law to determine 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). If they are, they must be affirmed.

Claimant sustained injuries on April 6, 2004, during the course of his employment with employer, and he thereafter received medical and disability benefits under the Act from employer’s carrier. On August 31, 2005, claimant and his wife filed a third-party liability suit against Avis Rent-a-Car System, Inc. (Avis) in the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida, for injuries arising out of the April 6, 2004, accident which gave rise to this claim for benefits under the Act. On May 9, 2006, claimant and his wife executed a settlement agreement with Avis in the Brevard County third-party suit for \$40,000, and on July 12, 2006, the third-party suit was dismissed with prejudice. Employer subsequently moved for summary decision, contending that claimant’s entitlement to further benefits under the Act was forfeited based on claimant’s failure to obtain employer’s prior written approval of the third-party settlement pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1).

In an Order Granting Employer/Carrier’s Second Motion for Summary Decision issued on January 23, 2007, the administrative law judge found that the undisputed material facts establish that claimant’s third-party settlement was for an amount less than the disability compensation to which he is entitled under the Act and that he did not obtain employer’s prior written approval of the settlement. The administrative law judge therefore granted employer’s motion for summary decision and dismissed claimant’s claim for benefits.¹ Claimant, representing himself, appeals the decision, and employer responds, urging affirmance.

After consideration of the administrative law judge’s decision in light of the evidence of record and our statutory standard of review, we affirm the administrative law judge’s determination that Section 33(g)(1) bars claimant’s entitlement to further compensation under the Act. The administrative law judge properly applied the standard for determining whether to grant summary decision. Summary decision is proper when there are no genuine issues of material fact and no controversy concerning inferences to be drawn from the facts, and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin*

¹ In a previous Order issued on September 6, 2006, the administrative law judge denied employer’s initial motion for summary decision on the basis that it had not yet been determined whether the third-party settlement was for an amount less than the compensation to which claimant would be entitled under the Act. Thereafter, employer filed a second motion for summary decision providing information regarding the amount of compensation that had been paid to claimant under the Act. The administrative law judge’s January 23, 2007 Order granting summary decision incorporates by reference the undisputed material facts set forth in the September 6, 2006 Order.

Corp., 33 BRBS 204 (1999); 29 C.F.R. §18.41. The administrative law judge must look at the facts in the light most favorable to the party opposing summary decision to determine whether there is an absence of a genuine issue of fact. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In this case, the assertions made by claimant in his responses to employer's motions for summary decision do not give rise to a genuine issue of material fact with respect to the applicability of Section 33(g)(1), and, thus, the administrative law judge properly found employer entitled to summary decision.

Section 33(g)(1) of the Act² bars claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than the disability compensation to which he would be entitled under the Act without obtaining the prior written approval of employer and its longshore carrier. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004); *Esposito v. Sea-Land Serv., Inc.*, 36 BRBS 10 (2002). The section is intended to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *aff'd in part and vacated on other grounds on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

In the instant case, it is undisputed that claimant settled his third-party lawsuit for \$40,000. Previously, he had received \$47,244.60 in temporary total disability benefits under the Act from employer. 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)

² Section 33(g)(1) 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).

applicable. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT). The plain language of Section 33(g)(1) mandates that before entering into such a settlement, claimant must have obtained prior written approval of the settlement from employer and its longshore carrier in order to retain entitlement under the Act. *Mapp*, 38 BRBS at 45. As it is undisputed that claimant did not obtain written approval from employer and its carrier prior to executing the third-party settlement, which was for an amount less than the compensation to which he was entitled under the Act, we affirm the administrative law judge's granting of summary decision denying claimant further benefits under the Act.³ *Id.* at 46.

Accordingly, the Order Granting Employer/Carrier's Second Motion for Summary Decision of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

³ The evidence submitted by claimant to the administrative law judge regarding employer/carrier's awareness of the third-party suit does not present an issue of material fact. Although direct participation in the actual settlement by an employer and carrier may be found sufficient to render the Section 33(g)(1) bar inapplicable, *see Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), the mere involvement in or knowledge of a third-party action by the employer and carrier is insufficient to alter the claimant's duty under Section 33(g)(1) to obtain prior written approval of the settlement. *See, e.g., Esposito*, 36 BRBS at 13.

Moreover, the particular circumstances of the third-party suit in this case, as set forth in claimant's responses to employer/carrier's motions for summary decision, do not exempt him from the Section 33(g)(1) requirement that he obtain prior written approval of the settlement. *See generally Mapp*, 38 BRBS 43.