U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 22-0017
and 22-0017A

MAXINE PELKER (Widow of REX D. PELKER) Claimant-Petitioner Cross-Respondent v. OWENS CORNING FIBERGLASS and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA Employer/Carrier-Respondents Cross-Petitioners COLUMBIA I & S (a/k/a COLUMBIA ASBESTOS) E.J. BARTELLS COMPANY and SAIF CORPORATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED	)	DATE ISSUED: 01/27/2023

STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Norman Cole (Brownstein Rask LLP), Portland, Oregon, for Claimant.

Alan G. Brackett and Joann T. Hymel (Mouledoux, Bland, Legrand & Brackett, LLC), New Orleans, Louisiana, for Owens Corning Fiberglass and Travelers Property Casualty Company of America.

Jill Gragg (SAIF Corporation), Salem, Oregon, for Columbia I & S and E.J. Bartells Company/SAIF Corporation.

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

PER CURIAM:

Claimant appeals, and Owens Corning Fiberglass (OCF, Employer) cross-appeals, Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Denying Benefits (D&O) (2019-LHC-01022) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rex D. Pelker (Decedent) worked as an insulator for various companies from 1975 until his voluntary retirement in 2004, including stints with maritime employers Columbia I & S (CIS) (1980-83), OCF (1980-1981), and E.J. Bartells (EJB) (1985-88 and 1997-2000), during which time he was allegedly exposed to asbestos. In 2014, he was diagnosed with stage 4 lung cancer, as well as bilateral pulmonary disease and extensive bilateral brain metastases resulting in seizures. SX 23 at 110-115. He died on December 3, 2014, with his death certificate and autopsy report, both completed and certified by Dr. William Brady, listing the cause of death as "pulmonary asbestosis with carcinoma of the lung." CXs 20, 22. Claimant, on February 12, 2015, filed a claim for death benefits under the Act

on behalf of herself and two minor children against EJB, CIS, and OCF.[1] All employers and their respective carriers controverted the claims.

Meanwhile, on April 13, 2016, Claimant, as personal representative of Decedent's estate, filed a wrongful death suit in Oregon state court against numerous third-party manufacturers, distributors, and purchasers of asbestos products. Beginning in May 2017, Claimant's then-attorney, Jeffrey S. Mutnick, engaged in correspondence with Jill Gragg, counsel for EJB's and CIS's carrier, SAIF Corporation, and with Elton Foster, then-counsel for OCF's carrier, Travelers Property and Casualty Company of America (Travelers), in an attempt to secure agreements on a settlement trust arrangement for the third-party settlements in accordance with Section 33(g) of the Act, 33 U.S.C. §933(g). In July 2017, Mr. Mutnick requested an informal conference; prior to any conference and at his request, the case was transferred to the Office of Administrative Law Judges (OALJ) on October 2, 2017, for a formal hearing. Mr. Mutnick continued to correspond with the opposing attorneys, and specifically Mr. Foster, in an effort to resolve any potential Section 33(g) issues.

By July 2018, Mr. Mutnick believed he had an agreement in place securing, among others, OCF's and Travelers' approval of Claimant's tentative third-party settlements in accordance with Section 33(g)(1), 33 U.S.C. §933(g)(1), although no Form LS-33 or written equivalent was ever filed in this case. At OCF's request, without objection from Claimant, ALJ Richard M. Clarke issued an order dated July 13, 2018, remanding the case to the district director for further development of the record and consideration of "the information surrounding Section 33(g) issues." CX B-14. On January 11, 2019, Mr. Mutnick provided Ms. Gragg and Mr. Foster with a list of the known 23 settlements and a statement that the funds remained in a trust account. CX B 16.

On May 23, 2019, Norman Cole, who replaced Mr. Mutnick as Claimant's attorney, sent a letter to Ms. Gragg and Patricia Clotiaux, who replaced Mr. Foster as Travelers' in-house counsel, discussing the procedural status of the claim. Mr. Cole indicated that as of that date, the third-party claim had "produced gross settlements of $909,810.59 to which, to my knowledge, you have consented." CX B 18. Neither attorney responded to Mr. Cole's letter. In June 2019, the case was returned to the OALJ for a formal hearing. On July 30, 2019, Alan Brackett and Joann Hymel were substituted as attorneys for OCF and

[1] Decedent was survived by his three children with Claimant: Paige Amanda, born February 7, 1991, Morgan Margaret Geneva, born March 12, 1995, and Rex Denton III, born April 9, 2002. At the time Claimant filed her claim, only Morgan and Rex III qualified as a "child" under Section 2(14) of the Act, 33 U.S.C. §902(14); *see also* 33 U.S.C. §909(b).

Travelers. On July 30, 2020, Ms. Hymel filed OCF's prehearing statement, which included Section 33(g) as an outstanding issue. The ALJ held a formal hearing by videoconference on August 6, 2020.

In her decision, the ALJ initially found Claimant did not invoke the Section 20(a) presumption, 33 U.S.C. §920(a), against either EJB or CIS and, thus, held they cannot be liable for any benefits. She next found Claimant entitled to the Section 20(a) presumption relating Decedent's death to his asbestos exposure at work for OCF in 1980 and OCF did not establish rebuttal of the presumption. Therefore, she concluded Claimant is entitled to Section 9, 33 U.S.C. §909, death benefits from OCF, the last covered employer to expose Decedent to asbestos. However, she concluded Claimant's right to benefits under the Act is forfeited pursuant to Section 33(g) because Claimant entered into third-party settlements for an amount less than her entitlement to benefits without obtaining OCF's prior written approval. Accordingly, the ALJ denied Claimant's claim for benefits.[2]

On appeal, Claimant challenges the ALJ's designation of OCF as the responsible employer and conclusion that Section 33(g) bars her claim for benefits. OCF and CIS respond, urging affirmance of the ALJ's denial of benefits. In its cross-appeal, OCF challenges the ALJ's finding that Decedent's death was the result of his covered occupational exposure to asbestos and resulting conclusion that Claimant established a compensable claim.[3] Claimant has not responded, and CIS has affirmatively declined to respond, to the cross-appeal. The Director, Office of Workers' Compensation Programs, has indicated he will not respond to either appeal.

As ascertaining the responsible employer in an occupational disease case correlates to that of compensability under Section 20(a), 33 U.S.C. §920(a); *Albina Engine & Mach.*

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[2] The ALJ also found Decedent's children, Morgan and Rex III, are not entitled to Section 9 benefits because their portions of the third-party settlements are greater than the amount they each are entitled to under the Act, and Section 33(f) applies to give Employer a credit for these amounts. 33 U.S.C §933(f); D&O at 30; *see also generally Harris v. Todd Pac. Shipyards Corp.*, 28 BRBS 254, 269 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (the offset provision under Section 33(f) provides the employer a credit in the amount of the net third-party recovery against its liability for both compensation and medical benefits).

[3] No party challenges the ALJ's findings that EJB is not the responsible employer and that Section 33(f) applies to offset the Decedent's children's entitlement under the Act. We affirm these findings as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

v. Director, OWCP, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), we shall address Claimant's contention that the ALJ incorrectly found OCF, rather than CIS, is the responsible employer in conjunction with OCF's contention in its cross-appeal that the ALJ erroneously invoked the Section 20(a) presumption against it.

Responsible Employer

Claimant asserts the ALJ erred in stating there was no evidence of asbestos exposure during Decedent's work with CIS in the early 1980s. She maintains Decedent's Social Security and union records, coupled with testimony from Decedent's former co-workers, Danny Miller and Albert Roth, regarding the general working conditions at CIS, constitute evidence sufficient to invoke the Section 20(a) presumption against CIS. In addition, she states that because Decedent's asbestos exposure at CIS occurred subsequent to his 1980 exposure with OCF, and CIS offered no evidence to rebut the presumption, CIS, rather than OCF, is the responsible employer liable for Claimant's benefits as a matter of law.

Section 20(a) Causation

OCF contends the ALJ erred in finding Claimant's medical evidence sufficient to invoke the Section 20(a) presumption and, alternatively, that it did not rebut the presumption. Specifically, it asserts the ALJ disregarded medical evidence and ignored "serious credibility issues" concerning Dr. Brady's medical conclusions. It maintains that while Decedent's treatment records indicated he suffered from lung cancer, they do not mention or imply he suffered from any asbestos-related disease. In addition, it asserts Decedent's autopsy report is incomplete and, therefore, his death certificate, which is premised on the autopsy findings, is flawed. Alternatively, it contends the ALJ erred in finding it did not rebut the Section 20(a) presumption as the absence of any reference to asbestos-related conditions or disease in Decedent's treatment records, coupled with the ALJ's repeated references to Dr. Brady's lack of credibility, constitute substantial countervailing "negative" evidence to rebut the presumption that Decedent's death is work-related.

To be entitled to the Section 20(a) presumption linking his injuries to his employment, a claimant must sufficiently allege: 1) he has sustained a harm; and 2) an accident occurred or working conditions existed which could have caused or aggravated the harm. *Rose v. Vectrus Systems Corporation*, __ BRBS __, BRB No. 20-0279 (Dec. 29, 2022) (Decision on Recon. en banc); *see also Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010)*; Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). The claimant bears an initial burden of

production in order to invoke the Section 20(a) presumption.[4] *Rose*, slip op. at 18. Credibility can play no role in addressing whether a claimant has established a prima facie case. *Rose*, slip op. at 21. In this regard, the Section 20(a) invocation analysis "does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence." *Id.*, slip op. at 22. Instead, the claimant need only "present some evidence or allegation that if true would state a claim under the Act."[5] *Id.* Consequently, if the claimant produces some evidence to support his prima facie case, he is entitled to the presumption that his injury is work-related and compensable. *Id.*

If the Section 20(a) presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence that the employee's death was not caused, aggravated, or accelerated by the conditions of his employment. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises,[6] has held that an employer's burden on rebuttal is to produce "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment." *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT) (internal citation omitted). The inquiry at rebuttal concerns "whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT). Thus, the employer's burden on rebuttal is one of production only. The weighing of conflicting evidence or of the credibility of evidence "has no proper place in determining whether [employer] met its burden of production." *Id.*

In *Albina Engine*, the Ninth Circuit held:

> [T]he ALJ in multiple-employer occupational disease cases should conduct a sequential analysis, as follows: the ALJ should consider *sequentially*, starting with the last employer, (1) whether the § 20(a) presumption has been

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[4] "The burden of production or 'some evidence' standard which we have set forth here is a light burden meant to give the claimant the benefit of the statutory framework." *Rose*, slip op. at 22-23.

[5] "Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation." *Rose*, slip op at 23.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent's injury occurred in Portland, Oregon. 33 U.S.C. §921(c); *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983).

> invoked successfully against that employer, (2) whether that employer has presented substantial, specific and comprehensive evidence so as to rebut the § 20(a) presumption, *see* [*Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1998)], and (3) if the answer to the second question is yes, whether a preponderance of the evidence supports a finding that that employer is responsible for the claimant's injury, *see* [*Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700, 14 BRBS 538, 544 (2d Cir. 1982)]. The first employer in the analytical sequence (that is, the last employer in time) who is found to be responsible under this analysis shall be liable for payment of benefits, and the ALJ need not continue with this analysis for the remaining employers. In conducting this analysis, the ALJ should consider all evidence regarding exposure or lack thereof at a particular employer, and evidence supporting a finding of exposure at a given employer may be submitted either by the claimant or by earlier employers.

Albina Engine, 627 F.3d at 1302, 44 BRBS at 93-94(CRT) (emphasis in original).

In addressing the working conditions element, the ALJ thoroughly set out and discussed the relevant evidence of record. D&O at 4-8. Following review of that evidence, she permissibly relied on aspects of Mr. Miller's and Mr. Roth's testimony, as well as Decedent's Social Security and union records, to find he likely was most recently exposed to asbestos in shipyard work for OCF in 1980 while working on ship re-insulation jobs such as the one on the USS *Monticello*. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). This conclusion, as the ALJ found, is supported by the following evidence: Mr. Roth's "specific recollection" of working with Decedent at OCF and his "certainty" that Decedent was exposed to asbestos during his employment with OCF in 1980-81; Mr. Miller's "specific recollection" of doing asbestos tear off work on US Navy ships with Decedent at Swan Island in the 1980s and of last working with Decedent on the USS *Monticello* in conditions that could have exposed him to asbestos; Mr. Miller's testimony about the dirty and dusty conditions on the ships, the fact that removing insulation containing asbestos would create asbestos dust, and OCF's instructions to its workers to wear a paper mask, HT at 33-40;[7] and Mr. Miller's testimony that some of his work on US Navy ships was with OCF and some was with EJB in the

[7] Mr. Miller stated ships built in the World War II era were "probably all insulated with asbestos products," and Decedent regularly did insulation work or removal of asbestos on these ships.

1980s and early 1990s, HT at 41.[8] This evidence, therefore, constitutes "some evidence" that "if true would state a claim under the Act."[9] *Rose*, slip op. at 22; *see also Albina Engine*, 627 F.3d at 1298, 44 BRBS at 91(CRT) (citing *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990)). The ALJ therefore rationally inferred "upon review of the evidence" that Claimant met her burden to present "some evidence" of exposure to asbestos during Decedent's covered employment with OCF. *Id.* Accordingly, we affirm the ALJ's finding that Claimant invoked the Section 20(a) presumption against OCF. *Id.*

Turning to rebuttal, the Ninth Circuit has held that "each employer may rebut the § 20(a) presumption with *substantial* evidence that it is not the last responsible employer." *Albina Engine*, 627 F.3d at 1304 (emphasis added). More specifically, the employer bears the burden of showing it is not the responsible employer by demonstrating either the employee was not exposed at its facility in sufficient quantities to cause his disease or the

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[8] Gary Riehl, Decedent's longtime friend who worked in the shipyard, attested Decedent would have been exposed to asbestos fibers while he worked at Northwest Marine Iron Works (Swan Island). CX 43 at 538.

[9] Claimant asserts she has sufficiently alleged the existence of a harm (Decedent's diagnosed metastatic lung cancer) and working conditions (the record establishes Claimant worked for CIS in 1980-83 at Swan Island, CX 4 at 6, 11, where he was likely exposed to asbestos) and, therefore, has established the requisite elements of her prima facie case against CIS. *Rose*, slip op. at 18. Mr. Roth's testimony that he believed he was exposed to asbestos when he "worked in the shipyard for [CIS]" and that he "worked together" with Decedent "at some time or another" meets the working conditions element. HT at 58-59; *Rose*, slip op. at 18. Regardless, the ALJ's accurate finding of an "absence of any evidence" showing: 1) Decedent's work for CIS occurred on a covered situs; and 2) that such work involved conditions that actually or could have exposed him to asbestos, constitutes "evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment" and therefore rebuts the Section 20(a) presumption as to CIS. This also is supported by Mr. Roth's testimony that he has no recollection of actually working with Decedent in the shipyard at CIS; rather, the only specific recollection he has of working with Decedent in a shipyard was with OCF. HT at 60. Moreover, the same findings ultimately constitute substantial evidence, based on the record as a whole, that Claimant has not established Decedent's death is related to his work for CIS. *Ogawa*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Ramey*, 134 F.3d at 959, 31 BRBS at 210(CRT). Accordingly, any error in not invoking the Section 20(a) presumption against CIS is harmless, and we affirm the ALJ's finding that CIS is not the responsible employer. *Albina Engine*, 627 F.3d at 1302, 44 BRBS at 93-94(CRT).

employee was exposed while working for a subsequent covered employer. In this regard, the court stated "the presumption may be rebutted not only with substantial evidence that the [decedent] was not harmed by injurious stimuli at that employer, but also with substantial evidence that the [decedent] was exposed to injurious stimuli at a subsequent covered employer. *See* [*Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 5-6, 33 BRBS 162, 165(CRT) (1st Cir. 1999)]." *Albina Engine*, 627 F.3d at 1302 n.3, 44 BRBS at 93-94(CRT) n.3. In general, an ALJ may find "negative evidence" sufficient to rebut the Section 20(a) presumption, so long as she finds it constitutes "substantial evidence" of the lack of a connection between the Decedent's harm and his work-related exposures. *See Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

As the ALJ found, there is no evidence in the record indicating Decedent was not or could not have been exposed to asbestos while working at OCF's facility in 1980. Moreover, OCF has not presented any evidence indicating Decedent encountered asbestos exposure with a subsequent employer. Consequently, OCF did not rebut the Section 20(a) presumption. *Albina Engine*, 627 F.3d at 1302 n.3, 44 BRBS at 93-94(CRT) n.3. OCF, however, maintained before the ALJ, as it does again on appeal, that the absence of any diagnosis or reference to an asbestos-related condition in Decedent's treatment records, coupled with the unreliability of Dr. Brady's opinion, constitutes substantial evidence establishing his death is unrelated to asbestos exposure while he was employed by OCF, which the ALJ permissibly rejected.

In this regard, the ALJ properly framed the rebuttal inquiry as "whether the negative evidence of the treating medical records is specific and comprehensive enough to sever the potential causal connection between the harm and the work environment." D&O at 24. Acting within her discretion, she found it "understandable" that Decedent's treating physicians would offer no opinion as to the cause of his disease because "their focus would rightly be on his diagnosis and treatment." *Id.*; *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). She therefore concluded the absence of reference in Decedent's treating records to asbestos-related conditions or disease does not constitute substantial countervailing evidence and rationally concluded OCF did not put forth sufficient evidence to rebut the Section 20(a) presumption that Claimant's claim comes within the provisions of the Act. *See generally Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 127 (1997), *aff'd on recon. en banc*, 32 BRBS 134 (1998) (no rebuttal given the absence of any medical evidence in the record suggesting condition was not related, at least in part, to the work environment); *Adams v. Gen. Dynamics Corp.*, 17 BRBS 258 (1985) (pathologist's report silent for asbestosis is inadequate rebuttal evidence). We therefore affirm the ALJ's finding that OCF did not rebut the Section 20(a) presumption linking Decedent's death to his work-related exposure to asbestos with OCF in 1980, as that

finding is rational, supported by substantial evidence and in accordance with law.[10] *Albina Engine*, 627 F.3d at 1302 n.3, 44 BRBS at 93-94(CRT) n.3; *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). As OCF did not present substantial evidence in rebuttal, it is the employer responsible for Decedent's death as a matter of law. *Albina Engine*, 627 F.3d at 1303, 44 BRBS at 94(CRT).

Section 33(g)

Claimant contends the ALJ erred in finding her entitlement to benefits barred by Section 33(g) for failure to obtain prior written approval of the third-party settlements. A claimant may proceed with both a compensation claim under the Longshore Act against the employer and a tort suit against potentially liable third parties. 33 U.S.C. §933(a). To protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C. §933(f), a claimant, under certain circumstances, either must give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the prior written approval of the third-party settlement from the employer and its carrier. 33 U.S.C. §933(g);[11] *Estate of Cowart v. Nicklos Drilling Co.*,

[10] Moreover, we note OCF did not present any medical opinions stating Decedent's death from metastatic lung cancer was not work-related.

[11] Section 33(g)(1), (2) 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 (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.
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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.

505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988). Section 33(g)(1) requires a "person entitled to compensation" to obtain the employer's written approval prior to entering into a third-party settlement for less than the amount to which she is entitled under the Act. 33 U.S.C. 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281. Failure to obtain prior written approval of a "less than" settlement results in the forfeiture of benefits under the Act.[12] 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). Relevant to a widow's claim for death benefits under the Act, Section 33(g) is potentially applicable to the widow's recovery from third-party settlements entered into after the employee's death. *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (1997).

Parties' Contentions

Claimant contends she secured OCF's and Travelers' global agreement to approve all prior and future third-party settlements, so her failure to file any LS-33 Forms was not a waiver of entitlement to compensation. She maintains the record "unequivocally demonstrates" Mr. Mutnick, through correspondence, wanted Mr. Foster to approve all existing and future third-party settlements, and Mr. Foster, acting officially on behalf of OCF and Travelers, explicitly agreed to those terms. Moreover, she states nothing in the Act prohibits an employer/carrier from granting Claimant's counsel blanket consent to negotiate third-party settlements, especially where, as in this case, the parties are represented by experienced counsel, the net proceeds are retained, and the employer/carrier is given an accounting before any compensation is paid under the Act.

Citing *Valdez v. Crosby & Overton*, 34 BRBS 69 (2000), Claimant also contends her failure to file a Form LS-33 does not automatically result in application of the Section 33(g) bar. She maintains the filing of an LS-33 form is purely a ministerial act which was obviated in this case by OCF's and Travelers' explicit consent to all prior and future third-party settlements. Furthermore, she asserts the strict construction interpretation of Section

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[12] The Board has held that an employer's interests, specifically its rights to recoup its compensation liability from the third-party tortfeasors and offset its compensation liability against those settlement amounts under 33 U.S.C. §933(f), are preserved in cases where the employer is a party to the third-party action. *See Deville v. Oilfield Industries*, 26 BRBS 123, 131 (1992). The ALJ's finding that OCF neither participated in the third-party actions nor was it mentioned in any of the third-party settlement provisions is unchallenged on appeal.

33(g) espoused by OCF, mandating the filing of an LS-33 form to avoid application of the Section 33(g) bar, leads to an unjust result "contrary to the humanitarian purposes of the Act." Claimant argues equitable estoppel bars OCF from asserting the Section 33(g) bar as an affirmative defense.

OCF avers it met its burden to show Claimant entered into third-party settlements without its prior written approval because the record establishes it did not provide the required written consent either through execution of an official Form LS-33 or via other actions constituting constructive consent. OCF argues *Valdez* is distinguishable because in that case the carrier's representative testified she approved the settlement subject to the carrier's lien and credit rights and properly executed Form LS-33 and filed it with the Office of Workers' Compensation Programs, albeit late. In short, OCF states Claimant did not comply with Section 33(g) in any material respect and therefore, based on the plain language of that provision and the controlling case law, her failure to obtain its express written approval of her third-party settlements bars her from obtaining any death benefits under the Act.

The Board has consistently held an employer has given constructive approval of a third-party settlement for purposes of Section 33(g) where it has significantly participated in the third-party case and/or negotiations and its participation exhibited a clear intent to approve the settlement or to protect its lien in terms of the claim arising under the Act. *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997); *Deville v. Oilfield Industries*, 26 BRBS 123 (1992); *see also generally I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (Section 33(g) bar inapplicable if the employer participates in the settlement process and assents to its terms, because it has assured, by its own actions, the protection of its Section 33(f) offset rights).[13] More

[13] The Ninth Circuit has not yet addressed the issue of constructive approval under Section 33(g). For an historical perspective, prior to the Supreme Court's decision in *Cowart,* the United States Court of Appeals for Fifth Circuit stated in its decision in that case that there are no exceptions to the prior approval requirement of Section 33(g)(1). *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *aff'd on other grounds*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). In reliance on the Fifth Circuit's statements in *Cowart*, the Board initially held that participation by an employer or carrier in the third-party settlement negotiations does not nullify the claimant's Section 33(g)(1) responsibility of requesting and obtaining the employer's prior written approval of the settlement. *Monette*, 25 BRBS at 272; *Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991). The Supreme Court, in *Cowart*, specifically declined to address the issue of the effect of an employer's participation in the settlement process, as it was not included in the question on which *certiorari* was granted, *see Cowart*, 505 U.S. at 483, 26 BRBS at

specifically, where an employer/carrier is a party to a third-party suit, participates in settlement negotiations, and agrees to the settlement, Section 33(g) may be inapplicable, and the claimant is relieved of the requirement to obtain a signed LS-33 form. *Id.* This precedent, however, does not apply where the employer/carrier participates in a third-party suit but does not approve the settlement. *See Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007); *Esposito*, 36 BRBS 10; *Perez v. Int'l Terminal Operating Co.,* 31 BRBS 114 (1997); *Pool v. General American Oil Co.*, 30 BRBS 183 (1996).[14]

These cases make it clear that, absent a considerable degree of participation in the third-party litigation and settlements, which constitutes constructive approval sufficient to overcome the requirements of Section 33(g)(1), the plain language of the Act requires a claimant to obtain the employer's prior written approval for the employer to remain liable for compensation. 33 U.S.C. §933(g)(1). In this regard, in *Cowart*, the Supreme Court underscored what it characterized as the mandatory and unambiguous language of Section

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53(CRT). Nevertheless, the Board, citing *Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), subsequently held an employer's participation in the third-party proceedings may be sufficient to preclude the applicability of the Section 33(g)(1) bar. *See Deville*, 26 BRBS at 131-132.

[14] In *Bockman*, 41 BRBS 34, the Board affirmed the ALJ's finding that although the claimant's counsel credibly described communications between himself and the employer's carrier, those communications did not constitute sufficient participation in the settlement by employer's carrier to preclude application of the Section 33(g) bar. In *Esposito*, 36 BRBS 10, the employer was involved in the discovery aspect of the third-party case but was then dismissed from the case. There was conflicting evidence as to whether the employer was kept abreast of the settlement negotiations. The ALJ found the employer was not involved, and it did not sign or consent to the general release. The Board therefore affirmed the ALJ's finding that the employer's participation did not rise to the level that would constitute constructive approval and render the Section 33(g) bar inapplicable. In *Perez,* 31 BRBS 114, the Board affirmed the ALJ's finding that the Section 33(g) bar applied even though the employer participated in the third-party suit. The employer was impleaded by another defendant and agreed to compromise its lien, but it specifically stated its action was not to be construed as approval of the settlement. Finally, in *Pool*, 30 BRBS 183, the Board held an intervenor-carrier who participated in the third-party settlement process, only to later refuse to sign the documents and distance itself from the negotiations, did not participate to a sufficient degree to preclude application of the Section 33(g) bar.

33(g), stating Section 33(g)(1) contained "no exception" to its approval requirement.[15] *Cowart*, 927 F.2d at 828, 24 BRBS at 93(CRT); *see also Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991). In short, case law establishes that absent the filing of an LS-33 form or an equivalent written document, an adjudicator may only find that an employer has constructively approved a third-party settlement where it meaningfully participated in the third-party litigation and/or affirmatively took action to protect its potential Section 33(f) offset rights.

In this case, as the ALJ found, there is a complete absence "of evidence showing compliance with the facial requirement of Section 33(g) to submit a Form LS-33 or its equivalent."[16] D&O at 36. The ALJ also found "no evidence that OCF participated in any way in the underlying litigation, not as a party or intervenor," nor was it "directly involved in third-party settlement negotiations." *Id.* at 37. Furthermore, she found OCF did not specifically disapprove or withhold consent to any settlements, nor did it not sign any agreements or releases.

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[15] However, in affirming the Fifth Circuit's holding that the claim was barred in *Cowart*, the Supreme Court noted the statute provides two exceptions to the written approval requirement: where the claimant settles a third-party suit for an amount greater than his compensation entitlement and where the claimant obtains a judgment against a third party. *Cowart*, 505 U.S. at 483, 26 BRBS at 53 (CRT). While the Court did not address the effect of an employer's participation in the third-party case, a strict interpretation of the mandatory and unambiguous statutory language of Section 33(g) necessarily precludes consideration of Claimant's contention that an employer/carrier may provide blanket consent to future settlements not yet negotiated, especially in situations like the one presented in this case where no Form LS-33 was ever filed.

[16] As OCF maintains, Claimant's citing to *Valdez*, 34 BRBS 69, for the proposition that her failure to file a Form LS-33 does not automatically result in application of the Section 33(g) bar, is misplaced. In *Valdez*, the Board held based on the facts of that case that the late filing of the Form LS-33, with the employer's approval on it, did not trigger the Section 33(g) bar because the employer otherwise acted directly to ensure the protection of its rights to offset and/or recoupment. In reaching this determination, the Board recognized the employer actually approved the settlement agreement prior to the third-party suit's dismissal by a district court judge, agreed to waive its lien, and acknowledged its approval on the proper form. In this case, there is no evidence OCF acted directly to ensure the protection of its offset rights, for it neither directly approved the third-party settlements nor acknowledged such action in any written form. We therefore reject Claimant's contention.

The ALJ next considered whether the written communications between the parties' initial attorneys constituted compliance with Section 33(g) "in all material respects such that OCF acted directly to insure the protection of its offset rights." *Id.* at 38. "Upon careful consideration," the ALJ stated she could not conclude that OCF gave constructive approval of the third-party settlements. She reasonably inferred from the evidence that "Mr. Mutnick was not seeking approval from the employers or carriers of actual third-party settlements, but was instead seeking agreement from counsel that he would not have to litigate Section 33(g) if counsel gave him blanket consent to settle cases." *Id.* at 40. Additionally, although Mr. Mutnick originally acknowledged an executed Form LS-33 was required to show approval, she found he later relied on OCF's counsel's general agreement that Section 33 would not be an issue and on its lack of a response or objection to his proposed settlement resolution as evidence of its approval. She therefore found OCF met its burden to prove Claimant did not obtain its prior written approval either on the requisite Form LS-33 or "it's equivalent." In addition, she found these communications and non-responses did not constitute constructive approval of any third-party settlements, and OCF did not constructively approve the settlements by participating in the underlying litigation or settlement negotiations or taking any direct action to ensure protection of its offset rights. Moreover, she found OCF is not equitably estopped from invoking the Section 33(g) bar. *See generally Bockman*, 41 BRBS at 40.

The ALJ properly concluded the communications between Mr. Mutnick and Mr. Foster did not constitute either written approval or constructive approval by OCF through sufficient participation in the settlements to preclude application of the Section 33(g) bar. As she found, although Mr. Mutnick repeatedly informed Mr. Foster and Ms. Clotiaux of his "longstanding agreement" with EJB's and CIS's carrier, SAIF, for navigating third-party settlements and obtaining, in essence, pre-approval pursuant to Section 33(g) for claims arising under the Act, and he sought their "cooperation regarding Section 33," there is nothing in the record to show Mr. Mutnick and OCF's attorneys reached any written agreement. Nor is there any evidence OCF or its representatives played any part in the third-party litigation or settlements. In view of the above, and in conjunction with the absence of a signed Form LS-33 or its equivalent, we affirm the ALJ's finding that the Section 33(g) bar applies, as Claimant did not obtain OCF's prior written approval of any of the less-than third-party settlements. *Esposito*, 36 BRBS 10; *Perez*, 31 BRBS 114; *Pool*, 30 BRBS 183.

As the Board discussed in *Bockman*, this case also illustrates the Supreme Court's statement that the Section 33(g) "forfeiture penalty creates a trap for the unwary." *Estate of Cowart*, 505 U.S. at 483, 26 BRBS at 53(CRT). Regardless of OCF's or Travelers' original intent as expressed by its then-counsel Mr. Foster, or the possible representations made in the discussions between counsels, the fact remains Claimant did not obtain OCF's or Travelers' prior written approval of her third-party settlements. Equitable

considerations are inapplicable.[17] *See generally Bockman*, 41 BRBS at 40. Because Claimant did not obtain the required prior written approval of the third-party settlement from OCF or Travelers, the ALJ properly found Section 33(g) bars Claimant's claim. *Mapp*, 38 BRBS 43; *Esposito*, 36 BRBS 10.

Accordingly, we affirm the ALJ's Decision and Order Denying Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[17] We therefore reject Claimant's position that equitable estoppel and the humanitarian purposes of the Act preclude OCF from invoking the Section 33(g) bar. The plain and clear language of the statute mandates Claimant obtain its express written consent, and the facts of this case do not present a situation where broad construction may overcome that clear language to excuse Claimant's failure to comply with the requirements of that provision. *Estate of Cowart*, 505 U.S. at 483, 26 BRBS at 53(CRT).