U.S. Department of Labor

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

BRB No. 24-0250

JAMIE LYNN STEIN, Successor-in-Interest to MARTHA MIHALKO (Deceased Widow of JAMES F. MIHALKO)

Claimant-Petitioner

v.

THORPE INSULATION COMPANY

and

ASSOCIATED INDEMNITY INSURANCE COMPANY/ALLIANZ and UTICA MUTUAL INSURANCE COMPANY

Employer/Carriers-Respondents

and

CONTINENTAL CASUALTY COMPANY

Carrier

and

CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

Insurance Guarantee Association

NOT-PUBLISHED

DATE ISSUED: 01/13/2026

and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
		DECISION and ORDER

Appeal of Decision and Order Denying Benefits on Summary Decision of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

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

Gursimmar Sibia (Sibia, Chang & Bruyneel, LLP), Daly City, California, for Carrier Respondent Associated Indemnity Insurance Company/Allianz.

Wallace M. Tice and Johanna Berta (Kaufman Dolowich LLP), San Francisco, California, for Carrier Respondent Utica Mutual Insurance Company.

Olgamaris Fernandez (Jonathan Berry, Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Susan Hoffman's Decision and Order Denying Benefits on Summary Decision (2016-LHC-01154) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act or LHWCA). 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.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case is before the Benefits Review Board following the ALJ's summary decisions on the purely legal issue of whether the widow of an allegedly injured employee entered into a third-party settlement agreement such that her claim for death benefits under the Act is barred by 33 U.S.C. §933(g). This case has a complex history.

On November 20, 2012, Martha Mihalko (Mrs. Mihalko) filed a claim for death benefits under the Act alleging the death of her husband, James F. Mihalko (Decedent),[2] occurred due to his employment-related exposure to airborne toxins while working for Employer as an asbestos insulator at various California shipyards from 1963 until 1994. 33 U.S.C. §909; D&O at 5-6; Director's Renewed Motion for Summary Decision (MSD) Ex. A.[3] In 2009, prior to his death, Decedent and Mrs. Mihalko, both represented by Brayton Purcell LLP, filed a tort claim for injuries arising from the same exposure against various third parties in the Superior Court of California, County of San Francisco (Case No. CGC-09-275367) ("2009 lawsuit"), seeking damages for personal injury and loss of consortium.[4] D&O at 7; MSD Ex. K. Following Decedent's death, his daughter, Jamie Stein (Claimant), also represented by Brayton Purcell LLP, filed a survival and wrongful death action in the Superior Court of California, County of Los Angeles (Case No.

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Decedent sustained his alleged injuries in California and died in Washington state. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

[2] Decedent died on August 17, 2012. His cause of death was listed as refractory septic shock, severe obstructive airway disease, aspiration pneumonia, and cardiopulmonary arrest due to tension pneumothorax. Director's Renewed Motion for Summary Decision Exhibit (MSD Ex.) C.

[3] In his Renewed Motion for Summary Decision, the Director attached Exhibits K through Q and incorporated by reference Exhibits A through J from his original Motion for Summary Decision filed on June 6, 2019.

[4] The 2009 lawsuit was dismissed without prejudice on August 5, 2016, at the request of Alan R. Brayton, attorney for the plaintiffs. MSD Ex. N.

BC515743) ("2013 lawsuit").[5] D&O at 7; MSD Ex. O. Claimant submitted a declaration in the 2013 lawsuit identifying herself as Decedent's successor-in-interest. D&O at 7; MSD Ex. D.

On April 15, 2014, Mrs. Mihalko signed a disclaimer of participation in third-party lawsuits, requesting her attorneys, Brayton Purcell LLP, instead pursue Longshore benefits on her behalf (despite having already filed a Longshore claim two years prior). D&O at 6; Associated's Opening Br. Ex. C. There is no evidence the disclaimers were filed in any court proceeding or provided to any third party. D&O at 6.

On May 22, 2014, Claimant executed a settlement agreement with Pfizer.[6] D&O at 8; MSD Ex. G. The settlement agreement identified Claimant as the "personal representative of the estate of James Mihalko" and indicated she was executing the settlement "on behalf of the estate, for myself, and the decedent's heirs, executors, beneficiaries, administrators, successors and assigns." D&O at 8; MSD Ex. G at 1 (unpaginated). In signing the agreement and in consideration of $996.39,[7] Claimant agreed to "forever . . . refrain from bringing any suit or proceeding at law or in equity" against Pfizer, and released Pfizer from all claims, "including, but not limited to, any pecuniary and non-pecuniary injuries suffered by James Mihalko or [his] survivors, any future lost wages or prospective earnings, the loss of companionship and consortium and funeral

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[5] In addition to Claimant, the other named plaintiffs in the survival and wrongful death California state action included the other two daughters of Decedent and Mrs. Mihalko, Genevie Mihalko and Martha Varner, as well as Genevie Mihalko's two minor children (through their mother as guardian ad litem). The complaint acknowledged Martha Mihalko, as Decedent's widow, was also an heir and therefore entitled to bring survival and wrongful death actions pursuant to Cal. Civ. Proc. Code §377.60 (West) but indicated she was a named defendant pursuant to Cal. Civ. Proc. Code §382 (West) because "her consent to be joined cannot be obtained." MSD Ex. O at 12. On May 7, 2014, Mrs. Mihalko was dismissed from the lawsuit, without prejudice, at plaintiffs' request. MSD Ex. P.

[6] Pfizer was not a named defendant in either California state court claim. *See* MSD Exs. K, O. Further, as the ALJ noted, the Pfizer settlement agreement included in the record does not appear to be the entire document, as it is titled "Exhibit A to the Settlement Agreement." D&O at 8, n.16; MSD Ex. G at 1 (unpaginated). Nevertheless, no party submitted the entire settlement agreement or indicated the document was incomplete.

[7] No party disputes that this amount is less than the potential recovery of death benefits under the Act. D&O at 9.

expenses." MSD Ex. G at 2 (unpaginated). Claimant's counsel, Brayton Purcell LLP, also signed the agreement. *Id.* at 6 (unpaginated). No evidence suggests Employer or any purported Carrier were notified of the settlement prior to its execution. D&O at 9. Mrs. Mihalko died intestate on February 1, 2015.[8] D&O at 11.

Following Mrs. Mihalko's death, Claimant was substituted as her successor-in-interest in the LHWCA claim for death benefits. *See* the ALJ's June 24, 2019 Order Granting Motion to Substitute Party. The Director, Office of Workers' Compensation Programs (Director), filed his first motion for summary decision on June 6, 2019, and the ALJ granted it on October 9, 2019. *See* October 9, 2019 Decision and Order Granting Director's Motion for Summary Decision. Based on the undisputed facts and the Board's decision in *Hale v. BAE Sys. S. F. Ship Repair*, 52 BRBS 57 (2018),[9] she concluded Section 33(g) bars Claimant's recovery of any benefits under the Act and dismissed the claim.

Claimant appealed to the Board. While her appeal was pending, the United States Court of Appeals for the Ninth Circuit reversed the Board's *Hale* decision.[10] *Hale v. BAE*

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[8] Claimant executed two additional settlements following Mrs. Mihalko's death. On April 27, 2015, she executed a settlement with Quintec Industries, Incorporated, a named defendant in the 2009 lawsuit, for $10,000. D&O at 8; MSD Ex. H. On December 15, 2015, she executed a settlement with Stauffer Chemical Company, a named defendant in the 2013 lawsuit, for $10,000. D&O at 8-9; MSD Ex. I.

[9] *Hale v. BAE Sys. S.F. Ship Repair*, 52 BRBS 57 (2018), *rev'd* 801 F. App'x 600 (9th Cir. 2020), involved a widow's claim for death benefits under the Act where the decedent's heirs filed a California wrongful death claim in which the widow purported to disclaim any interest. The Board held the widow "entered" into a third-party settlement for purposes of Section 33(g) of the Act as she had not informed anyone about her disclaimers, Brayton Purcell LLP represented her in both the separate wrongful death claim and the claim under the Act, and California law bound her to the settlement of the wrongful death claim. *Hale*, 52 BRBS at 64. Consequently, the Board held she was barred from recovery under the Act as she did not obtain the employer's prior written approval of the settlement. *Id.*

[10] In an unpublished memorandum opinion, a panel majority reversed the Board's holding that the claimant had "entered into" a third-party settlement, creating a distinction between being "bound by" the settlement document her daughter signed under the law of contracts and personally "entering into" a settlement by signing it herself under the Act. *Hale*, 801 F. App'x at 601. Finding no evidence in the record that the claimant had either personally entered into a settlement agreement or authorized her daughter to act as an agent on her behalf, the court held the daughter's execution of the third-party settlement

Sys. S. F. Ship Repair, Inc., et al., 801 F. App'x 600 (9th Cir. 2020). Given the Ninth Circuit's reversal, the Board vacated the ALJ's application of the Section 33(g) bar, as well as her resulting grant of summary decision, and remanded the case for reconsideration of the Director's motion. *Stein v. Thorpe Insulation Co.*, BRB No. 20-0061 (Dec. 15, 2020).

On remand and following an additional period of discovery, the Director submitted a Renewed Motion for Summary Decision (MSD), again arguing 33 U.S.C. §933(g) bars recovery under the Act, notwithstanding the Ninth Circuit's unpublished decision in *Hale*, because the undisputed facts show Claimant acted as Ms. Mihalko's agent when she executed the Pfizer settlement agreement.[11]

On March 18, 2024, the ALJ issued a Decision and Order Denying Benefits on Summary Judgment (D&O). She once again found the facts undisputed and concluded the applicability of Section 33(g) turned on the legal question of whether Mrs. Mihalko "entered into" a third-party settlement. D&O at 10-11. Based on the unambiguous language of the Pfizer settlement agreement, as well as Mrs. Mihalko's imputed knowledge of the settlement through her counsel, the ALJ concluded Claimant was acting as Mrs. Mihalko's ostensible or implied agent when she executed the agreement. *Id.* at 14-18. Consequently, Mrs. Mihalko "entered into" the Pfizer settlement agreement. Because she failed to obtain prior written approval from Employer or any purported Carrier and because the amount of the Pfizer settlement was less than her potential entitlement under the Act, the ALJ found Mrs. Mihalko's Longshore claim is barred in accordance with Section 33(g). *Id.* at 18.

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agreements had not triggered Section 33(g)'s forfeiture provision. *Id*. at 601-602. The dissenting judge would have upheld the Board's decision, finding the majority's distinction to be one without a difference and the settlement's plain language bound the claimant under California law. *Id.* at 602-603.

[11] Both before the ALJ and on appeal, the Director also argues Claimant undisputedly acted as Mrs. Mihalko's "representative" within the meaning of the Act when she executed the Quintec and Stauffer settlement agreements following Mrs. Mihalko's death, thereby forfeiting benefits under Section 33(g). MSD at 17-19; Dir's Resp. Br. at 14-16. However, the ALJ did not address this argument, finding Claimant's execution of the Pfizer settlement agreement sufficient to trigger Section 33(g)'s forfeiture provision, *see* D&O at 18, and we cannot address it for the first time on appeal. 20 C.F.R. §802.301(a); *Brown v. I.T.T./Cont'l Baking Co*., 921 F.2d 289, 293 (D.C. Cir. 1990); *J.T. [Tisdale] v. Am. Logistics Servs.*, 41 BRBS 41, 45 (2007).

Claimant appeals, arguing the ALJ erred in finding Mrs. Mihalko "entered into" the Pfizer settlement agreement because she did not sign it, she received no consideration, she provided no consent (either at the time it was executed or afterward through ratification), and she gave no one direct authority to enter into it on her behalf. She also asserts the ALJ ignored "basic principles" of California contract law finding otherwise. Pet'r's Br. at 21, 23-24, 33-34, 36.

The Director and Associated Indemnity Insurance Company (Associated)[12] separately respond, urging affirmance of the ALJ's decision.[13] They maintain the ALJ's decision is rational and in accordance with the law because an agency relationship existed that would cause a third party to reasonably believe Claimant had authority to bind Mrs. Mihalko to the Pfizer settlement agreement. Dir's Resp. Br. at 8; Associated's Resp. Br. at 2, 9-10. Therefore, no genuine dispute exists that Mrs. Mihalko "entered into" the Pfizer settlement agreement within the meaning of Section 33(g). Dir's Resp. Br. at 8, 11; Associated's Resp. Br. at 2, 10, 12.

Claimant submitted a reply, arguing Pfizer knew the settlement agreement excluded Mrs. Mihalko as a result of both her dismissal from the 2013 lawsuit and a line striking out a signature block within the settlement agreement designated "[f]or spouse releasing loss of consortium claim." Pet'r's Reply Br. at 19-20, 22. Further, Claimant maintains the ALJ's decision fails to serve the purpose of Section 33(g), as the Pfizer settlement agreement did not result in Mrs. Mihako's double recovery. *Id.* at 15, 20.

The Board reviews summary judgment orders *de novo*. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992); *Tomka v. Seiler Corp.*, 66 F.3d

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[12] Associated is one of three purported carriers joined in this claim. The California Insurance Guarantee Association (CIGA), on behalf of Employer's insolvent carriers Mission Insurance Company and Western Employers' Insurance Company, initially controverted Mrs. Mihalko's claim. Thereafter, an ALJ dismissed CIGA based upon California Insurance Code §1063.1, *see* ALJ William Dorsey's November 15, 2016 Order Dismissing California Guarantee Association, but the Board subsequently vacated the ALJ's dismissal. *See Stein v. Thorpe Insulation Co.*, BRB No. 20-0061 (Dec. 15, 2020). On remand, the ALJ re-joined CIGA by order issued July 9, 2021. Following additional discovery, CIGA and Claimant moved the ALJ to join other potentially liable insurance carriers: Associated, Utica Mutual Insurance Company (Utica), and Continental Casualty Company (Continental). The ALJ joined these parties by orders issued August 15, 2022, and May 8, 2023.

[13] Utica joined in the Director's and Associated's Responses.

1295, 1304 (2d Cir. 1995). In determining whether to grant a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether any genuine issues of material fact exist and whether the moving party is entitled to summary decision as a matter of law. *Sheren v. Lakeshore Eng'g Serv., Inc.*, 54 BRBS 17, 20 (2020); *see also Han v. Mobil Oil Corp.*, 73 F.3d 872, 875 (9th Cir. 1995); *R.V.* [*Villaverde*] *v. J. D'Annunzio & Sons*, 42 BRBS 63, 64 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); 29 C.F.R. §18.72. The party seeking summary judgment bears the initial burden of demonstrating there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only then does the burden shift to the non-moving party to survive the motion by demonstrating specific, material facts that give rise to a genuine issue. *Id*. In that regard, to defeat a motion for summary decision, the non-moving party must present "specific facts" showing there exists "a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, the parties do not dispute the ALJ's factual findings.[14] Therefore, the question on review is whether the ALJ properly applied the law to grant summary decision. *Sheren*, 54 BRBS at 20; *Villaverde*, 42 BRBS at 64; *see also Han*, 73 F.3d at 875.

Under Section 33, 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

[14] We reject Claimant's argument that summary decision is inappropriate because the question of agency is one of fact, not law. Pet'r's Br. at 27. Not only does Claimant fail to identify any specific disputed facts requiring resolution, *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), the question of whether Claimant acted as Mrs. Mihalko's agent when she executed the Pfizer settlement agreement is a mixed question of law and fact involving undisputed underlying facts, and therefore, the ALJ correctly found summary decision may appropriately be granted. *Han*, 73 F.3d at 875; D&O at 11-12; *see also Church Mut. Ins. Co., S.I. v. GuideOne Specialty Mut. Ins. Co.*, 72 Cal. App. 5th 1042, 1062, 287 Cal. Rptr. 3d 809, 824 (2021), *as modified on denial of reh'g* (Jan. 11, 2022) ("Although the existence of an agency relationship is typically a question of fact, where the essential facts are not in dispute, the existence of agency becomes a matter of law.").

third-party settlement from the employer and its carrier.[15] 33 U.S.C. §933(g);[16] *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469 (1992); *Bethlehem Steel Corp. v. Mobley*,

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[15] Despite the ALJ's language to the contrary, there is no statutory or legal requirement that a claimant obtain this prior written approval from the Director. D&O at 9, 11, 18; *see* 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469 (1992). In dismissing CIGA early in this claim, however, ALJ Dorsey suggested liability for death benefits could fall to the Special Fund, administered by the Director. Which party would be responsible for Claimant's death benefits continued to be a disputed issue, with the Board vacating CIGA's dismissal, the ALJ's re-joinder of CIGA, and the additional joinder of Associated, Utica, and Continental as potentially liable carriers. Although our affirmance of the ALJ's D&O rendered the issue moot, it was reasonable for the ALJ to assume, at the time Claimant executed the Pfizer settlement agreement, that the Special Fund, administered by the Director, was a potentially liable party under the Act and therefore a party from whom Claimant was potentially required to obtain prior written approval in accordance with Section 33(g). We therefore find the ALJ's error to be harmless, as it is undisputed neither Claimant nor Mrs. Mihalko sought or obtained prior written approval from any party prior to execution of the Pfizer settlement agreement. *Suarez v. Serv. Employees Int'l, Inc.*, 50 BRBS 33, 36-37 (2016); *see generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010) (harmless error principle applies in cases arising under the Act).

[16] 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

920 F.2d 558 (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988); *Siver v. Kaiser Aluminum & Chemical Corp.*, 57 BRBS 11, 15 (2022), *aff'd mem.* (Feb. 21, 2024), *reh'g denied* (9th Cir. May 30, 2024).

Pursuant to Section 33(g)(1), prior written approval of the settlement is necessary when the "person entitled to compensation" or "the person's representative" enters into a settlement with a third party for less than the amount to which she is entitled under the Act. 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. at 482; *Siver*, 57 BRBS at 15; *Honaker v. Mar Com, Inc.*, 44 BRBS 5, 7 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10, 11-12 (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. 33 U.S.C. §933(g)(2); *Siver*, 57 BRBS at 15; *Esposito*, 36 BRBS at 12; 20 C.F.R. §702.281(b).

The ALJ found it undisputed that Mrs. Mihalko, as Decedent's surviving spouse, was a "person entitled to compensation" within the meaning of Section 33(g) and was also Decedent's beneficiary and heir under California law. D&O at 10 (citing Cal. Civ. Proc. Code §377.10 (West); Cal. Prob. Code §44 (West)). She also found it undisputed that the Pfizer settlement agreement was less than Mrs. Mihalko's potential recovery under the Act and further, "[n]either Mrs. Mihalko, [Claimant], nor anyone on their behalf obtained prior written approval of the Pfizer Settlement from any Longshore Respondent or the Director." D&O at 11. As a result, the ALJ rationally found that "the applicability of the Section 33(g) bar here depends on the legal determination as to whether Mrs. Mihalko 'entered into' the third-party settlements." *Id.*

The ALJ turned first to the settlement agreement itself. D&O at 12. Under California law, which governs the Pfizer settlement agreement,[17] the ALJ interpreted it to give effect to the parties' mutual intentions. D&O at 12 (citing Cal. Civ. Code §§1636, 1639 (West); *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1089 (9th Cir. 2015); *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 956, 135 Cal. Rptr. 2d 505 (2003)). She found the Pfizer settlement agreement unambiguously identified Mrs. Mihalko as a releasor, as both a beneficiary and heir. D&O at 14; MSD Ex. G at 1 (unpaginated). Further, she found the Pfizer settlement agreement explicitly released all of Mrs. Mihalko's present and future claims arising out of Decedent's asbestos exposure, including wrongful death claims,

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terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

[17] D&O at 12, n.23.

which accrue to enumerated survivors under California law,[18] and loss of companionship and consortium claims, which accrue to Mrs. Mihalko. D&O at 14-15; MSD Ex. G at 2 (unpaginated). Finally, the ALJ found the settlement agreement unequivocally identified Claimant as having the "right and authority" to execute the release, and that she executed it "on behalf of . . . decedent's heirs, executors, beneficiaries, administrators, successors, and assigns," which included Mrs. Mihalko.[19] D&O at 15; MDS Ex. G at 1, 5 (unpaginated). Consequently, the ALJ found the settlement's plain language released all claims on behalf of all parties, including Mrs. Mihalko. D&O at 16.

The ALJ next addressed the "purported difference between entering into and being bound by a contract" as suggested by the Ninth Circuit in its unpublished memorandum decision in *Hale*, 800 F. App'x at 601.[20] D&O at 14. Having already found the settlement

[18] According to Cal. Civ. Proc. Code §377.60(a) (West), a surviving spouse, children, and the personal representative acting on behalf of the estate are enumerated persons granted standing to file a wrongful death claim.

[19] The ALJ rejected Claimant's argument that a line striking out the unsigned signature block for the "spouse releasing loss of consortium claim" constituted proof the agreement explicitly excluded Mrs. Mihalko. D&O at 14, n.26; *see also* Pet'r's Br. at 13, 22; Pet'r's Reply Br. at 22. We agree with the ALJ. A line drawn through a separate signature block, when Claimant had warranted she had the authority to represent all heirs and beneficiaries, does not constitute objective evidence of an intent to exclude Mrs. Mihalko, especially considering the agreement contains a specific release of any loss of consortium claims. Cal. Civ. Code §§1636, 1638, 1639 (West); *Founding Members of the Newport Beach Country Club*, 109 Cal. App. 4th at 956, 135 Cal. Rptr. 2d 505.

[20] According to the panel majority in *Hale*, "[e]ven if the widows were ultimately bound by the third-party settlements signed by the daughters, no record evidence suggests [they] personally 'enter[ed] into a settlement with a third person.'" *Hale*, 800 F. App'x at 601. As the dissenting judge in *Hale* pointed out, the *Hale* majority offered no explanation as to the difference between "entering into" and being legally "bound by" a settlement for purpose of Section 33(g). *Hale*, 800 F. App'x at 602-603. Rather, creating this distinction "unnecessarily blur[s] what should be straight-forward matters of contract law, [and] potentially writes Section 33(g) out of the statute." *Siver*, 57 BRBS at 20, n.18; *see also Hale*, 800 F. App'x at 603 ("Here, as the majority acknowledges, the plain language of the settlements binds [the claimants] to its terms as 'heirs' to the decedents. Accordingly, I read the settlements as expressing an objective intention that [the claimants] be bound by and parties to the settlements.").

bound Mrs. Mihalko, the ALJ rejected the notion that Mrs. Mihalko nevertheless had not "entered into" it simply because she had not personally signed it.[21] D&O at 14. The ALJ relied on *Siver*, where the Board agreed with the dissenting opinion in *Hale* that the terms "bound by" and "entered into" are essentially synonymous and to find otherwise "permits claimants to unilaterally bargain away funds to which the employer might be entitled under 33 U.S.C.§933(b)-(f) by becoming parties to enforceable contracts that by their terms extinguish employers' rights to an offset." D&O at 16 (quoting *Siver*, 57 BRBS at 20, n.18).

Claimant cites *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997), as additional support for differentiating between being "bound by" and "entering into" a settlement. Pet'r's Reply Br. at 9-10. In *Casey*, the Board affirmed the ALJ's finding that a widowed claimant's agreement to dismiss an appeal of her wrongful death suit in exchange for the third-party defendant's waiver of the right to recover court costs was not a third-party settlement so that Section 33(g) barred her recovery of death benefits. According to Claimant, although the widow was "bound by" the agreement, the Board found she had not "entered into" a third-party settlement. Pet'r's Br. at 12. But whether the claimant "entered into" the agreement was not at issue; the issue was whether the agreement to withdraw the appeal constituted a third-party settlement within the meaning of Section 33(g). The ALJ found, and the Board agreed, that it did not, as the claimant had already lost her tort suit on the merits and therefore employer's offset rights under the Act were not affected by an agreement to withdraw an appeal. *Casey*, 31 BRBS at 150. Conversely, the nature of the Pfizer settlement agreement in this case is not at issue: it is a third-party settlement.

[21] Claimant argues the ALJ erred in not considering certain factors of contract law to determine whether Mrs. Mihalko "entered into" the Pfizer settlement agreement, such as whether Mrs. Mihalko signed the agreement, whether she received consideration, and whether she consented to the agreement. Pet'r's Br. at 23-25, 33-34, 36, 39 (citing *Chavez v. Director, OWCP*, 961 F.2d 1409 (9th Cir, 1992); *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001); *Doucet v. Avondale Indus.*, 34 BRBS 62 (2000)); Pet'r's Reply Br. at 8, 10, 17-18. But those factors were not used in *Chavez* and *Williams* to determine whether a party "entered into" an already perfected settlement agreement, but to determine whether a properly executed settlement agreement existed at all. *See Chavez*, 961 F.2d at 1413; *Williams*, 35 BRBS at 97. And although the Board in *Doucet* found the widow had not "entered into" a third-party settlement, it was because she was not a "person entitled to compensation" when the settlement was executed by her husband. *Doucet*, 34 BRBS at 64-65. Here, Mrs. Mihalko unquestionably was a "person entitled to compensation" in accordance with Section 33(g) when Claimant executed the Pfizer settlement agreement.

Claimant urges the Board to reject the ALJ's reliance on *Siver*, which she maintains is factually distinguishable, and instead rely on *Hale* because its facts are virtually identical to this claim. Pet'r's Br. at 11, 14, 16, 49. We decline to do so. The ALJ rationally found that, even if she accepted the Ninth Circuit's distinction between "bound by" and "entered into," the undisputed facts of this claim show Claimant acted as Mrs. Mihalko's agent when she executed the Pfizer settlement agreement. D&O at 16-17. Although there was no explicit power of attorney as in *Siver*, the ALJ relied on California agency law, under which agency may be ostensible (when the principal either intentionally, or by want of ordinary care, causes a third party to believe another is his agent), or implied (by the conduct of the parties, including a principal's failure to object or repudiate another's act). D&O at 12-13 (citing *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 479 (9th Cir. 2000); *van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549, 571 (2003); *Preis v. Am. Indem. Co.*, 220 Cal. App. 3d 752, 761 (Ct. App. 1990); *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972); Cal. Civ. Code, §§2298, 2300, 2307, 2317 (West); Restatement (Third) of Agency §4.01 (A.L.I. 2006)). Moreover, as the ALJ pointed out, *Siver* is published, precedential, and has been affirmed by the Ninth Circuit,[22] while the Ninth Circuit's *Hale* decision is unpublished. D&O at 16; *U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000); 9th Cir. Rule 36-3 ("Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.").

Claimant further maintains California agency law requires some affirmative action by the principal (Mrs. Mihalko), and there was none here. Pet'r's Br. at 26-27. We disagree. The ALJ rationally found Mrs. Mihalko's inaction, in conjunction with the plain language of the settlement agreement and her imputed knowledge of the third-party settlement through her counsel, ratified Claimant's execution of the Pfizer settlement agreement on Mrs. Mihalko's behalf. D&O at 17-18. The Pfizer settlement agreement's plain language indicated Claimant had the "right and authority" to execute the agreement and did so on behalf of all heirs and beneficiaries, which, according to California law, includes Decedent's surviving spouse, Mrs. Mihalko. D&O at 17; MSD Ex. G at 5 (unpaginated). Brayton Purcell LLP, counsel for both Claimant and Mrs. Mihalko at the time the Pfizer settlement agreement was executed, also signed it, thereby imputing legal knowledge of the third-party settlement to Mrs. Mihalko.[23] D&O at 17 (citing *Link v.*

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[22] *See Siver v. Kaiser Steel Res., Inc.*, No. 22-2098, 2024 WL 705707, at 1 (9th Cir. Feb. 21, 2024) ("[T]he Board's interpretation of the requirements of the LHWCA is reasonable and fits within the statute's underlying purpose….").

[23] Claimant maintains that if Mrs. Mihalko is to be imputed with knowledge of the third-party settlements through her counsel, Claimant should likewise be charged with imputed knowledge of Mrs. Mihalko's disclaimers as to third-party actions. Pet'r's Br. at

Wabash R. Co., 370 U.S. 626, 633-634 (1962)); MSD Ex. G at 5 (unpaginated). Despite this knowledge, neither Mrs. Mihalko nor Brayton Purcell LLP expressly informed Pfizer that her claims were not included in the Pfizer settlement agreement, which they could have done with explicit language or by disclosure of Mrs. Mihalko's 2014 disclaimers.[24] D&O at 17. Contrary to Claimant's arguments, it does not matter whether Claimant believed she was acting as Mrs. Mihalko's agent when she executed the settlement agreement, but whether Pfizer reasonably believed Claimant had authority to act on Mrs. Mihalko's behalf. *See Henderson v. U. S. Aid Funds, Inc.*, 918 F.3d 1068, 1075 (9th Cir. 2019) (the principal need not explicitly communicate consent to an agent, but, rather, failure to object or repudiate an action may indicate approval); *Am. Cas. Co. of Reading, PA v. Krieger*, 181 F.3d 1113, 1122 (9th Cir. 1999) (ostensible agency can occur when the principal knows the agent holds herself out to have authority and remains silent). And the ALJ rationally found, based on the plain language of the settlement agreement and Mrs. Mihalko's conduct, that it was "reasonable for Pfizer to believe [Claimant] had the authority to act on behalf of Mrs. Mihalko." D&O at 17.

We further reject Claimant's argument that the ALJ's decision fails to support the purpose of Section 33(g) because there was no double recovery or unjust enrichment to Mrs. Mihalko. Pet'r's Rep. Br. at 15. Avoidance of double recovery is not Section 33(g)'s only purpose. Rather, the primary purpose of Section 33(g) is to protect an employer's rights in third-party settlements by preventing claimants from unilaterally bargaining away funds to which the employer might be entitled under 33 U.S.C. §933(f). *I.T.O. Corp. of*

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46. However, the purported agent's knowledge or belief when executing the settlement is irrelevant; rather, it is the third-party's reasonable knowledge or belief that creates an ostensible agency relationship. Moreover, imputing knowledge of the disclaimers to Claimant only enforces the ALJ's decision, as she failed to take any action to notify or alert Pfizer as to their existence, thereby reinforcing Pfizer's reasonable belief that she had authority to act on Mrs. Mihalko's behalf.

[24] While Claimant is correct that there is no "mandate" for Mrs. Mihalko to alert Pfizer that she was no longer pursuing any third-party claims, Pet'r's Br. at 45, her inaction, through counsel, created the ostensible agency relationship. We also find it irrelevant that Mrs. Mihalko had been dismissed from the 2013 lawsuit prior to execution of the Pfizer settlement agreement. Pet'r's Br. at 13, 15-16, 41. Not only was Pfizer not a named party to the 2013 lawsuit, but Mrs. Mihalko was voluntarily dismissed without prejudice, meaning her claims were not extinguished. *Metabyte, Inc. v. Technicolor S.A.*, 94 Cal. App. 5th 265, 275, 312 Cal. Rptr. 3d 129, 140 (2023), *review denied* (Nov. 15, 2023); *Nolan v. Workers' Comp. Appeals Bd.*, 70 Cal. App. 3d 122, 128, 138 Cal. Rptr. 561, 564 (Ct. App. 1977); Cal. Civ. Proc. Code §581 (West).

Baltimore v. Sellman, 954 F.2d 239, 242, *vacated in part on other grounds on reh'g*, 967 F.2d 971 (4th Cir. 1992); *Bell v. O'Hearne*, 284 F.2d 777, 780 (4th Cir. 1960). That purpose would not be served were we to accept Claimant's position. *Siver*, 57 BRBS at 20, n.18; *see also Siver*, No. 22-2098, 2024 WL 705707; *Hale*, 800 F. App'x at 603. Rather, substantial evidence supports the ALJ's application of Section 33(g) to bar Claimant's claim, and her grant of summary decision accords with the law.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge