BRB No. 01-0461

RALPH ESPOSITO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	DATE ISSUED: FEB 12, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-0398) of Administrative Law Judge Paul H. Teitler 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).

Claimant worked for employer as a hustler-driver and injured his right leg on January 10, 1996. The parties stipulated that this injury resulted in orthopedic and psychiatric disabilities, and employer paid claimant temporary total disability benefits from May 22, 1996, through September 6, 1999, totaling approximately $137,903, and medical benefits.

Decision and Order at 2; Cl. Ex. 1. In October 1997, claimant filed suit in district court for his injuries against employer and unknown defendants. Emp. Ex. A. Once the proper defendants were identified, A.G. Ship Maintenance Corporation and Snow Removal, Incorporated, claimant's third-party attorney, Mr. Katz, and employer's attorney, Mr. Fazio, filed a stipulation dismissing employer from the tort suit. Emp. Exs. C-F. The Stipulation of Dismissal was filed on March 26, 1998. Thereafter, Mr. Fazio remained involved in the case for discovery purposes only.

Trial was scheduled for August 24, 1999. That morning, prior to entering the courtroom, claimant signed a "General Release" which released A.G. Ship of liability in return for $60,000, and a Stipulation of Dismissal was filed with the court. Emp. Exs. K-L. The trial proceeded on liability only, and the jury returned a verdict assessing A.G. Ship 99 percent negligent, Snow Removal one percent negligent, and claimant zero percent negligent. Emp. Ex. M. On September 6, 1999, employer terminated benefits due to claimant's failure to obtain its prior written approval of the settlement with A.G. Ship. Cl. Exs. 1-2. On September 30, 1999, A.G. Ship sent a check for $60,000 to Mr. Katz, who received the check on October 4, 1999. Cl. Ex. 6; Emp. Ex. R. On October 20, 1999, the district court entered a Judgment Notwithstanding the Verdict in favor of Snow Removal, and this judgment was not appealed by claimant. Emp. Ex. O; Tr. at 44. As of the date of the hearing before the administrative law judge, April 6, 2000, Mr. Katz still had possession of the A.G. Ship check and had not cashed it. Tr. at 45.

Claimant contended before the administrative law judge that employer was sufficiently involved in the third-party case so as to waive the requirement that he obtain its prior written approval of the settlement with A.G. Ship pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1). In the alternative, claimant contended that he gave employer proper notice of the settlement pursuant to Section 33(g)(2), 33 U.S.C. §933(g)(2), and should retain his entitlement to medical benefits. He also argued that even if benefits were properly terminated, they were terminated prematurely. The administrative law judge rejected claimant's arguments. After a thorough review of law on Section 33(g), 33 U.S.C. §933(g), and after noting that the United States Court of Appeals for the Second Circuit has not spoken on this matter, the administrative law judge determined that employer's limited participation in the third-party litigation did "not rise to the level necessary" to relieve claimant of his obligations under Section 33(g)(1). Decision and Order at 15. The administrative law judge found that the facts of the instant case are analogous to those in *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Smith and Brown, JJ., concurring and dissenting). *Id.* Based on the plain language of the Act, the administrative law judge found that claimant forfeited his rights to both compensation and medical benefits under Section 33(g)(2) due to his non-compliance with Section 33(g)(1). Decision and Order at 17. Finally, the administrative law judge rejected claimant's assertion that benefits should not have been terminated until the third-party payment was received because the settlement was

not valid and enforceable until that time. *Id.* at 18. Thus, the administrative law judge found that employer properly terminated claimant's benefits. *Id.* Claimant appeals, and employer responds, urging affirmance.

Prior Approval

Claimant first contends employer's involvement in the third-party litigation was sufficient to constitute its constructive approval of the settlement with A.G. Ship. Specifically, claimant asserts his attorney had conversations and contacts with employer's attorneys to the degree that they knew of and approved of his actions/progress in settling the third-party claim. Employer argues that there was no request for prior written approval and there was none given; therefore, claimant violated the provisions of Section 33(g)(1).

Section 33(g)(1) of the Act 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). Thus, the claimant must obtain prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than the compensation to which the claimant would be entitled under the Act. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in result only); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part). Absent the employer's approval, the claimant forfeits such entitlement. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). The claimant need only notify the employer under Section 33(g)(2) if he obtains a judgment against the third parties or if he settles the third-party claim for an amount greater than or equal to that which he is entitled under the Act. *Id.*; 33 U.S.C. §933(g)(2). The Section 33(g) bar is in the nature of an affirmative defense, placing the burden on the employer of proving that the claimant entered into a fully executed settlement without prior written approval. *Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996),

cert. denied, 520 U.S. 1239 (1997); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999); *Barnes v. General Ship Service*, 30 BRBS 193 (1996).

It is undisputed that neither claimant nor his attorney, Mr. Katz, requested or obtained from employer written approval of the A.G. Ship settlement prior to its execution on August 24, 1999. Emp. Exs. U-W, Y at 21; Tr. at 65, 157. Claimant stated he never spoke with employer about the issue, and Mr. Katz testified he did not know he needed written approval of the settlement. Tr. at 64, 157. Therefore, we affirm the administrative law judge's determination that claimant did not obtain employer's prior written approval of the A.G. Ship settlement as required by Section 33(g)(1) of the Act.

Nevertheless, claimant argues that his entitlement under the Act is not forfeited because employer's involvement in the third-party case was sufficient to relieve claimant of his obligation to obtain prior written approval of the A.G. Ship settlement. Specifically, claimant argues that Mr. Katz kept both Mr. Fazio, employer's attorney in the third-party litigation, and Mr. Simon, employer's workers' compensation attorney, apprised of settlement proceedings throughout the course of the case. Claimant argues that during the brief discussions with Mr. Simon, Mr. Katz repeatedly sought information as to employer's position with regard to its lien and updated him on the settlement process, including revealing the existence of at least one offer, but Mr. Simon only told Mr. Katz to keep him informed.[1] *See, e.g.*, Emp. Ex. Y at 16-20; Tr. at 31-35, 50. Claimant also asserts that the actions and statements of Mr. Fazio should be deemed sufficient to constitute constructive approval of the A.G. Ship settlement. Claimant, his wife and Mr. Katz all testified that Mr. Fazio was at court every day and was involved in the trial: he represented employer's witnesses at trial and at depositions, he produced requested documents, he participated in an inspection of the accident site, and he voiced opinions about the settlement negotiations when reported to him by Mr. Katz. Emp. Ex. Y at 6-7, 11-14; Tr. at 25-26, 37, 39, 94-95, 152, 154, 167, 169-171. In particular, Mr. Katz testified that Mr. Fazio was informed of the $60,000 settlement offer and considered it a "steal." Tr. at 40, 62. Mr. Fazio denied that his involvement amounted to

[1]Mr. Katz testified that he had not read and was not familiar with the requirements of the Act and that he was unaware of the need for prior written approval of the third-party settlement. Tr. at 45-47, 49-51. Claimant argued that Mr. Simon had a duty to inform Mr. Katz of the requirements under the Act, especially since they had been discussing employer's lien and potential settlements. The administrative law judge rejected claimant's argument, stating he was "unaware of any law or duty" requiring Mr. Simon to instruct Mr. Katz on the elements of Section 33(g). Decision and Order at 16. Moreover, Mr. Simon faxed Mr. Katz a letter the day before trial, informing him of the requirements under the Act, but Mr. Katz did not get the fax until he returned to New York after the trial in New Jersey was completed. Emp. Ex. J; Tr. at 35.

much, especially since employer had been dismissed from the case, he denied being in court on the first day of trial, he denied frequent contact with Mr. Katz, and he denied the statement to Mr. Katz.[2] Tr. at 98-103.

As the administrative law judge acknowledged, the Second Circuit, within whose jurisdiction this case arises, has not addressed this issue. The United States Court of Appeals for the Fourth Circuit, however, has held that Section 33(g) is not applicable where the employer is a party to and directly participates in the third-party litigation and joins in the settlement negotiations, ultimately entering into an agreement to its benefit. *I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *aff'd in part, 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). The court held that, where an employer takes action in third-party litigation to protect its own interests, the purposes of Section 33(g) are met and the requirement for prior written approval is unnecessary. *Sellman*, 954 F.2d at 242, 25 BRBS at 106(CRT). The court stated that the statutory language supports this construction as it refers to a situation where "the person entitled to compensation" reaches a settlement, consistent with purpose of Section 33(g) to prevent unilateral action by claimant detrimental to the employer. The court found it significant that the Act contains no approval requirement where employer is also a participant in the settlement.[3]

[2]The administrative law judge did not make a finding as to whether Mr. Fazio was actually in court or not. Rather, he noted that, regardless of whether Mr. Fazio was not present or whether he was present but refused to sign the release, neither act constituted consent to the settlement. Decision and Order at 15 n.5.

[3]The Court agreed with the Board that prior cases where the written approval requirement was upheld despite employer's participation were distinguishable, as in those cases employer opposed the settlement.

Similarly, in *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), the Board held that the employer's active participation as an intervener on claimant's side in the third-party litigation, including appearing at the hearing, contributing to the settlement agreement by obtaining a provision for offset, and signing the release, precluded application of Section 33(g)(1). Assuming Section 33(g)(1) applied, the Board held that employer gave the required written approval by signing a release.[4] Consequently, the Board held that Section 33(g) did not bar the claimant's entitlement to benefits. *Id.* at 131-132; *see also Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring). In *Gremillion*, the employer was both a third-party defendant and an intervener which participated in the settlement negotiations and joined in the Joint Motion for Partial Dismissal. Although the employer did not sign the release, the document recited the agreement of all parties to the case, and the employer did not dispute it. *Gremillion*, 31 BRBS at 166. Thus, the Board affirmed the administrative law judge's finding that Section 33(g) did not bar the claimant's entitlement to benefits. *Id.*

Mere participation by an employer in a third-party action, however, is not sufficient to affect the applicability of Section 33(g)(1). In *Pool*, 30 BRBS 183, the Board held that the facts of *Sellman* and *Deville* were distinguishable, concluding that the employer's participation in the *Pool* third-party suit was insufficient to render Section 33(g) inapplicable or provide a basis for concluding that employer approved the settlement. *Pool*, 30 BRBS at 188. In *Pool*, the employer, through its carrier, intervened in the third-party suit and participated, to some extent, in the settlement process; however, the carrier's counsel distanced himself from the settlement negotiations, specifically refused to agree to any settlement and did not sign any settlement documents. *Id.* A majority of the panel concluded that, as the carrier did not appear on the side of the claimant and did not sign the settlement, its actions were insufficient to render Section 33(g)(1) inapplicable or to constitute constructive approval of the settlement. *Id.*

In *Perez v. International Terminal Operating Co.*, 31 BRBS 114 (1997) (Smith, J., concurring), the employer's participation in the third-party suit also was held to be insufficient to constitute approval of the settlement. In *Perez*, the employer was impleaded into the case by the third-party defendant. The employer agreed to compromise its lien to promote the settlement negotiations, but it maintained the position that it would not become

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[4]Employer signed under the following statement:

> Oilfield Industries of Louisiana (Intervenor), by signing this release specifically approves of this settlement and it is understood that plaintiff does not waive any future rights to Longshoreman Compensation to which he may be entitled.

involved in the third-party proceedings nor would it consent to the actions therein. *Perez*, 31 BRBS at 117. Therefore, relying on its decision in *Pool*, the Board affirmed the administrative law judge's determination that Section 33(g)(1) barred the claimant's entitlement to future compensation. *Id.*

We reject claimant's assertions that employer's actions in this case amount to a constructive approval of the settlement with A.G. Ship, and we affirm the administrative law judge's determination that employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. This case is distinguishable from *Sellman*, *Deville* and *Gremillion* in that the employer's participation in the third-party litigation was extremely limited. In fact, employer in this case participated in the third-party case to a lesser degree than did the employer in *Pool*, a case where the Board held Section 33(g)(1) applied. First, as the administrative law judge found, employer here was a named defendant in the tort suit; thus, it did not appear in the case on claimant's side. Second, employer was dismissed from the case in March 1998, nearly one and one-half years before the trial and settlement, and employer's attorney, Mr. Fazio, remained active only for discovery purposes. While there is conflicting evidence as to whether he was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the $60,000 settlement, the administrative law judge found Mr. Fazio was not involved in the negotiations themselves, and he did not sign or consent to the general release. Finally, Mr. Simon, although aware of claimant's responsibility under the Act, was even less involved in the third-party suit than Mr. Fazio, and, as the administrative law judge stated, was under no obligation to explain the law to Mr. Katz. *See* n. 1, *supra.* As the administrative law judge rationally found, employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement with A.G. Ship and render Section 33(g)(1) inapplicable. *Perez*, 31 BRBS at 117; *Pool*, 30 BRBS at 188. Because claimant entered into a settlement for less than the amount of compensation due him under the Act, Decision and Order at 15; Cl. Ex. 1; Emp. Exs. G-H, K, we affirm the administrative law judge's finding that Section 33(g)(1) applies to bar claimant's entitlement to compensation. *Id.*; *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 18 (1998) (Smith, J., dissenting); *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996).

Benefits Forfeited

Next, claimant contends the administrative law judge erred in finding that Section 33(g) bars his entitlement to medical benefits as well as disability benefits. Citing *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT), the administrative law judge stated that Section 33(g)(2) provides for the termination of medical benefits and compensation if there is no written approval obtained pursuant to Section 33(g)(1) or, in those instances where only notification

is required,[5] if there is no notification given. Decision and Order at 17; *see Cowart*, 505 U.S. at 471, 26 BRBS at 50(CRT). Thus, he found, as claimant settled his lawsuit for less than the amount of his compensation entitlement, Section 33(g)(1) approval was required and was not obtained, thereby "satisfying" the first part of Section 33(g)(2). Finding that neither of the two circumstances which would require a claimant only to notify an employer of a settlement or judgment rather than to obtain employer's written consent was present in this case, the administrative law judge found it was unnecessary to address the notice argument. Decision and Order at 17. Having met the first part of the disjunctive, the administrative law judge concluded that claimant forfeited all benefits pursuant to Section 33(g)(2). Decision and Order at 17. Claimant argues that even though he did not obtain prior written approval of the A.G. Ship settlement, employer had notice of the settlement; therefore, he should not lose his right to medical benefits. Thus, claimant contends Section 33(g)(2) provides claimants with a means for retaining their entitlement to medical benefits despite having lost their entitlement to compensation.

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[5]The Supreme Court held:

> An employee is required to provide notification to his employer, but is not required to obtain written approval in two instances: (1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability.

Cowart, 505 U.S. at 482, 26 BRBS at 53(CRT).

The precise issue raised regarding the interaction between subsections (g)(1) and (g)(2) with regard to medical benefits is one of first impression before the Board.[6] However, in our view, the issue is resolved by the plain language of Section 33(g)(2), as discussed by the Supreme Court in *Cowart*. As the court explained in *Cowart*, when interpreting a statute, the starting point is the plain meaning of the words of the statute, *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989), and it is a settled principle of statutory construction that courts should give effect, if possible, to every word of the statute. *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n. 15 (1985); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983); *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 298 (1956). Section 33(g)(2) of the Act provides:

> *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)(2) (emphasis added). As the first phrase of Section 33(g)(2) is written in the disjunctive, it provides alternatives; the use of the term "or" introduces "any of the possibilities in a series. . . ." Webster's New World Dictionary (3d ed. 1994). Thus, the word "or" separates and makes independent each of the criteria listed, and only one or the other possibility need occur in order for the consequence to arise.

Claimant asserts that this disjunctive phrasing means that he need comply with only one of the alternatives, *i.e.*, provide written approval *or* notice. His argument also relies on the fact that Section 33(g)(1) refers only to employer's liability for compensation, with the only reference to termination of both medicals and compensation stated in Section 33(g)(2). Claimant asserts that by providing notice, he satisfied Section 33(g)(2), and thus his claim for medical benefits is not barred. We cannot accept this construction. Section 33(g)(2) in plain terms provides termination of benefits if claimant fails to obtain written approval under Section 33(g)(1) or fails to provide notice of a settlement or judgment. It is clear from the Court's discussion of Section 33(g)(2) in *Cowart* that if claimant *either* fails to comply with the written approval requirement of Section 33(g)(1) *or* fails to give notice to employer in the

[6]In *Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186, *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring), the Board noted that the Supreme Court suggested, but did not address directly, that the failure to comply with Section 33(g)(1) results in the forfeiture of medical benefits as well as compensation. As Section 33(g)(1) was inapplicable to the *Glenn* situation, the Board declined to address the issue. *Glenn*, 26 BRBS at 191 n.5.

instances where written approval is not required, *i.e.,* a settlement exceeding compensation entitlement or a judgment, then the forfeiture provision of Section 33(g)(2) applies. This provision explicitly includes medical benefits.

Any doubt as to the construction of Section 33(g)(2) is dispelled by the *Cowart* decision. In discussing the third party provisions of the Act, the Court summarized the effect of Section 33(g) as follows:

> The Act allows injured workers, without forgoing compensation under the Act, to pursue claims against third parties for their injuries. But §33(g) of the LHWCA, 33 U.S.C. §933(g), provides that under certain circumstances if a third party claim is settled without the written approval of the worker's employer all future benefits, including medical benefits, are forfeited.

Cowart, 505 U.S. at 471, 26 BRBS at 50(CRT). The Court later stated:

> Cowart concedes that he did not comply with the written-approval requirements of the statute, while Nicklos and Compass do not claim that they lacked notice of the Transco settlement. By the terms of §33(g)(2), Cowart would have forfeited his LHWCA benefits if, and only if, he was subject to the written-approval provisions of §33(g)(1).

Id., 505 U.S. at 475, 26 BRBS at 51(CRT). Ultimately, Cowart was found to be a "person entitled to compensation" under the Act subject to the provisions of Section 33(g)(1), and the Supreme Court held:

> under the plain language of §33(g), Cowart forfeited his right to further LHWCA benefits by failing to obtain the written approval of Nicklos and Compass prior to settling with Transco.

Id. Thus, in *Cowart,* since Section 33(g)(1) applied and claimant failed to obtain employer's written consent, he failed to satisfy the first alternative of Section 33(g)(2) and thus lost the

right to all compensation and medical benefits.[7]

The implementing regulation, 20 C.F.R. §702.281, also supports this result. Section 702.281 explains that a claimant must obtain prior written approval of a settlement for an amount less than his entitlement under the Act, and it provides:

> Failure to do so relieves the employer and/or carrier of liability for compensation described in section 33(f) of [the] Act, 33 U.S.C. §933(f)[,] *and* for medical benefits otherwise due under section 7 of the Act. . . .

20 C.F.R. §702.281(b) (emphasis added). The language is unambiguous: both disability and

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[7]The Supreme Court stated in *Cowart* , 505 U.S. at 483-484, 26 BRBS at 53(CRT):

> We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary.... If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

medical benefits are forfeited in the event a claimant fails to obtain prior written approval of a settlement when the proceeds therefrom are less than the amount of his compensation entitlement. Therefore, the plain language of the Act, the regulation, and the *Cowart* opinion all lead to the conclusion that failure of the person entitled to compensation to obtain written approval as required by Section 33(g)(1) will bar both disability and medical benefits.

In this case, claimant failed to obtain employer's prior written consent of his settlement with A.G. Ship, and we have affirmed the administrative law judge's finding that Section 33(g)(1) applies. As claimant did not satisfy the requirements of Section 33(g)(1), and as Section 33(g)(2) states that failure to comply with Section 33(g)(1) results in the forfeiture of compensation and medical benefits, we affirm the administrative law judge's determination that claimant forfeited his right to all benefits under the Act. *Cowart*, 505 U.S. at 471, 475, 26 BRBS at 50-51(CRT); 20 C.F.R. §702.281(b). In light of our determination that Section 33(g)(1) bars claimant's entitlement to both disability and medical benefits, we need not address claimant's argument that he gave timely notice of the settlement to employer.

Timing of the Termination of Benefits

Finally, claimant contends the administrative law judge erred in declining to award additional benefits beyond September 6, 1999. He avers that even if his actions resulted in the forfeiture of his longshore benefits, employer terminated payments prematurely. Specifically, claimant contends he is entitled to at least one additional month of benefits because Mr. Katz did not receive the settlement check from A.G. Ship until October 4, 1999, and without the check, there is a failure of consideration and no contract between claimant and A.G. Ship.

Section 33(g)(1) specifically states that the employer is liable for benefits only if the claimant obtains written approval "before the settlement is executed. . . ." 33 U.S.C. §933(g)(1). While the Board has acknowledged that, for practical purposes, there can be nothing to approve unless there is some sort of agreement between the claimant and the third party, *see Smith v. Jones Oregon Stevedoring Co.*, 33 BRBS 155, 157 (1999), there comes a point in the process when the parties are beyond mere agreement and a settlement has been executed. *Id.*; *Barnes*, 30 BRBS at 196. Evidence of an executed settlement can consist of an actual, signed settlement agreement, the receipt of money by the claimant, and the inability of the parties to rescind the agreement and return to the *status quo ante*. *See Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992); *Smith*, 33 BRBS at 159; *Barnes*, 30 BRBS at 197-198.

In this case, claimant signed the settlement document on August 24, 1999. That same

day, the parties filed with the court a Stipulation of Dismissal with prejudice. Emp. Exs. K-L. Employer made its last payment of benefits on September 1, 1999. Although claimant's attorney did not receive the settlement check until October 4, 1999, and although he has yet to cash that check for claimant, once the court dismissed the case against A.G. Ship with prejudice, the parties could not rescind the settlement agreement and return to the *status quo ante*. *Compare with Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001). Therefore, as in *Barnes*, the settlement was fully executed as of August 24, 1999, and the status of the settlement check does not affect its execution. *Barnes*, 30 BRBS at 198. In light of claimant's failure to obtain written approval of the settlement prior to the execution of the settlement, he is not entitled to any benefits as of the date of the settlement or thereafter. *See Broussard*, 30 BRBS at 58; *see also Wyknenko*, 32 BRBS at 20. Therefore, employer's termination of benefits as of September 6, 1999, cannot be considered premature. Consequently, we reject claimant's assertion that he is entitled to additional benefits, and we affirm the administrative law judge's finding that benefits properly terminated on September 6, 1999.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge