

MARY MABILE)
(Widow of LUCIEN MABILE))
)
 Claimant-Respondent)

v.)

SWIFTSHIPS, INCORPORATED)
)
 and)

DATE ISSUED: MAR 11, 2004

TRAVELERS CASUALTY AND)
SURETY COMPANY)
)
 Employer/Carrier-)
Petitioners)

DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Daniel J. Nail, Thibodaux, Louisiana, for claimant.

Mark S. Taylor (Waller & Associates), Metarie, Louisiana, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-1824) of Administrative Law Judge C. Richard Avery 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Lucien Mabile (decedent) was employed by employer from 1967 until 1991. He was exposed to toxic substances and later was diagnosed with aluminum pneumoconiosis and lung cancer. He filed tort suits in state court against employer and employer's

executive officers. In 1996, decedent and his wife (claimant) settled the suit against employer for \$75,000, specifically reserving the right to pursue the suit against employer's executive officers. EX 4. Decedent also filed suit against manufacturers of aluminum. He settled that suit for \$350,000, and carrier agreed to waive its "right to collect any of the sums paid to" decedent. EX 5. In exchange for carrier's waiving its lien, which then amounted to \$114,475, decedent agreed not to pursue his Louisiana workers' compensation claim and not to file a claim under the Longshore Act. EX 5.

Decedent succumbed to his illness on July 8, 1998, and claimant filed a claim for death benefits under the Act, 33 U.S.C. §909. Subsequent to the formal hearing on claimant's death benefits claim, employer conceded that decedent's death was work-related. At the time of decedent's death, his state court suit against employer's executive officers remained pending. Claimant and her adult son moved to substitute themselves as plaintiffs in this suit, as representatives of decedent's estate. They also moved to add additional counts, including, *inter alia*, damages for wrongful death, loss of support, loss of consortium, and mental pain and anguish. CX 9. The defendants moved to dismiss these additional claims. The district court granted the defendants' motion to dismiss all of the newly filed death counts on the ground that state law bars such claims. *Mabile v. The Executive Officers of Swiftships, Inc.*, No. 94-754-A (La. Dist. Ct. March 9, 2000). The court stated that the plaintiffs' suit for the *decedent's* pain and suffering and past economic loss remained viable. CX 14.

On March 21, 2002, claimant and her son settled the suit against employer's executive officers for the gross sum of \$412,000, without employer's or carrier's prior written approval. EX 3. The settlement document, in numerous places, reserved claimant's right to seek death benefits under the Longshore Act and the Louisiana workers' compensation statute. Employer moved to bar claimant's entitlement to death benefits under the Act pursuant to Section 33(g), 33 U.S.C. §933(g), on the ground that claimant was a "person entitled to compensation" who settled a third-party suit without employer's prior written approval. Employer also contended that it is entitled to a credit pursuant to Section 33(f) for the net amount of claimant's third-party recovery against its liability for death benefits.

The administrative law judge found that Section 33(g) does not bar the claim for death benefits. He found that although claimant settled a third-party suit after her husband's death, she did not settle any of her own claims but only the claims "inherited" upon her husband's death. The administrative law judge stated that, in effect, claimant was not a "person entitled to compensation" with respect to the claims settled as they were decedent's claims only. For this reason, the administrative law judge also denied employer a Section 33(f) credit against its liability for death benefits. He further found that since decedent did not pursue, and employer did not pay, any disability or medical benefits under the Act, there is no liability against which the third-party settlement proceeds can be credited. The administrative law judge awarded claimant death benefits and funeral expenses pursuant to Section 9.

On appeal, employer contends that the administrative law judge erred in finding both Sections 33(g) and 33(f) inapplicable. Claimant responds, urging affirmance.

Section 33(g)(1) provides a bar to a claimant's receipt of compensation where the "person entitled to compensation" enters into a third-party settlement for an amount less than her compensation entitlement without obtaining employer's prior written consent.¹ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). In addressing the meaning of the phrase "person entitled to compensation" in *Cowart*, the Supreme Court held that an employee becomes a person entitled to compensation at the moment her right to recovery vests, and not when an employer admits liability. The right to recovery vests when the claimant satisfies the prerequisites attached to the right. *Id.*, 505 U.S. at 477, 26 BRBS at 52(CRT). In a case involving a claim for death benefits, such as this case, the widow cannot be a "person entitled to compensation" prior to the death of her husband.² *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

We affirm the administrative law judge's finding that Section 33(g) does not bar claimant's claim for death benefits in this case. Although claimant entered into a third-party settlement after the death of her husband, the claim she settled was decedent's tort action for his pain and suffering and economic loss, which remained pending at the time of his death. The Louisiana court dismissed all of the claims claimant filed in her own right, specifically holding that only the claims for decedent's lost wages and pain and suffering could go forward. Thus, claimant obtained the proceeds of the third-party settlement with employer's officers only because she was substituted for her husband as a representative of his estate and not because she surrendered any of her own rights. As

¹ Section 33(g)(1) states:

If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1).

² The widow in *Yates* released her right to file future wrongful death suits as part of settlements entered into with decedent prior to his death.

claimant was not a “person entitled to compensation” for decedent’s pain and economic loss, Section 33(g) does not apply to the settlement of the tort suit based solely on his claims. *See Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff’d in part, part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991) (applying this rationale to Section 33(f)); *see also Martin v. Kaiser Co.*, 24 BRBS 112 (1990).

The purpose of Section 33(g) is to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *See Banks v. Chicago Grain Trimmers Ass’n*, 390 U.S. 459 (1968); *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh’g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev’d on other grounds*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). Section 33 applies where a third party is liable in damages for the same disability or death for which benefits are sought under the Act. 33 U.S.C. §933(a). In this case, although the decedent’s disability claim and the widow’s death benefits are based on the same occupational exposure, they are separate claims for distinct types of benefits. *See* 33 U.S.C. §§908, 909. As the widow’s claim is for death benefits under the Act, and the settlement is solely based on decedent’s lost wages and pain and suffering during his life, the third party was not liable for the same disability or death for which the widow sought benefits under the Act. Where, as here, the claimant does not have a right to seek damages from the third party for her own benefit, then employer does not have the right, under Section 33(b), to seek damages on the death claim from that third party. *See generally United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979). Under such circumstances, Section 33(g) is not applicable with regard to claimant’s post-death settlement of decedent’s *inter vivos* tort claims because claimant was not a “person entitled to compensation” with regard to the third-party suit. *See generally Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff’d mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2^d Cir. 1997).

Employer cites *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000), in support of its assertion that Section 33(g) bars claimant’s claim. In *Doucet*, the employee/decedent filed a third-party action against several asbestos manufacturers, and entered into a settlement with Owens-Corning without the approval of employer. It is undisputed that decedent’s widow, the claimant, was not a signatory to this agreement. Subsequent to decedent’s death, the pending claim was amended to include claimant and decedent’s children as parties to the action for the purpose of continuing the third-party action, specifically noting that claimant was not pursuing any wrongful death action in order to pursue a death benefits claim under the Act; claimant was dismissed as a party with respect to any wrongful death action. Thereafter, Owens-Corning forwarded the settlement proceeds to decedent's attorney, who subsequently distributed the money to claimant. The Board affirmed the administrative law judge’s finding that Section 33(g)

did not bar the death claim. Claimant was not a “person entitled to compensation” at the time the settlement was entered into, as the agreement was reached when decedent signed the agreement, not when claimant received the funds. Employer contends that because claimant in this case entered into the settlement after decedent’s death, *Doucet* suggests that Section 33(g) would bar a claim for death benefits. We reject this inference, as *Doucet* addresses only the fact pattern presented in that case and does not suggest the conclusion employer seeks. Specifically, *Doucet* does not address the issue of whether the third-party claims being settled were the decedent’s *inter vivos* claims or claims the widow pursued as a result of her husband’s death.

Employer also cites *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998), in support of its contention. In *Wyknenko*, the decedent filed several third-party suits against asbestos manufacturers. He settled some of these prior to his death. His widow accepted a settlement from the Manville Trust after his death, without employer’s prior approval. The administrative law judge found that the claim for death benefits was barred by Section 33(g) only as of the date claimant executed the settlement. Employer appealed the award of death benefits up to the date of the settlement, as well as the award of funeral expenses. The Board held that the plain language of Section 33(g) requires the holding that all death benefits are barred, not just those that accrued after the settlement. The Board further held that funeral benefits are barred when Section 33(g) is applicable.

On its face, *Wyknenko* has similarities to the instant case. However, a critical fact present in this case, which is unknown in *Wyknenko* as the administrative law judge correctly observed, is that the claims claimant settled here were solely the pre-death claims of decedent. Her own claims were dismissed, and she entered into the settlement as a representative of decedent’s estate. In *Wyknenko*, the decision does not state whether the post-death settlement involved the claimant’s rights to claim compensation for the death of her husband or the decedent’s *inter vivos* claim. Moreover, claimant did not appeal the administrative law judge’s finding that Section 33(g) was applicable, and the Board’s decision was thus limited to the issue raised regarding the date of termination. Thus, the administrative law judge correctly found that *Wyknenko* does not require that he find that claimant’s claim barred in this case.

That Section 33(g) is not applicable to bar the widow’s claim in this case is further supported by consideration of the relationship between Sections 33(f) and (g). Section 33(f) states:

If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this chapter, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses

reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f). It is well settled that a third-party recovery on decedent's claims can be offset pursuant to Section 33(f) only against decedent's recovery under the Act, not against claimant's death benefits. See *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3^d Cir. 1995); *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78(CRT) (5th Cir. 1994); *Force*, 938 F.2d 981, 25 BRBS 13(CRT). Thus, to the extent that employer seeks to credit the net settlement proceeds against employer's liability for death benefits, this contention must fail. Moreover, since Sections 33(f) and (g) must be read consistently with each other, see *Taylor*, 201 F.3d 1234, 33 BRBS 197(CRT); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, __ BRBS __, BRB No. 03-0355 (Feb. 17, 2003), it follows that Section 33(g) is not applicable when claimant receives proceeds as a result of her deceased husband's tort suit.

We also affirm the administrative law judge's finding that employer is not entitled to a credit for the amount of medical benefits it would have had to pay decedent had decedent proceeded with a claim under the Act. The administrative law judge correctly found that employer's explicit waiver of its lien, as part of decedent's 1996 third-party settlement and settlement of his state workers' compensation claim, does not mean employer also waived its offset rights. *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993). Nonetheless, the administrative law judge found that decedent never pursued a claim for medical benefits under the Act nor did claimant seek reimbursement for medical expenses paid, in addition to her claim for death benefits under the Act. Thus, the administrative law judge concluded that there is no liability to decedent under the Act against which the third-party proceeds could be offset.

Employer argues that, pursuant to *Texports Stevedore Co. v. Director, OWCP [Maples]*, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991), it is entitled to a Section 33(f) credit in the amount of decedent's medical expenses for which it could have been held liable if claimant had sought reimbursement of such expenses. In *Maples*, the claimant's private health insurer had paid some of his medical benefits, and employer was actually held liable under Section 7 of the Act, 33 U.S.C. §907, for only the remaining expenses. In order to exhaust the third-party credit sooner, the claimant sought to apply, against his third-party recovery, the entire amount of medical benefits for which the employer would have been liable. The Board and the Fifth Circuit held that this interpretation of Section 33(f) was correct.

Employer relies on *Maples* to permit it a credit for the medical expenses, amounting to \$155,614.32, according to the administrative law judge, which decedent incurred for his work injury. Employer's premise, however, is faulty, in that no other benefits are owed to the decedent under the Act against which this credit can be applied, and the administrative law judge therefore properly denied the credit. In *Maples*, further

compensation benefits were owed the claimant after the credit for the medical benefits was exhausted. As established above, moreover, employer cannot take the credit in this amount against the widow's death benefits. *Force*, 938 F.2d 981, 25 BRBS 13(CRT). Therefore, we reject employer's contentions regarding Section 33(f), and we affirm the administrative law judge's decision in its entirety.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge