BRB No. 03-0607

HARRY MAPP	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRANSOCEAN OFFSHORE USA, INCORPORATED	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	DATE ISSUED: JUN 16, 2004
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Pamela Creel Jenner and William L. Denton (Law Office of William L. Denton), Biloxi, Mississippi, for claimant.

Michael D. Murphy (Hays, McConn, Rice and Pickering), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision (02-LHC-2742) of Administrative Law Judge Larry W. Price denying benefits 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 sustained a back injury on July 22, 1997, while working for employer on the *MARIANAS* oilrig, which had been towed to the Amfels Shipyard (Amfels) in Brownsville, Texas. Claimant filed a lawsuit in state court against employer under the Jones Act, as well as general maritime claims against third-party defendants, Amfels[1] and Shell Oil Company. Employer sought summary judgment in the Jones Act case on the ground that claimant was not a seaman but rather a longshoreman as defined by the Act, because the *MARIANAS* was not a "vessel in navigation." The court granted employer's motion for summary judgment on August 5, 2002. The parties thereafter reached an accord, wherein claimant received $100,000 in full and final settlement of the third-party lawsuit against Amfels. This agreement was executed on November 8, 2002.

Meanwhile, claimant also sought benefits under the Act, and in June 2002, he contacted employer's longshore carrier, Zurich American Insurance Company (carrier), to discuss his interest in putting together a package settlement of the third-party case and the longshore claim, with a credit for the carrier for the amount representing Amfel's liability in the third-party case. Carrier repeatedly advised claimant that it would not approve any third-party settlement unless the agreement resolved all disputes, including those under the Longshore Act. Nonetheless, the third-party settlement was executed, and the longshore case proceeded administratively. Before the administrative law judge, carrier filed a motion for summary decision pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), alleging that claimant entered into the third-party settlement without its prior written approval.

In his decision, the administrative law judge determined that while carrier had notice of the third-party settlement, claimant never obtained its written approval prior to executing said agreement. He then concluded that as claimant settled his third-party suit for an amount less than the amount of carrier's liability under the Act, claimant's failure to obtain carrier's prior written approval mandates a forfeiture of all benefits under the Act. Accordingly, the administrative law judge granted employer's motion for summary decision and dismissed claimant's claim.

[1] Employer, by virtue of an indemnity agreement with Amfels, actively defended the case on Amfels's behalf. *See* Shipyard Agreement Between Transocean Offshore, Incorporated and Amfels (April 16, 1997), Article XIII, Section 2(b) (Transocean is liable "to pay the full amount of any judgment or settlement rendered against" Amfels).

On appeal, claimant challenges the administrative law judge's dismissal of his claim for benefits. Employer responds, urging affirmance.

Claimant asserts that, in contrast to the administrative law judge's findings, he did not forfeit his right to disability and medical benefits under the Act pursuant to Section 33(g) since employer's active participation in the third-party settlement constitutes a constructive approval of the third-party settlement by both employer and its carrier. Claimant maintains, citing *I.T.O Corp. of Baltimore v. Sellman*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993), and the Board's decisions in *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997), and *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), that employer's active participation in the third-party settlement negotiations made prior written approval of the agreement unnecessary, thus resulting in a waiver of employer's Section 33(g)(1) defense. Carrier responds, arguing that employer's extensive involvement in the settlement agreement did not negate claimant's duty to separately seek carrier's approval of the settlement.

Section 33(g) bars claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining the prior written consent of employer and its carrier. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49(CRT) (1992); *Esposito v. Sea-Land Service,* 36 BRBS 10 (2002). The section is intended to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f); *United Brands Co. v. Melson*, 569 F.2d 214, 8 BRBS 239 (5th Cir. 1978). Section 33(g)(1) specifically requires written approval of both employer and its carrier:

> 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) (emphasis added). In this case, employer, by virtue of its active participation in the negotiation of the settlement and the fact that it is an actual signatory

to that agreement, received adequate notice and provided satisfactory approval of the agreement in compliance with Section 33(g)(1). *See Gremillion*, 31 BRBS at 166; *Deville*, 26 BRBS at 131-132. However, as the administrative law judge concluded and carrier presently maintains, claimant's claim under the Act is barred pursuant to Section 33(g) because he did not obtain the prior written approval of the carrier.

The administrative law judge initially determined that, although carrier had notice of the third-party settlement for $100,000, claimant did not obtain carrier's written approval before entering into the third-party settlement and the settlement was for an amount less than carrier's liability under the Act. These findings establish that the claim is barred under Section 33(g).[2] It is axiomatic under the rules of statutory construction that, 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); *United States v. Flowers*, 227 F.Supp. 1014 (W.D. Tenn. 1963), *aff'd*, 331 F.2d 604 (6th Cir. 1964), 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). As the plain language of Section 33(g)(1) states that employer is liable for compensation "only if written approval of the settlement is obtained from *the employer and the employer's carrier*, before the settlement is executed," the Act clearly requires that claimant obtain the prior written approval of both employer and its carrier.

This dual approval requirement placed the onus upon claimant to obtain approval of the third-party settlement from both employer and its longshore carrier prior to the execution of the settlement. In this case, moreover, employer contracted with separate carriers for its liability pursuant to its indemnity agreement with Amfels and its liability under the Longshore Act. Thus, it is clear that the carrier on the longshore claim was not

[2] The administrative law judge also relied on the statement in the Fifth Circuit's initial decision in *Estate of Cowart v. Nicklos Drilling Co.*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991)(*en banc*), that Section 33(g) contains no exceptions to the written approval requirement to conclude the claim was barred. On appeal, however, the United States Supreme Court identified two statutory exceptions to the approval requirement, and expressly declined to address the effect of the employer's alleged participation in the third-party litigation on the Section 33(g) bar as that issue was not properly before the Court. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). In this regard, the Supreme Court's decision is controlling. *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997). On the facts presented, the administrative law judge's reliance on this language is harmless, as the exceptions do not apply and the plain language of Section 33(g)(1) dictates our disposition of the case.

providing coverage for employer or otherwise a party to the third-party litigation. On these facts, employer's approval of the third-party settlement cannot be imputed to carrier, and the cases cited by claimant involving situations where employer participated in the third-party litigation and agreed to a settlement, *e.g.*, *Sellman*, 967 F.2d 971, 26 BRBS 7(CRT), *Gremillion*, 31 BRBS 163, and *Deville*, 26 BRBS 123, are inapposite. As employer and carrier are separate and distinct entities, the separate approval of each was required.

In *Meaux v. Franks Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (2001), the Board implicitly acknowledged the requirement that both an employer and its carrier's prior written approval of a third-party settlement agreement under Section 33(g) is necessary. In *Meaux*, 35 BRBS 17, the claimant entered into third-party settlements for an amount less than his entitlement under the Act. Claimant obtained his employer's approval, but did not obtain the written approval of a carrier, as he had been advised prior to the third-party settlement that the carrier's policy was canceled and that carrier was insolvent. The Board noted that as carrier no longer secured payments under the Act, employer became solely liable for benefits under Section 4, 33 U.S.C. §904. Consequently, the Board held that under those circumstances, employer's consent alone to the settlement satisfied Section 33(g), as it in essence became the employer and carrier. *Id.*

Moreover, claimant's actions in pursuing the third-party settlement in this case indicate that he was aware of the necessity to obtain carrier's written approval prior to executing that document. In a letter sent to carrier dated June 6, 2002, claimant specifically articulated that the purpose of the third-party settlement was "to dispose of the Jones Act claim and third-party claim against Amfels," and he further indicated that he "would like to settle the longshore claim as part of the package." Subsequently, claimant submitted its "demand to compromise" the longshore claim, and further explicitly requested carrier to submit its approval of the third-party settlement prior to the execution of that agreement. In particular, in correspondence dated August 5, 2002, claimant advised carrier "under 33 U.S.C. §933 that the parties [Transocean, Amfels and claimant] have settled the Jones Act claim against Amfel Shipyard for $100,000," and requested that carrier forward to his attorney "a copy of the carrier's approval form required under [20] C.F.R. §702.281." These actions establish that claimant was, in contrast to his counterpart in *Meaux*, aware of the identity of the responsible carrier in this case, that he was fully aware of his obligation under Section 33(g)(1) and its accompanying regulation to obtain carrier's prior written approval, and that he in fact tried, albeit in vain, to obtain said approval before executing the third-party settlement in this case.

In view of the plain language of Section 33(g)(1), we hold that claimant's claim is barred due to his failure to obtain the prior written approval of employer's longshore carrier when he entered into the third-party settlement for an amount less than that to which he would be entitled to receive under the Act. We reject claimant's assertion that the administrative law judge erred in his comparison of the settlement amount to claimant's potential longshore award, as he applied a reasonable method in calculating the lifetime amount of benefits which claimant would have been entitled to receive under the Act.[3] *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). As it is undisputed that claimant did not obtain carrier's prior written approval of the third party settlement in this case, which was for an amount less than his compensation entitlement under the Act, we affirm the administrative law judge's finding that claimant's claim for benefits under the Act is barred by Section 33(g)(1).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3] The administrative law judge estimated the amount of compensation to which claimant would be entitled under the Act for the five years of past temporary total disability to which he alleged entitlement at the time of the hearing at approximately $112,000, which is more than the amount for which claimant settled his third-party action. The administrative law judge calculated this amount by taking claimant's average weekly wage, as indicated in the pleadings related to the motion for summary decision, of approximately $838 ($43,000 per year divided by 52), and extrapolating the resulting compensation rate ($558) over five years.