BRB No. 05-0964

RAYMOND SEARS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORQUEST SEAFOODS, INCORPORATED	)	DATE ISSUED: 08/28/2006
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order Denying Motion for Summary Decision and the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Dietrich Biemiller and D. Michael Tomkins, Seattle, Washington, for claimant.

Robert J. Burke, Jr. and Philip W. Sanford (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Motion for Summary Decision and the Decision and Order (2003-LHC-906, 907) of Administrative Law Judge Gerald M. Etchingham 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 was hired as a shipboard laborer by Labor Ready, an employment broker, in 1999. He was subcontracted to Norquest Seafoods (Norquest) on February 14, 2000, to clean a 6500 to 8000 gallon water tank aboard the vessel *M/V Pribiloff*. On February 16, 2000, while inside the water tank, claimant was exposed to fumes resulting from a combination of materials, including chlorine and unknown waste materials. The fumes formed a cloud-like fog that overcame claimant. After being helped from the tank by a co-worker, claimant was taken by ambulance to the hospital. He has been diagnosed with Reactive Airways Initiated Dysfunction Syndrome and is unable to return to his former work.

Claimant sought benefits under the Act, designating Labor Ready as his employer. Labor Ready controverted the claim, but later agreed to settle the claim for disability and medical benefits for the net sum of $10,000, pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). The district director approved the settlement on April 30, 2001. Claimant filed a lawsuit in federal district court against Norquest for damages under Section 5(b) of the Act, 33 U.S.C. §905(b). The district court, however, agreed with Norquest that it was claimant's borrowing employer, and thus, that its liability is limited to disability compensation and medical benefits under the Act. *Sears v. Norquest Seafood, Inc.*, Case No. C01-337L (W.D. Wash. 2002). Claimant then filed a claim under the Act naming Norquest as his employer.

Norquest filed an Expedited Motion for Summary Decision on August 12, 2003, contending that the case should be dismissed because claimant filed an earlier claim for benefits stemming from this injury and that the claim had been settled. Administrative Law Judge Gee found that the discharge of an employer's liability pursuant to Section 8(i) applies only to the "parties" to the settlement. Thus, as Norquest was not a party to the claim that gave rise to the settlement with Labor Ready, any liability it may have arising out of claimant's injury was not discharged by the settlement. Order Denying Motion for Summary Judgment (Sept. 4, 2003). Judge Gee also stated that the two employers could be held jointly liable for claimant's benefits. A hearing on the merits was set for the week of January 26, 2004. Norquest filed a Motion for Dismissal due to the fact that claimant did not file his pre-trial statement until three days before the scheduled hearing. Administrative Law Judge Karst found that dismissal would be too extreme a sanction for claimant's missing the pre-trial deadline, and he denied employer's motion. Order Denying Motion for Dismissal (March 22, 2004). The hearing was rescheduled before Administrative Law Judge Etchingham (the administrative law judge) for the week of September 13, 2004. Norquest filed another Motion for Summary Decision based on its earlier contention that claimant's claim had been settled and also raising the contention that Section 33(g) of the Act, 33 U.S.C. §933(g), precluded further benefits in this case. The administrative law judge agreed with Judge Gee's prior order, and he found that as Norquest was not a party to the settlement, claimant's settlement with Labor Ready does not discharge Norquest's liability under the Act. In addition, the

administrative law judge found that Section 33(g) is not applicable as claimant did not settle with a third-party tortfeasor in a civil suit. Order Denying Motion for Summary Judgment (July 19, 2004). A formal hearing was held on September 16, 2004.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant's respiratory and psychiatric conditions are due, at least in part, to his work-related accident on February 16, 2000. The administrative law judge concluded that claimant was temporarily totally disabled due to his psychiatric condition from February 16, 2000 to April 20, 2001, when this condition resolved. The administrative law judge also found that claimant was temporarily disabled due to his respiratory condition from February 16, 2000 to April 17, 2001, when the condition became permanent. The administrative law judge found that claimant is not able to return to his former position and concluded, after reviewing and rejecting the positions identified in the proffered labor market surveys, that employer has not established the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant temporary total disability benefits from February 17, 2000, to April 17, 2001, and continuing permanent total disability benefits from April 18, 2001, as well as medical benefits, payable by Norquest. In addition, the administrative law judge accepted the parties' stipulation that Norquest is entitled to a credit of $10,000, representing the sum paid to claimant by Labor Ready pursuant to the approved settlement.

On appeal, Norquest contends that claimant settled all claims for his work injury when he settled with Labor Ready, and that there is no "joint liability" of two employers under the Act. Norquest therefore avers that the administrative law judge erred in holding it liable for claimant's benefits. Claimant responds, urging affirmance of the administrative law judge's decision. Claimant also contends in his response brief that if the Board agrees that the settlement agreement with Labor Ready prevents claimant from seeking benefits from Norquest, the Board should hold that the settlement agreement was void as it was not signed by Labor Ready or its carrier.[1]

We agree with Norquest that Judge Gee erred in stating that Labor Ready and Norquest are jointly liable if an employee suffers a work-related injury while working for the borrowing employer. *See* Order Denying Motion for Summary Judgment (Sept. 4, 2003). A borrowed servant becomes the employee of the borrowing employer, and is not also the servant of the nominal employer. *Perron v. Bell Maintenance & Fabricators, Inc.*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). Thus, the borrowing employer, as claimant's statutory employer, is solely liable for any compensation benefits due claimant for his work-related injury. *Total*

[1] We observe, however, that the settlement was signed by counsel for Labor Ready and its carrier, Reliance National.

Marine Services, Inc. v. Director, OWCP, 87 F.3d 774, 30 BRBS 62 (CRT) (5th Cir. 1996). In this case, Norquest does not dispute that it is the borrowing employer, and therefore, claimant's statutory employer.[2]

Norquest contends, however, that its liability as claimant's statutory employer was extinguished by virtue of the settlement agreement between claimant and Labor Ready. Section 8(i) provides that "whenever *the parties* to any claim for compensation under this Act . . . agree to a settlement," the employer's liability will be discharged if the settlement is approved by the district director or administrative law judge. 33 U.S.C. §908(i) (emphasis added). Judge Gee and the administrative law judge found that as Norquest was not a party to the claim that was settled, the settlement does not discharge Norquest's liability.

Case precedent establishes that a claimant cannot obtain additional benefits from the same employer with which he settled his claim. *See, e.g., Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991);[3] *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989). These cases, however, do not address the effect of a claimant's settlement of a claim for the same injury with an employer that is not the statutory employer. We reject employer's contention that all liability is precluded by virtue of claimant's settlement with Labor Ready. The administrative law judges' construction of Section 8(i) comports with the plain language of the statute. *See generally Charpentier v. Ortco Contractors, Inc.*, 39 BRBS 55 (2005), *modified in part on recon.*, 39 BRBS 117 (2006); *Bailey v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 11 (2005). Norquest was not a "party" to claimant's initial claim. Neither claimant nor Labor Ready joined Norquest in the informal proceedings. Labor Ready's

[2] Moreover, the district court's decision that Norquest is the borrowing employer is entitled to collateral estoppel effect because the case was litigated between the same parties and the finding was necessary to the court's judgment. *See Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *see generally Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995). In fact, Norquest, in seeking to have the Section 5(b) case dismissed, contended it was claimant's employer under the Act.

[3] In *Olsen*, the claimant settled his compensation claim with employer, and subsequently sought rehabilitation services from the Office of Workers' Compensation Programs (OWCP), for which the Special Fund could have been liable. 33 U.S.C. §§939, 944. The Board agreed with the Director's position that the settlement precluded claimant from obtaining such services. In 2003, the OWCP changed its policy so that "permanently disabled workers who settle their Longshore claims may continue to receive rehabilitation services after settlement." Industry Notice No. 113, *reprinted in* A BRBS 3-164 (2003).

attorneys did not represent Norquest nor did Norquest agree to the settlement's terms. Thus, we hold that the administrative law judges properly found that Norquest was not a party to the settlement within the meaning of Section 8(i), and that its liability to claimant was not extinguished by the settlement.

This result is supported by the decisions in *Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) and *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). In these cases, the courts addressed the situation in which the claimants settled their occupational disease claims against several named employers who were later found by an administrative law judge not to be the responsible employer. The responsible employers then sought a credit for the amounts of the settlements received against their liability to the claimants as the responsible employer.

In *Alexander*, 297 F.3d 805, 36 BRBS 25(CRT), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that the responsible employer is not entitled to a credit under such facts. The court first held that Section 3(e) of the Act is not applicable to alternative settlement awards.[4] The court next held that Section 14(j) of the Act is not applicable because it applies only to payments by the responsible employer.[5] The court rejected the employer's contention that Section 33(f) provided a credit, as the settlements were not recovered in a third-party action.[6] Lastly, the Ninth Circuit discussed the applicability of the credit doctrine, as

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[4] Section 3(e) of the Act states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of title 46, Appendix (relating to recovery for injury to or death of seamen), shall be credited against any liability imposed by this chapter.

33 U.S.C. §903(e).

[5] Section 14(j) of the Act states:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

[6] Section 33(f) of the Act states:

espoused in *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). In cases with multiple successive injuries where a worker has been actually compensated for disability to the same member at a previous point in time, a credit for the amount previously received is awarded to the responsible employer in order to prevent a double recovery for the same disability. This credit is based on the applicability of the aggravation rule by which the responsible employer is liable for the totality of the claimant's disability. *Id.* In *Alexander*, the aggravation rule was not applicable. The court stated that the settlements claimant received were an alternative to an entire award against any one of the three settling employers, who might have been liable for the entire award if it had been found to be the responsible employer. The Ninth Circuit, quoting the Supreme Court's decision in *McDermott v. Amclyde*, 511 U.S. 202, 220 (1994), stated that the employee's "'good fortune in striking a favorable bargain' is not to be treated as a boon to the other defendants." *Alexander*, 297 F.3d at 807, 36 BRBS at 26(CRT). Thus, a credit was denied to the responsible employer.

In *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT), the United States Court of Appeals for the Fifth Circuit reached the same conclusion. The court reasoned that had Congress intended for a liable employer to receive a credit against its total liability for sums the injured employee received by way of settlements under the Act with previous employers, Congress would have explicitly provided for such a credit. The Act, however, provides a credit only for amounts claimant received under "any other workers' compensation law" or the Jones Act. *See* 33 U.S.C. §903(e); n. 3, *supra*. The Fifth Circuit also held that the *Nash* credit doctrine is not applicable because the aggravation rule was not applicable. The court thus concluded that the amount claimant received from settlements under the Act with other employers, before the determination that the disability and death were compensable and that another employer was the responsible employer, are irrelevant to the amount owed by the actual responsible employer, and should not reduce its liability. *Ibos*, 317 F.3d at 488, 36 BRBS at 98(CRT).

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section 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).

These cases support the result reached by the administrative law judges in this case, as they stand for the proposition that the responsible employer is fully liable to the claimant notwithstanding his recovery in settlement from another potentially liable employer. The cases are not distinguishable on the grounds that they involved occupational diseases and claimant's injury herein was caused by a single incident at work, or by the fact that claimant filed separate claims against each employer at separate times.[7] Claimant initially filed a claim against an employer that, ultimately, was not liable for benefits under the Act. That employer chose to settle the claim rather than to contest its liability. After attempting to seek redress under Section 5(b) of the Act, claimant learned that Norquest's liability under the Act, as the borrowing employer, was restricted to compensation benefits.. Claimant then filed a claim for compensation against Norquest. *See* 33 U.S.C. §913(d). Like the claimants in *Alexander* and *Ibos*, claimant settled his claim against a potentially liable employer before the issue of liability was determined. The Ninth Circuit, within whose jurisdiction this case arises, has held that under such circumstances the liability of the responsible employer is not affected by the settlement of claims arising out of the same injury with other potentially liable employers. *Alexander,* 297 F.3d 805, 36 BRBS 25(CRT). Therefore, as it is in accordance with law, we affirm the administrative law judges' finding that the discharge of liability under Section 8(i) applies only to the parties who settled the claim for compensation. As Norquest was not a party to the earlier claim or to the settlement, we hold that its liability was not discharged by the Section 8(i) settlement between claimant and Labor Ready. Therefore, we affirm the administrative law judge's award of benefits payable by Norquest.

Accordingly, the Order Denying Motion for Summary Decision and the Decision and Order Awarding Benefits of the administrative law judge are affirmed.

SO ORDERED.

[7] In this regard, we reject Norquest's contention that claimant's claim against it must be construed as an attempt to modify the otherwise final settlement in this case, which is precluded as Section 8(i) settlements are not subject to modification. 33 U.S.C. §922. Claimant's claim against Norquest did not seek to modify the terms of Labor Ready's liability under the settlement.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge