

U.S. Department of Labor

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



BRB No. 17-0523

BEVERLY HALE)
(Widow of ANTHONY R. HALE, SR.))

Claimant-Petitioner)

v.)

BAE SYSTEMS SAN FRANCISCO SHIP)
REPAIR)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION, LIMITED)

Employer/Carrier-)
Respondents)

NAUTICAL ENGINEERING)

and)

STATE COMPENSATION INSURANCE)
FUND)

Employer/Carrier-)
Respondents)

SAN FRANCISCO WELDING AND)
FABRICATION)

and)

DATE ISSUED: 10/10/2018

AMTRUST NORTH AMERICA)	
)	
Employer/Carrier-)	
Respondents)	
)	
BETHLEHEM STEEL COMPANY)	
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration and Motion to Re-Open the Record of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell, L.L.P.), Novato, California, for claimant (on brief).

Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., for claimant (oral argument).

Frank B. Hugg, Oakland, California, for BAE Systems San Francisco Ship Repair and Signal Mutual Indemnity Association, Limited.

Lauren N. Vuong, Suisun City, California, for Nautical Engineering and State Compensation Insurance Fund.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Brown, L.L.P.), Long Beach, California, for San Francisco Welding & Fabrication and Amtrust North America.

Bill Parrish (Law Office of Bill Parrish), San Francisco, California, for Bethlehem Steel Corporation and Travelers Insurance Company.

Mark A. Reinhalter, Counsel for Longshore (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration and Motion to Re-Open the Record (2014-LHC-01205) of Administrative Law Judge Christopher Larsen 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).¹ We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Statutory Framework -- Section 33 of the Longshore Act

This case involves Section 33 of the Act, which recognizes that "a person entitled to compensation" (PETC) may file a claim for benefits and simultaneously seek to recover damages from third parties ultimately at fault for the disability or death at issue. Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if she determines that the third party may be liable for damages for the work-related injuries. Section 33(g) is intended to ensure that an employer's rights are protected in a third-party settlement and to prevent the claimant from unilaterally bargaining away funds to which the employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *Parfait v. Director, OWCP*, ___ F.3d ___, No. 16-60662, 2018 WL 4326520 (5th Cir. Sept. 11, 2018); *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).

¹ The Board held oral argument in this case in San Francisco, California, on June 26, 2018. Claimant, the Director, Office of Workers' Compensation Programs, BAE Systems, and San Francisco Welding participated.

To protect an employer's right to offset any third-party recovery against its liability for compensation under the Longshore Act, 33 U.S.C. §933(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g);² *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988).

Pursuant to Section 33(g)(1), prior written approval of the settlement is necessary when the PETC 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, 26 BRBS at 53(CRT); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (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); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). Section 33(g) is an affirmative defense, and the employer bears the burden of proving that the claimant entered into a "less than" settlement with a third party without obtaining prior written approval from it and its carrier.

² Section 33(g), 33 U.S.C. §933(g) (emphasis added), is titled "Compromise obtained by person entitled to compensation" and 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.*

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

Force v. Director, OWCP, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). The current dispute pertains to whether claimant was a party to settlements that triggered Section 33's notice and forfeiture procedures.

Factual Background

The underlying facts of this case are not in dispute. Decedent worked as a shipfitter and boilermaker for a number of shipyard employers. Allegedly, he was exposed to asbestos during the course of his employment. In 2007, he filed suit in state court against a number of third-party defendants. *Anthony Hale v. Asbestos Defendants*, Superior Court of California County of San Francisco, Case No. CGC-07-274010. In August 2011, while his suit was still pending, he died of cardiac arrest secondary to lung cancer. On May 16, 2012, the Superior Court appointed decedent's daughter, Brandie Pittman, as successor-in-interest to decedent in his third-party suit. BAE EX 5.14.

On July 20, 2012, decedent's widow, who is the claimant in this proceeding and the mother of Ms. Pittman, filed a claim for death benefits under the Longshore Act. 33 U.S.C. §909; BAE EX 3. Thereafter, on July 31, 2012, Ms. Pittman and her sister, Ta-wanna Maxwell, filed a wrongful death suit against various third-party defendants. *Brandie Pittman, et al. v. Burnham, LLC, et al.*, Superior Court of California County of San Francisco, Case No. CGC-12-276086;³ BAE EX 12.

On April 12, 2012, while the various claims were pending, claimant signed two disclaimers which purported to renounce her interest in the third-party actions and in decedent's estate in favor of her pursuit of death benefits under the Longshore Act. BAE EX 6. The first was titled "Disclaimer of Interest in Estate," in which she purported to disclaim her "interest in the following property to the extent to which I am entitled to take such interest as beneficiary of the estate of Anthony Hale." *Id.* The release defined the disclaimed property as "[a]ll current and future net proceeds from lawsuits and claims filed by Anthony Hale and/or Anthony Hale's estate in connection with Anthony Hale's

³ Anthony Hale, Jr., their brother, and claimant were named as defendants in the claim pursuant to California Code of Civil Procedure Section 382, Cal. Civ. Proc. Code §382, because they did not give their consent to be joined. BAE EX 12. Mr. Hale, Jr., later agreed to be joined. Claimant claims she was dismissed from the claim, but the record contains no documentation to support this assertion. OA Tr. at 55.

exposure to asbestos that would belong to Anthony Hale's estate and that were negotiated after Anthony Hale's death." *Id.*

The second was titled "Disclaimer of Participation in Third-Party Lawsuit." BAE EX 6. It states that claimant read and fully understood its contents and that the law firm that represents claimant in the current proceeding, and the estate in the civil lawsuits, advised her of her rights. In the second disclaimer, claimant purported to "disclaim all of [her] interests in any ongoing or future third-party civil lawsuits based on injuries and death caused by [her] spouse's asbestos exposure." *Id.*

The disclaimers were not filed in any court, nor provided to any other party, until the administrative law judge ordered their disclosure in this matter. Decision and Order at 13.

Ms. Pittman thereafter executed settlements with third parties. Two are relevant here. First, on May 17, 2012, Ms. Pittman executed a "Compromise and Release" that released CBS Corporation (CBS) from liability for personal injury and wrongful death in exchange for \$2,000. BAE EX 10.28-10.41. The release states in part that the "Parties to be Bound by Release (Releasers)" include decedent's children and "Decedent's heirs (not otherwise set forth above) as defined by California Code of Civil Procedure Section 377.60." BAE EX 10.28; *see also* Cal. Civ. Proc. Code §377.60. Section 377.60, in turn, provides in relevant part: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: (a) The decedent's surviving spouse. . . ." Cal. Civ. Proc. Code §377.60(a).

Second, on April 30, 2014, Ms. Pittman executed a settlement with Pfizer, Incorporated (Pfizer). BAE EX 10.63-10.67.⁴ In return for \$7,000, as "personal representative of the estate of Anthony Hale," and "on behalf of the estate, for myself, and the decedent's heirs," Ms. Pittman released "any and all claims of any kind whatsoever" including "future lost wages or prospective earnings, the loss of companionship and consortium and funeral expenses[.]" and "all further or future Claims . . . including death. . . ." *Id.* at 10.63-10.64. The settlement further states that Ms. Pittman recognized that the "[r]elease is binding on me, the decedent's *heirs*, executors, beneficiaries, administrators,

⁴ The Pfizer release appears to be an attachment to another settlement document, but that other document is not in the record. BAE EX 10.

successors and assigns in every way. . . .” *Id.* at 10.67 (emphasis added); *see also id.* at 10.63 (identifying release as being on behalf of same groups).⁵

The same law firm, Brayton Purcell, has been the exclusive representative for claimant with respect to her longshore claim,⁶ as well as the exclusive representative of Ms. Pittman and the entirety of the decedent’s estate in the third-party actions at all relevant times.

The ALJ’s Decision

In this case, no party disputes claimant’s status as a PETC under the Act after decedent’s death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000). Additionally, no party disputes that decedent’s representative (his daughter, Ms. Pittman)⁷ entered into the CBS and Pfizer settlements, claimant did not sign either of them, and Ms. Pittman has not filed a claim for benefits under the Act.⁸ Further, it is undisputed that the aggregate of the proceeds from the CBS and Pfizer settlements is

⁵ The signature line “For spouse releasing loss of consortium claim” is crossed out and unsigned. BAE EX 10 at 10.67. There is no indication who, when, or why the signature line was crossed out. In addition, the “heirs” are not identified by name.

⁶ Claimant supplemented her representation by adding appellate counsel specifically for purposes of the oral argument.

⁷ The term “representative,” as that term is used in Section 33(g)(1), pursuant to Section 33(c), means “legal representative of the deceased” and does not refer to an attorney. 33 U.S.C. §933(c), (g)(1); *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Williams v. Ingalls Shipbuilding, Inc.* 35 BRBS 92 (2001). Thus, Section 33(g)(1)’s phrase “the person entitled to compensation (or person’s representative),” refers to a claimant or to a legal representative of the deceased, and does not refer to a “representative” of the claimant under agency principles. Therefore, “person’s representative” in this case refers to Ms. Pittman as the representative of decedent, not of claimant.

⁸ No party asserts that Ms. Pittman and her siblings are eligible for benefits under the Act, as they are all independent adults. *See* 33 U.S.C. §§902(14), 909(d).

far less than claimant's entitlement under the Act,⁹ and none of the employers or carriers gave prior written approval of either settlement.¹⁰ See *Mapp*, 38 BRBS 43.

Thus, the sole issue is whether claimant, or someone with the authority to do so on her behalf, "enter[ed] into a settlement with a third person." 33 U.S.C. §933(g). If she did, Section 33(g) bars her claim. *Mapp*, 38 BRBS 43. If she did not, her claim for benefits under Section 9 would not be barred. *Newton-Sealey*, 49 BRBS 17.

After a hearing on the issue, the administrative law held that Section 33(g) barred claimant's Longshore claim. Based on the language of the settlements, he found that claimant settled with CBS and Pfizer for amounts less than her entitlement under the Act without obtaining prior written approval from the longshore employers and carriers. Decision and Order at 12, 15-16. The administrative law judge reasoned: 1) claimant is the surviving spouse of decedent and is, at least, a "presumptive heir" under state law, as, "under ordinary circumstances," she is "an heir *and* a beneficiary *and* a successor;" 2) the CBS and Pfizer settlements stated that "Ms. Pittman is authorized to, and does, waive the claims of Mr. Hale's heirs" and terminated the wrongful death claims against those defendants; 3) there is no evidence to suggest that CBS or Pfizer knew claimant was to be excluded from the third-party settlements; 4) the settlements are not reasonably susceptible to claimant's interpretation that she was excluded from them; and 5) claimant did not

⁹ The aggregate, gross, apportioned amounts of the settlements are to be compared with the total amount to which the claimant would be entitled under the Act. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The administrative law judge calculated that, as of March 2, 2017, claimant would be entitled to over \$91,000 under the Act, not including annual adjustments. Decision and Order at 15. In comparison, the two settlements at issue grossed a total of \$9,000. Although unnecessary to his conclusion, the administrative law judge considered testimony from BAE Systems' expert economist regarding the apportionment of funds and found claimant would have been entitled to 70.2 percent of the total settlement amount, or \$6,318. *Id.* at 16. If claimant received nothing from the third-party settlements, but was a party to them, then they were for an amount less than her entitlement (zero is less than \$91,000). In any event, claimant does not dispute that the agreements were for an amount less than the longshore benefits she would otherwise receive.

¹⁰ Claimant, purportedly, has not received any money from the post-death third-party settlements.

disclose the disclaimers to the third parties. Therefore, the administrative law judge concluded that claimant was bound by the CBS and Pfizer agreements.¹¹ *Id.* at 10, 12-14.

The administrative law judge subsequently denied claimant's motion for reconsideration and her motion to re-open the record. Order at 3-5. He clarified that the California statute, Cal. Civ. Proc. Code §377.60; Cal. Prob. Code §24, and the plain language of the releases support his conclusion that claimant is bound by the third-party contracts. He also stated that the law and the objective language in the third-party settlements are more compelling than claimant's assertions that she was not a party to the settlements, despite the fact that her signature was absent from the agreements.¹² With respect to the disclaimers, the administrative law judge stated that claimant should have made clear to the third-party defendants that she was not a party to the settlements by incorporating the disclaimers into the settlements. Order at 2-4.¹³

¹¹ The administrative law judge also found the testimony of claimant and Ms. Pittman lacked credit. Decision and Order at 9-11. He specifically concluded:

whatever Ms. Pittman may have believed she was doing; regardless of whether [claimant] has any idea what an "heir" is; whether or not [claimant] knew her children were settling with alleged third-party tortfeasors; irrespective of the April 12, 2012, disclaimers; and even if [claimant] did not take a penny of the CBS or Pfizer settlement amounts, under the particular circumstances of this case, I can only interpret the CBS and Pfizer releases as including a release of claims by [claimant].

Id. at 13.

¹² We reject claimant's assertion that the administrative law judge incorrectly applied the doctrine of estoppel to preclude her from arguing that she was not a party to the third-party settlements. Although the administrative law judge, citing Cal. Evid. Code §623, stated he believed a California court would agree claimant had participated, Order at 3, no California court made such a finding. As the administrative law judge fully addressed the issue of claimant's status as a party to the agreements, he did not apply any estoppel doctrines and merely declined to address the issue again on the motion for reconsideration.

¹³ The administrative law judge denied claimant's motion to re-open the record to allow the testimony of an attorney in the law firm representing her and her family in the third-party actions and in the death benefits claim. The administrative law judge stated that claimant resisted producing the third-party settlement documents until ordered to do so, *in camera*, and then limited her arguments before him to asserting she was not a party

This Appeal

Claimant appeals the administrative law judge's decisions. BAE Systems,¹⁴ Nautical Engineering, San Francisco Welding, and Bethlehem Steel (the employers) and the Director, Office of Workers' Compensation Programs (the Director) respond, separately, urging affirmance.¹⁵ Claimant filed a reply brief.

Claimant asserts the administrative law judge erred in relying on the California definition of the term "heirs" to conclude she is bound by the third-party settlements before independently determining whether she "entered into" those settlements under the language of the Act. She contends she did not "enter into" any third-party settlements under the Act, and she did not authorize anyone to do so for her. Claimant alternatively argues that if California law governs the interpretation of the settlements, they are ambiguous, and the administrative law judge erred by disregarding parole evidence, which, she claims, establishes that she was not a party to the settlements.

Employers urge the Board to affirm the administrative law judge's decision. They assert that California law applies to determine the existence of a contract for the purposes of determining whether claimant "entered into" a third-party settlement under the Act. They contend claimant demonstrably is an "heir" under California law, and the straightforward settlement language unambiguously binds her, eliminating any need to consider parole evidence. Moreover, even if the third-party settlements were somehow ambiguous, employers assert that extrinsic evidence, such as claimant's failure to publicize or file the disclaimers, supports the administrative law judge's decision. Because claimant was not specifically excluded from the third-party settlements, which were for amounts less than the amount to which she would be entitled under the Act, and she did not seek

to them. The administrative law judge questioned why the attorney's testimony was not produced during the hearing and commented that, in light of the firm's dual representation of the family in the tort and longshore claims, the attorney is not a disinterested witness. Order at 5.

¹⁴ In a pleading dated July 31, 2018, the Board was informed that BAE Systems San Francisco Ship Repair, Inc., now doing business as San Francisco Ship Repair, Inc., filed a voluntary Chapter 11 petition in bankruptcy court.

¹⁵ We accept Bethlehem Steel's response brief, filed June 26, 2018, into the record. 20 C.F.R. §802.215.

prior written approval of those settlements, Section 33(g) mandates forfeiture of her claim for death benefits.¹⁶

The Director agrees with employers and urges the Board to affirm the administrative law judge's decision. She likewise asserts that California law applies to determine whether claimant entered into a settlement under the Longshore Act and that California law looks within the four corners of documents to determine their objective intent. There is no need to look at subjective intent or extrinsic evidence because the language here is not open to interpretation. The Director also asserts that the administrative law judge correctly gave little weight to the disclaimers because they were signed only by claimant and not by the third-party defendants. Therefore, they cannot modify the settlements under the law of contracts, and Section 33(g) bars claimant's claim for death benefits.¹⁷

We agree with employers and the Director. In determining the meaning of "entered into" under Section 33, the beginning point of any analysis, as with any statutory construction, is the language of the statute. If that language is clear, the inquiry is finished. *Cowart*, 505 U.S. at 475, 26 BRBS at 51(CRT).

We believe it is. Under a plain reading of Section 33, to "enter" into something means to become a participant in, or as it relates to agreements, to become a party to the agreement. *Black's Law Dictionary* (10th ed. 2014); *Webster's II New Riverside*

¹⁶ Employers note that Section 33 was designed to protect their interests, as the existence of third-party settlements may affect their liability under the Act. 33 U.S.C. §933(f), (g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Banks v. Chicago Grain Trimmers*, 390 U.S. 459 (1968); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993).

¹⁷ The Director agrees with employers that the purposes of Section 33 are to prevent double recovery and to protect employers from liability when another party is at fault, as the employers are the real parties-in-interest when a third-party settlement might reduce their liability. *See Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT).

University Dictionary (1984).¹⁸ Thus, the critical inquiry is whether a settlement of a third-party claim or lawsuit has been effected: “entering into” a third-party settlement means assessing whether a third-party settlement, to which the claimant is bound, exists or has been fully executed. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992); *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

Contracts are matters of state law, and settlements are contracts. Cal. Civ. Code §1550; *Weddington Productions, Inc. v. Flick*, 60 Cal. App. 4th (Cal. Ct. App. 1998). State law thus necessarily governs the determination of whether a settlement has been “entered into” or “effected.” See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (in diversity cases, federal court must follow choice-of-law rules of the state in which it sits to determine which substantive law applies); *John T. Jones Constr. Co. v. Hoot General Constr. Co., Inc.*, 613 F.3d 778 (8th Cir. 2010) (under choice-of-law rules, court applied law of forum, Iowa, to determine the existence of a contract, noting that, substantively, the contract required the application of North Dakota law); *R & D Distrib. Corp. v. Heath-Mor*

¹⁸ Section 33(g)’s implementing regulation clarifies that the determinative consideration under Section 33 is whether a valid settlement under the law has been reached. Section 702.281(a) provides that “[e]very person claiming benefits under this Act (or the representative)” must notify the employer when “[a] claim is made” that someone other than the employer is liable, “[l]egal action is instituted by the claimant or the representative[,]” or “[a]ny settlement, compromise or any adjudication of such claim *has been effected. . . .*” 20 C.F.R. §702.281(a) (emphasis added). Further, “[w]here the claim or legal action instituted against a third party *results in a settlement agreement*” for less than the amount of compensation that would be due, prior written approval must be obtained. 20 C.F.R. §702.281(b) (emphasis added).

Indus., Inc., 118 F.Supp.2d 806 (E.D. Mich. 2000) (Michigan law applied to determine the existence of the contract).¹⁹

As the Pfizer release was executed in California and, presumably, would be enforced by California courts, California law determines whether it constitutes a fully-executed settlement for the purposes of Section 33. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (Cal. 1992) (California adopted Restatement (Second) approach); Restatement (Second) Conflict of Laws §§187(2), 188(1) (1988) (assess whether chosen state has substantial relationship to parties or transaction or whether reasonable basis exists for parties' choice of law; if either test is met, apply parties' choice unless chosen law violates public policy of forum state; if neither test is met, or no choice was made, local law applies).

In California, as elsewhere, a contract exists if there are parties capable of contracting, consent, a lawful object, and sufficient consideration. Cal. Civ. Proc. Code §1550. The Pfizer settlement meets all of these elements. It released Pfizer from all

¹⁹ Claimant, in her brief before the Board, conceded that "California law governing the interpretation of contracts" applies to this case. Cl. Br. at 1. At oral argument, however, claimant asserted the Board should apply "the law under the Act" to determine whether claimant "entered into" a third-party settlement, stating that the concession in the brief is that California law governs only the scope of the settlement. OA Tr. at 9, 64-67. We disagree with claimant's assertion that there is independent "law under the Act" which determines whether a settlement exists. To the extent our previous cases have interpreted whether a claimant has "entered into" a contract for the purposes of Section 33(g), the factors considered are entirely consistent with state contract law. These factors include whether the claimant agreed to the settlement, signed a release, or obtained and retained money, whether conditions precedent had been satisfied, whether the attorney had the authority to settle on behalf of the claimant, whether the third-party suits had been dismissed, and/or whether any settlement had been rescinded and the parties returned to the *status quo ante*. *Williams*, 35 BRBS at 97.

liability, including liability for any claims claimant may have been entitled to file,²⁰ for consideration, and the parties did not return to the *status quo ante*.²¹ Moreover, there is no allegation that the parties lacked the authority to consent or that the agreement is unlawful or otherwise unenforceable. Ms. Pittman received the settlement proceeds “on behalf of the family.” See Tr. at 371-75. As the Pfizer agreement is a fully-executed settlement, a fact which no party disputes, the only remaining step is to determine whether the administrative law judge rationally found that claimant was a party to it.

Interpreting a contract is a judicial function, and the court is to give effect to the parties’ mutual intentions as of the time the contract was executed. Generally, intent is a legal question determined by the terms of the contract. Cal. Civ. Proc. Code §§1580, 1636; *Golden v. California Emergency Physicians Medical Grp.*, 782 F.3d 1083, 1089 (9th Cir. 2015) (settlement is matter of state law; California looks at objective intent embodied in language of contract); *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (Cal. 2002). Extrinsic evidence may be admitted to aid the interpretation only if there is ambiguity and the meaning of the contract is susceptible to the disputing parties’ differing positions, *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 618 F.3d 1066 (9th Cir. 2010), or if there was a mutual mistake and the contract does not reflect the parties’ mutual intent, *Hess*, 27 Cal. 4th at 524.

Claimant contends there is ambiguity because she did not sign the document; therefore, the administrative law judge should have considered parole evidence, such as

²⁰ The release covered decedent’s personal injury suit as well as the survivors’ wrongful death claims. Under California law, wrongful death is a statutory claim, *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807 (Cal. Ct. App. 1997), and each heir has a personal and separate wrongful death cause of action, but the actions are deemed “joint, single and indivisible and must be joined together in one suit.” *Corder v. Corder*, 41 Cal. 4th 644, 652 (Cal. 2007); see Cal. Civ. Proc. Code §377.60(a). Thus, the decedent’s personal representative may bring a wrongful death cause of action on behalf of the decedent’s surviving spouse, and all known heirs must be joined into the single suit. *Ruttenberg*, 53 Cal. App. 4th at 808.

²¹ Ms. Pittman’s July 2012 third-party lawsuit included multiple causes of action for damages against over 800 third-party defendants, most of which were identified by fictitious names. BAE EX 12.1. It is unknown whether Pfizer was one of the defendants. We take judicial notice that the wrongful death complaint was dismissed without prejudice on May 18, 2016, after the court was notified that the case had settled, and the case was removed from the court’s asbestos show cause calendar. <https://webapps/sftc.org> (for case CGC12276086) (viewed August 29, 2018).

the disclaimers and the hearing testimony that she was excluded from the settlement agreement. We reject claimant's assertion of ambiguity. The Pfizer document is a global release with straightforward intent: it protects the company from "any and all" claims brought by decedent's heirs including claims for lost wages, loss of consortium, and death. Under California law, an "heir" is "any person, *including the surviving spouse*, who is entitled to take property of the decedent by intestate succession. . . ." Cal. Prob. Code §44 (emphasis added); *see also* Cal. Prob. Code §24. A surviving spouse is an eligible wrongful death plaintiff, and she is the only plaintiff permitted in a claim for loss of consortium. Cal. Civ. Proc. Code §377.60; *Leonard v. John Crane, Inc.*, 206 Cal. App. 4th 1274 (Cal. Ct. App. 2012).²²

Moreover, a decedent's representative may bring suit on behalf of all heirs, including the surviving spouse, and in a wrongful death claim, all known heirs must be joined. *See, e.g., Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801 (Cal. Ct. App. 1997); *Herbert v. Superior Court of Los Angeles County*, 169 Cal. App. 3d 718 (Cal. Ct. App. 1985). The agreement at issue does not identify the heirs who released Pfizer from liability; however, it also does not name any heirs who are excluded from the release. As claimant is decedent's surviving spouse, she is an "heir" under California law, and the plain language of the Pfizer agreement establishes that she is a party to the settlement.²³ *Id.*

Regardless, to the extent the crossed-out signature line renders the Pfizer release "ambiguous," substantial evidence would support the administrative law judge's finding

²² Claimant's reliance on *Williams*, 35 BRBS 92, and *Doucet v. Avondale Industries, Inc.*, 34 BRBS 62 (2000), to conclude that she did not participate in the third-party settlements is misplaced. Those cases are distinguishable on their facts. In *Doucet*, although proceeds from the decedent's third-party settlement were disbursed after his death, the claimant, who did not sign the pre-death third-party settlement, received the proceeds as part of the decedent's estate. In any event, she was not a PETC at the time the settlement was signed by the decedent. *Doucet*, 34 BRBS at 64-65. *Williams* involved the disbursement of funds from an asbestos trust, which the Board held was more akin to a judgment than a settlement, and it remanded the case for the administrative law judge to address whether funds were received "in settlement." *Williams*, 35 BRBS at 95. If funds were received "in settlement," the Board stated that the administrative law judge should then determine whether the settlements were fully executed by the claimant.

²³ Because claimant's contention at oral argument shifted away from whether she was an "heir" under California law, employers interpreted this as claimant's concession that she is decedent's "heir." OA Tr. at 28.

that parole evidence does not aid claimant's cause.²⁴ Claimant made no public effort to be excluded from the Pfizer release and did not inform Pfizer of her signed disclaimers or have them included in the settlement.²⁵ OA Tr. at 62.²⁶ Further, the administrative law judge reasonably found that claimant and Ms. Pittman were not credible witnesses with respect to the events surrounding the third-party agreements. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Under these circumstances, we are hard-pressed to accept claimant's assertion that she did not participate in the third-party settlement. Indeed, it appears she knowingly let Pfizer believe she was a participant to maximize recovery. See OA Tr. at 61. While a claimant has no duty to file a third-party claim to reduce an employer's liability under the Act, *Mills v. Marine Repair Serv.*, 22 BRBS 335 (1989), *modifying on recon.* 21 BRBS 115 (1988), the administrative law judge may rely on credible circumstantial evidence to infer a party's intent. See generally *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999). Here, claimant's public conduct was fully consistent with the recital in the settlement document. Significantly, the same law firm represented claimant and decedent's estate in all of the relevant litigation. By its own admission, the firm was well aware of the application of Section 33(g) to this case. It could have avoided this harsh outcome, that is,

²⁴ Claimant's proffered parole evidence consists of her testimony, the testimony of her daughters, and the signed disclaimers. BAE EX 6; see, e.g., Tr. at 338-359, 371-381, 398.

²⁵ The Probate Code addresses how a beneficiary may renounce some or all interests she could take as a beneficiary. Cal. Prob. Code §§262, 264-265, 267, 275 ("A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this part."). To be effective in probate, the disclaimer must be filed. Cal. Prob. Code §279. Proceeds from a wrongful death settlement are not addressed in probate. However, while there is no statutory mandate to file the disclaimer, failure to notify Pfizer of the disclaimer affects the mutual intent of the contract. See, e.g. *City of Mill Valley v. Transamerica Ins. Co.*, 98 Cal. App. 3d 595, 602-603 (Cal. Ct. App. 1979) ("undisclosed unilateral intent of the insurer" is immaterial). Executing the disclaimer in secret, like making a private contract with yourself, holds little weight when no one knows to hold you accountable.

²⁶ Claimant stated at oral argument that "Pfizer wanted everyone listed" and did not care about whether she would receive proceeds from the settlement; it just "wanted to be sure it could not be sued by her in the future." OA Tr. at 44, 61. Claimant also acknowledged that Pfizer might have offered less money if it knew claimant was not a participant. *Id.* at 61, 81.

the conclusion that claimant entered into the third-party settlement without employer's approval, by either simply making clear in the settlements that they excluded claimant or by attempting to get employers' agreement prior to executing the settlement. It chose not to attempt either.²⁷

Consequently, we agree with employers and the Director that the administrative law judge properly found that employers have shown the existence of a fully-executed third-party settlement with Pfizer which extinguished claimant's claim against the third party for decedent's death and, thus, affects employers' rights under the Act.²⁸ Because the aggregate of the Pfizer and CBS settlements in this case is less than the amount to which claimant would be entitled under the Act, *see* n.9, *supra*, we need not address the nature of the CBS agreement. Consequently, we affirm the administrative law judge's finding that claimant's unapproved third-party settlement with Pfizer invokes the Section 33(g)(1) forfeiture provision and bars claimant's entitlement to death benefits under the Act. *Parfait*, 2018 WL 4326520 at *4.

²⁷ We reject claimant's assertion that equitable principles dictate that the administrative law judge's decision should be overturned because employers will be unjustly enriched by not having to pay death benefits for decedent's work-related death. Unlike many cases involving Section 33(g) where the provision "creates a trap for the unwary[.]" the facts of this case demonstrate that claimant and counsel were well aware of the potential harsh effects of Section 33(g). *Cowart*, 505 U.S. at 483-484, 26 BRBS at 53(CRT); OA Tr. at 44, 46, 55. The statute and the regulation explain the actions to be taken with respect to third-party settlements, claimant's counsel was well aware of them, and claimant's actions herein were insufficient to avoid forfeiture.

²⁸ We reject claimant's assertions at oral argument that the expiration of the time for filing a third-party claim, and not claimant's actions, precluded employers from protecting their interests. Claimant has control over whether and when to file a third-party action and whether and when she will inform the longshore employers/carriers of that action.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and the Order Denying Motion for Reconsideration and Motion to Re-Open the Record are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge