

VENTURA TRETO)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GREAT LAKES DREDGE AND DOCK)	DATE ISSUED:
COMPANY)	
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of E. Earl Thomas, Administrative Law Judge, United States Department of Labor.

Raul R. Lopez (Law Offices of Carlos E. Casuso), Miami, Florida, for claimant.

Guy A. Gladson, Jr., Miami, Florida, for employer/carrier.

Joshua T. Gillelan II (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Reconsideration (90-LHC-0710) of Administrative Law Judge E. Earl Thomas 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On December 4, 1980, claimant suffered work-related injuries to his head when a wheel loader he and three co-workers were riding stalled and rolled down an incline. Claimant thereafter filed a claim for benefits under the Act. In a Decision and Order dated August 3, 1984, Administrative Law Judge Robert G. Mahony awarded claimant temporary total disability benefits from December 4, 1980 through September 23, 1981, and continuing permanent total disability benefits from September 24, 1981. 33 U.S.C. §908(a), (b).

In addition to filing his claim for benefits under the Act, claimant instituted a lawsuit against five third-party defendants. Prior to trial, claimant obtained written approval from employer and its carrier (employer), by executing two LS-33 forms in November 1986 and February 1987, in compliance with Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), to enter into third-party settlements with Caterpillar Tractor Company, for \$45,000, and with Metropolitan Dade County, for \$150,000.¹

In January 1987, prior to employer's execution of an LS-33 form with regard to claimant's Dade County settlement, claimant secured a "Waiver of Lien" from employer. This document states, in pertinent part:

COME NOW the Employer and Carrier of the Plaintiff Ventura Treto, Great Lakes Dredge & Dock Company and Travelers Insurance Company, and in connection with the settlement of the claims by the Plaintiffs in the above-styled matter against the Defendant, Metropolitan Dade County and its insurer for these claims Travelers Insurance Company; the Employer and Carrier hereby waive all past and future liens for compensation benefits paid or to be paid as a result of Ventura Treto's accident of December 4, 1980, whether such benefits are or payable under the Longshore & Harbor Workers' Compensation Act, the Florida Workers' Compensation Act, or any other compensation program.

Emp. Ex. 1 at 11; Cl. Ex. 3.

Between February 24, 1987 and May 14, 1987, claimant entered into settlement agreements

¹ We note that Travelers Insurance Company was both the liability carrier for Dade County and employer's compensation carrier at the time of these settlements.

with the remaining three third-party defendants.² Employer did not give its written approval of these three settlements, nor was employer formally notified by claimant that he had entered into these settlements. On April 16, 1989, employer terminated claimant's compensation payments on the grounds that claimant entered into third-party settlement agreements without complying with the written approval and notification requirements of Section 33(g)(1) and (2) of the Act, 33 U.S.C. §933(g)(1), (2)(1988). Claimant subsequently filed this claim under the Act, seeking reinstatement of his compensation benefits.

In his Decision and Order, the administrative law judge initially determined that while employer waived its lien rights for compensation paid to claimant, it did not waive its rights to an offset of future compensation due. Next, the administrative law judge concluded that, since claimant neither obtained written approval of the last three settlements which he entered into, pursuant to Section 33(g)(1), nor notified employer of those settlements, pursuant to Section 33(g)(2) of the Act, claimant's benefits were properly terminated by employer. Thus, the administrative law judge denied claimant's claim for reinstatement of his compensation benefits.

Following the issuance of the administrative law judge's Decision and Order, claimant submitted a Petition for Reconsideration contending, *inter alia*, that the administrative law judge failed to consider the deposition of claimant's counsel when discussing employer's January 1987 Waiver of Lien. On December 5, 1990, the administrative law judge issued an order denying claimant's petition for reconsideration, stating that he had considered all of the evidence of record, including the deposition testimony of claimant's attorney who represented claimant at the time of the third-party settlements. The administrative law judge noted that claimant's counsel's testimony was insufficient to obviate the application of controlling law, and again found that employer's Waiver of Lien encompassed only employer's subrogation rights; claimant's petition for reconsideration was therefore denied.

On appeal, claimant contends that the administrative law judge erred in finding that employer had properly terminated his compensation benefits pursuant to Section 33(g); specifically, claimant argues that employer, by virtue of its Waiver of Lien, waived both its subrogation rights and its rights to an offset and that, thus, strict compliance with Section 33(g) is not required. In a supplemental brief, claimant further argues that the United States Supreme Court's decision in *Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), does not address the issue of whether the forfeiture provisions of Section 33(g) apply in situations where the

²Our review of the record reveals that on February 24, 1987, a stipulation was entered into in which Bob Young, Inc. was dropped as a party in claimant's lawsuit, on the grounds that the parties had reached an amicable settlement of all issues between them. Cl. Ex. 8. Claimant also entered into a stipulation in which the City of Miami agreed to be dropped as a party in the lawsuit, with prejudice. Cl. Ex. 9. With regard to the remaining defendant, Post, Buckley, Schuh and Jernigan, Inc., a consent judgment was obtained in the sum of \$500,000 on May 14, 1987; as part of this settlement, Post Buckley assigned to claimant any and all rights it had against employer, and paid to claimant the sum of \$25,000 upon entry of the stipulated judgment. Cl. Exs. 12 at 4-5; 13.

employer has waived its rights under Section 33(f) of the Act, 33 U.S.C. §933(f); thus, claimant contends, the Court left intact the line of cases holding that Section 33(g) is not applicable where the employer's interests are otherwise protected. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of claimant's appeal, contending that employer waived all its rights under Section 33(f) by virtue of the signed Waiver of Lien, and that the purpose of Section 33(g) becomes irrelevant where an employer has waived all of its interests in a third-party's potential liability. Employer responds, urging the Board to affirm the administrative law judge's determination that it properly terminated compensation payments to claimant.

Both claimant and the Director contend that employer, in its January 1987 Waiver of Lien, waived both its lien and offset rights against claimant. Specifically, the Director argues that under Section 33(f), employer is entitled to both a "lien" on a claimant's third-party tort recovery, and a right to "credit" or "offset" claimant's net recovery against its compensation liability; therefore, asserts the Director, lien and credit rights are two *remedies* for the effectuation of the same *statutory right*, *i.e.*, the right to reduce or eliminate compensation liability to the extent a tortfeasor can be held liable to the injured worker or survivor.³ Thus, both claimant and the Director argue that the term "lien," as used in the January 1987 Waiver of Lien, is synonymous with "offset," both of which may be waived by an employer. Accordingly, claimant and the Director maintain that, as employer waived its rights to all liens and offsets, employer was not entitled to discontinue claimant's compensation payments.

Section 33(f), as amended in 1984, provides employer with an offset for the "net amounts" recovered by a claimant in cases where the claimant enters into a settlement of a lawsuit brought against a third-party under 33 U.S.C. §933(a). Section 33(a) provides that a claimant may file a suit against a third party who is potentially liable in damages "on account of a disability or death for which compensation is payable under this chapter," in addition to his claim for benefits under the Act.⁴ *See generally Castorina v. Lykes Brothers Steamship Company, Inc.*, 24 BRBS 193 (1991).

³Black's Law Dictionary defines the word "lien," in part, to be a "[r]ight or claim against some interest in property created by law as an incident of contract. Right to enforce charge upon property of another for payment or satisfaction of debt or claim." *See* Black's Law Dictionary 832 (5th ed. 1979). "Offset" is defined as "[a] deduction; a counterclaim; a contrary claim or demand by which a given claim may be lessened or canceled." *Id.* at 979.

⁴Sections 33(a) and (f), 33 U.S.C. §933(a), (f)(1988), state:

- (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

* * *

In the instant case, the administrative law judge, relying on *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980), initially determined that an agreement between employer and its carrier solely for a waiver of its subrogation rights against a third-party defendant does not preclude application of an offset pursuant to Section 33(f) of the Act. In *Luke*, employer's carrier paid compensation benefits to claimant from the time of the work-related injury until claimant settled a third-party action, at which time payments were discontinued. The carrier's attempt to intervene in the third-party action to assert a lien for payments made to claimant was denied by the court, as a provision in the carrier's policy expressly waived employer's subrogation rights against the third-party. Claimant thereafter sought reinstatement of compensation benefits under the Act. The Board held that the waiver of subrogation contained in the policy constituted a waiver of carrier's right under Section 33(f) to offset claimant's recovery from the third-party against the carrier's future liability. *Luke v. Petro-Weld, Inc.*, 8 BRBS 369 (1978). The United States Court of Appeals for the Fifth Circuit, after rejecting the Director's position that the right to a Section 33(f) offset is the same as a right to participate in the proceeds of a third-party action, disagreed, stating that the carrier was not seeking any right of subrogation against the third-party, or seeking to participate in the settlement funds, but rather the carrier was attempting to have its compensation to claimant determined in accordance with Section 33(f). The court thus reversed the Board's decision that the waiver of subrogation precluded the application of a Section 33(f) offset, noting its determination that Section 33(f) of the Act "has nothing to do with the right of subrogation of the employer-carrier." *Petro-Weld*, 619 F.2d at 421, 12 BRBS at 341.⁵ Rather, the court stated that Section 33(f) "provides a statutory right to have the employer-carrier's liability for future compensation determined under its provisions." *Id.*; see also *I.T.O. Corporation of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir. 1992), *vacated in part on other grounds*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th Cir. 1992); *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163 (CRT) (5th Cir. 1988);⁶ *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18

(f) 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).

⁵As *Petro-Weld* was decided before September 30, 1981, it is binding as precedent in the Eleventh Circuit, wherein appellate jurisdiction of this case lies. See *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

⁶In *Jackson*, the Fifth Circuit stated: "Waiver of subrogation rights does not exhaust an employer's interest in a settlement between an employee and such a third-party. . . . The employer has a right to set-off the amount of the settlement against future payments." *Jackson*, 855 F.2d at

BRBS 67 (CRT) (5th Cir. 1986).⁷ Pursuant to the court's reasoning in *Petro-Weld*, we reject claimant's contention that the terms "lien" and "offset" are interchangeable under Section 33 of the Act,⁸ and we hold that the administrative law judge committed no error in concluding that employer's subrogation, or lien, rights are separate and distinct from its right under Section 33(f) to offset its compensation liability against the amounts a claimant recovers from a third-party defendant.

Next, the administrative law judge determined that employer, in its January 1987 Waiver of Lien, had "waived its lien rights to claimant's compensation benefits solely; [employer] did not eliminate its offset rights as well." Decision and Order at 4. Our review of employer's executed Waiver of Lien reveals no indication of any intent on behalf of employer to waive its offset right under Section 33(f); rather, that document expressly states employer's intention to waive "all past and future *liens* for compensation benefits paid or to be paid."⁹ Cl. Ex. 3 (emphasis added). We therefore affirm the administrative law judge's determination that employer, in its January 1987 Waiver of Lien, did not waive its right to an offset pursuant to Section 33(f) of the Act, as that finding is rational and is supported by the unambiguous language of the document. *See O'Keefe*, 380 U.S. at 359.

246, 21 BRBS at 165 (CRT), *citing* 33 U.S.C. §933(f) and *Collier, infra*.

⁷In *Collier*, the Fifth Circuit emphasized that an employer's right to a set-off is wholly independent of any right to subrogation. The court stated: "It is . . . false to suggest that a waiver of subrogation exhausts an employer's interest in the terms of a settlement between an employee and a third-party tortfeasor." *Collier*, 784 F.2d at 647, 18 BRBS at 70 (CRT).

⁸Claimant's reliance on *Villanueva v. CNA Insurance Co.*, 868 F.2d 684 (5th Cir. 1989), in support of its proposition that the term "lien" is synonymous with all interests retained by employer under Section 33 is misplaced. Contrary to claimant's contention, the court in *Villanueva* merely defined the distribution formula to be followed once a lien has been established.

⁹As employer's Waiver of Lien is unambiguous on its face, the administrative law judge need not have considered extrinsic evidence regarding the intent of the parties. *See* 30 Am. Jur. 2d *Evidence* §1016.

Lastly, as employer did not waive its right to an offset against claimant's net recovery against a third-party defendant, employer retained an interest in the third-party settlements entered into by claimant subsequent to January 1987. As it is uncontroverted that claimant failed to comply with the requirements of Section 33(g), we affirm the administrative law judge's determination that the claim is barred by that section and that employer properly terminated its benefit payments.¹⁰ *See Cowart*, ___ U.S. at ___, 112 S.Ct. at 2589, 26 BRBS at 49 (CRT).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

¹⁰The remaining arguments of claimant and the Director regarding Section 33(g) are thus moot.