BRB No. 92-0971

JOHNNY R. BROUSSARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOUMA LAND & OFFSHORE	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	DATE ISSUED:
	)	
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 Claimant's Motion for Summary Judgment and Granting Employer/Carrier's Motion for Summary Judgment of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joseph G. Albe, New Orleans, Louisiana, for claimant.

John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Samuel J. Oshinsky (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Claimant's Motion for Summary Judgment and Granting Employer/Carrier's Motion for Summary Judgment (91-LHC-2260) of Administrative Law Judge Lee J. Romero, Jr., 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).

The basic facts in this case are undisputed. Claimant sustained an injury in the course of his employment with Houma Land & Offshore on September 25, 1986, and subsequently filed a claim for compensation with the Department of Labor on March 6, 1987. Upon notification, employer filed its Notice of Controversion on April 20, 1987.

On July 28, 1987, a Complaint for Damages was filed by claimant in the United States District Court for the Eastern District of Louisiana naming CNG Producing Company and Bruce Boat Rental, Incorporated, as defendants. In September 1990, pursuant to Rule 68 of the Federal Rules of Civil Procedure, the defendants in this third-party suit made an offer of judgment in the amount of $10,000 each, which was accepted by claimant.

On September 13, 1990, a "Judgment Pursuant to Federal Rule of Civil Procedure 68" was rendered and signed by United States District Judge Robert F. Collins. Written approval of the action taken by claimant in accepting the Rule 68 Offer of Judgment and the money paid pursuant thereto was not made by employer/carrier, or for that matter sought by claimant. The parties to this claim agreed that the $20,000 received by claimant pursuant to the third-party suit is less than the compensation to which claimant would be entitled under the Act. Employer has paid no compensation or medical benefits to claimant since March 22, 1988.

The administrative law judge noted that the sole issue presented in this case is whether claimant's action in accepting an offer of judgment under Federal Rule of Civil Procedure (Rule) 68, for which consent was neither sought from nor given by employer/carrier, constitutes a "settlement" barring claimant's rights under the Act as provided by 33 U.S.C. §933(g)(1). The administrative law judge initially determined that a judgment under Rule 68 results from "an agreement among the parties involving mutual concession," and that the purpose of Section 33(g)(1), to protect the interests of employer, would be avoided if a claimant were allowed to settle third-party claims under Rule 68 without employer's approval. The administrative law judge, thus, found that claimant's acceptance of the third-party defendant's Offer of Judgment rendered pursuant to Rule 68 constituted a settlement of his third-party claim within the scope of the written approval requirements of Section 33(g)(1) of the Act. In light of this finding, the administrative law judge concluded that since the third-party settlement entered into by claimant did not conform to the explicit provisions of Section 33(g)(1), claimant is not entitled to any compensation or medical benefits due and/or owing as of the date of the approved offer of judgment and thereafter. Accordingly, the administrative law judge denied claimant's Motion for Summary Judgment and granted employer/carrier's Motion for

Summary Judgment. On appeal, claimant asserts that the administrative law judge erred by finding his claim barred by Section 33(g) of the Act. Employer/carrier responds, urging affirmance of the administrative law judge's Decision and Order.[1] Claimant has also filed a reply brief reiterating his challenge to the administrative law judge's finding under Section 33(g).

Claimant argues that his acceptance of the Offer of Judgment under Rule 68 is not equivalent to a settlement contemplated by Section 33(g) of the Act. Claimant maintains that the third-party document executed by claimant, CNG Producing Company and Bruce Boat Rental represents a judgment and thus does not constitute a settlement to which Section 33(g) applies. In support of his contention, claimant cites *Maguire v. Federal Crop Insurance Corp.*, 181 F.2d 320 (5th Cir. 1950), for the proposition that the Offer of Judgment under Rule 68 cannot be a settlement since the court issued an order rendering judgment according to the tender.

Claimant further avers that he should not now be penalized for following the procedures of the district court by entering into the Offer of Judgment, since both claimant and his attorney believed that the damage award on this federal third-party claim would not exceed the Offer of Judgment amount. Consequently, claimant argues that he was compelled to accept the Offer of Judgment, since had he refused, Rule 68 would have required him to be responsible for all costs incurred by the other parties after they made the offer. Claimant also asserts that he is prejudiced by a sanction provision in Rule 68 which is now being used to defeat any remedy he may have had for future workers' compensation benefits under the Act. Moreover, claimant asserts that no damage or injury has been sustained by the employer and/or carrier through claimant's acceptance of the Rule 68 Offer of Judgment without its approval.

[1]The Director, Office of Workers' Compensation Programs (the Director), filed a response brief requesting that the Board hold the instant case in abeyance pending resolution by the United States Supreme Court of *Estate of Cowart v. Nicklos Drilling Co.*, 60 U.S.L.W. 3418 (U.S. Dec. 9, 1991)(No. 91-17), *granting review of* 927 F.2d 828 (5th Cir. 1991)(*en banc*). We note that the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), was issued on June 22, 1992, thereby making the Director's request moot.

SECTION 33

Section 33 of the Act addresses situations where an employee sustains a disability compensable under the Act, for which a third party may be liable in damages. In such a case, the claimant need not elect whether to seek compensation or pursue a third-party suit to recover damages. 33 U.S.C. §933(a). Section 33 permits an employee to file suit against a third party while also pursuing compensation under the Act and contains provisions designed to prevent injured employees from receiving double recoveries where they are entitled to both benefits under the Act and civil damages from a successful suit. *See* 33 U.S.C. §933(e), (f), (g); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986); *United Brands v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

The purpose of Section 33(g) is to protect the employer against the employee's entering into an inordinately low settlement, which would deprive the employer of a proper offset under Section 33(f). *Collier*, 784 F.2d at 644, 18 BRBS at 67 (CRT); *see also Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992). Section 33(f) acts as a safeguard against double recovery by allowing employer to offset against its liability the net amount of any recovery that the person entitled to compensation receives from third parties for the same disability claimed under the Act.[2] *Collier*, 784 F.2d at 644, 18 BRBS at 67 (CRT); *Melson*, 594 F.2d at 1068, 10 BRBS at 494.

Under Section 33(g)(1) of the Act, an employer is not obligated to pay compensation to an employee who, without the employer's and carrier's prior written approval, settles a claim against a third person for an amount less than the compensation to which the employee is entitled under the Act.[3] An employee is required to provide notification under Section 33(g)(2) to his employer, but is

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[2]Section 33(f) provides

> If the person entitled to compensation institutes proceedings . . . 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. . . .

33 U.S.C. §933(f)(1988).

[3]Section 33(g)(1), as amended in 1984, 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,

not required to obtain prior written approval, in two instances: (1) where the employee obtains a *judgment*, rather than a *settlement* against a third party; or (2) where the employee settles for an amount greater than or equal to employer's liability under the Act.[4] *Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT). Claimant seeks to have this case fall under subsection (g)(2) by claiming that the Offer of Judgment is the equivalent of a judgment rather than a settlement.

In *Morauer & Hartzell, Inc. v. E. D. Woodworth*, 439 F.2d 550 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit held that a judicial determination of liability and/or damages is necessary to avoid a termination of benefits under Section 33(g). The court noted that the consent judgment obtained in that case by the claimant against a third-party tortfeasor was not the result of an independent judicial finding of the value of the claim after a full presentation of the evidence. Rather, the consent judgment was, at most, an informal exploratory attempt by the trial judge to determine the possibilities for a private settlement. The court observed that the trial judge did not force acceptance of his suggested figure by indicating that it was the highest amount he would accept from the jury if the case had gone to trial. The plaintiff was, therefore, free to reject the settlement opportunity and have the case heard. Consequently, the court concluded that since the consent judgment was not a judicial determination but rather a "compromise" within the meaning of Section 33(g), claimant's subsequent claim for additional compensation was barred. This rationale echoes the United States Supreme Court's decision in *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968), wherein the Court specifically held that since an Order for Remittitur is a judicial determination of recoverable damages, and is not an agreement between the parties involving mutual concessions, it cannot be a settlement for purposes of Section 33(g). In *Banks* the Supreme Court held that the danger of an employee's accepting too little for his cause of action against a third party is not present when damages are determined, not by negotiations between an employee and third party, but rather by the independent evaluation of a trial judge. *Banks*, 390 U.S. at 467. Therefore, a key factor in determining the applicability of Section 33(g)(1) is the relevant involvement of the parties and the district court judge in the resolution of the third-party claim.

> 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)(1988).

[4]In the instant case, the parties have stipulated that the amount received by claimant pursuant to the third-party settlement is less than the compensation to which claimant would be entitled under the Act, and thus, claimant is required to obtain employer's written approval of the third-party settlement, unless claimant's acceptance of the third-party Offer of Judgment is determined to be a judgment.

Rule 68 of the Federal Rules of Civil Procedure permits a defendant, until ten days before trial, to offer to allow a judgment to be taken against it. Fed. R. Civ. P. 68. If the plaintiff rejects this offer, and a subsequent judgment in favor of the plaintiff is not more favorable than the rejected offer, the plaintiff must pay the costs incurred after the offer was made.[5] *Id.* The application of Rule 68 is mandatory, both in terms of the judge's entering a Rule 68 Offer of Judgment if the plaintiff accepts the offer, and in awarding costs incurred after the offer was made and refused, and a lower judgment ensued. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (6th Cir. 1989); *Simon v. Intercontinental Trans. (ICT) B.V.*, 882 F.2d 1435 (9th Cir. 1989); *Johnston v. Penrod Drilling Co.*, 803 F.2d 867 (5th Cir. 1986). Unlike imposed judgments and ordinary consent judgments, Rule 68 leaves no discretion with the district court to do anything but enter judgment once an offer has been accepted. *Id.* In this regard, judgments entered under Rule 68 are self-executing. *Id.* Once the parties agree on the terms of the judgment, the court has no discretion to withhold its entry or to otherwise frustrate the agreement. *Id.*

To decide whether there has been a valid offer and acceptance for purposes of Rule 68, courts apply the principles of contract law. *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988); *Johnson v. University College of University of Alabama in Birmingham*, 706 F.2d 1205 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983); *Adams v. Wolff*, 110 F.R.D. 291 (D. Nev. 1986); *Bently v. Bolger*, 110 F.R.D. 108 (C.D. Ill. 1986). Thus, there must be an objective manifestation of mutual assent for offer and acceptance to create a binding Rule 68 Offer of Judgment. *Radecki*, 858 F.2d at 400. This occurs between the parties, completely independent of any tribunal officer, and therefore, reflects the nature of a settlement agreement rather than a judgment. *Id.*

[5]Fed. R. Civ. P. 68, states in pertinent part:

> At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. [If the offer is rejected and] . . . [i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

In *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), the United States Supreme Court delineated the function of Rule 68 as follows:

> The purpose of Rule 68 is to encourage the *settlement* of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional *inducement to settle* in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumably will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a *formal settlement offer* is made. If a plaintiff rejects a *Rule 68 settlement offer*, he will lose some of the benefits of victory if his recovery is less than the offer.

August, 450 U.S. at 352, [emphasis added]. In *Marek v. Chesny*, 473 U.S. 1 (1986), the Supreme Court similarly referred to Rule 68 as a "pretrial offer of settlement." *Marek*, 473 U.S. at 4. Consequently, the language of the *August* and *Marek* decisions strongly indicates that Rule 68 is intended to be a settlement device rather than a decision rendered by a court after judicial determination of contested damages and liability following the presentation of evidence.[6] *See also Herrington v. County of Sonoma*, 12 F.3d 901 (9th Cir. 1993)(referring to Rule 68 Offer of Judgment as an offer of settlement.).

In the instant case, the third-party defendants offered and claimant accepted a "Rule 68 settlement offer," in accordance with the basic tenets of contract law. Despite assertions to the contrary, claimant clearly had the option to reject the defendant's offer and have his case heard on its merits. However, claimant, presumably after a consideration of the relevant factors of his third-party claim, elected to accept the defendant's offer because that course of action appeared to be in his best interests. At that time, there was no guarantee that claimant would be able to obtain a favorable judgment awarding a greater sum of money had he sought to fully pursue his third-party suit. Claimant had to weigh the aforementioned information against the possibility that a subsequent judicial award of damages might not be greater than the settlement offer, thus, subjecting claimant to possible Rule 68 sanctions. Claimant, therefore, was not compelled to accept the offer.

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[6]Additional support for this determination is found through an examination of proposed Congressional amendments to Rule 68. In response to a growing belief that Rule 68 had failed to achieve its goal of encouraging settlements, an advisory committee proposed amendments in 1983 and 1984. 7 Moore's Federal Practice 68.07. Among the proposed changes, the Advisory Committee recommended that Rule 68 be "recaptioned to refer to `settlement' to indicate [that] it is that process rather than entry of a judgment that is being fostered." Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 102 F.R.D. 432 (1984). The Advisory Committee, however, tabled these proposals in 1986, largely due to suggestions that the proposed amendments as a whole involved substantive changes which violated the Rules Enabling Act, 28 U.S.C. §2072, which provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right." 7 Moore's Federal Practice 68.07[5].

Despite having signed a "Judgment Pursuant to Federal Rule of Civil Procedure 68," Judge Collins had no part in deciding the liability of the parties, or in determining whether the amount offered and accepted was appropriate. *See Banks*, 390 U.S. at 467. Consequently, there was no independent judicial evaluation of claimant's third-party claim. Judge Collins merely approved the stipulated settlement reached by the parties. Thus, the very nature of the Rule 68 Offer of Judgment in this case openly lends itself to being categorized as a settlement agreement. We, therefore, hold that the Rule 68 Offer of Judgment is tantamount to a formal settlement agreement and, thus, is a "compromise" for purposes of Section 33(g)(1).[7]

We also hold that claimant's remaining contentions are meritless. First, claimant is not being penalized for following the procedures of the court by entering into the Offer of Judgment. While Rule 68 does place an additional burden on claimant in that it provides possible sanctions against a plaintiff who rejects an offer of judgment and is subsequently awarded damages for less than the rejected offer, this additional burden is meant to serve as an "additional inducement" for claimant to settle rather than litigate his claim. *August*, 452 U.S. at 352. In this regard, the possibility of Rule 68 sanctions is not the equivalent of a penalty. Claimant's denial of additional compensation benefits under the Act is not immediately due to his execution of the Offer of Judgment. Claimant could have entered into such an agreement and remained eligible for additional compensation under the Act, by obtaining employer/carrier's approval of the agreement. The denial of additional compensation benefits in this case is a direct result of claimant's failure to comply with the Section 33(g)(1) prior written approval requirements.

Additionally, contrary to claimant's contention, employer has sustained an injury through the claimant's acceptance of the Rule 68 Offer of Judgment. As previously noted, the purpose of Section 33(g) is to protect the employer against the employee's entering into an inordinately low settlement, which would deprive the employer of a proper offset under Section 33(f). *Collier*, 784 F.2d at 644, 18 BRBS at 67 (CRT); *Melson*, 594 F.2d at 1068, 10 BRBS at 494. Consequently, the third-party settlement in this case has a direct effect on employer's liability for additional compensation benefits, and thus, most certainly has an impact upon employer.

Lastly, claimant's reliance on *Maguire*, 181 F.2d at 320, is misplaced. In *Maguire*, the court held that an offer of compromise is not an offer of judgment. The basis for the court's decision rests largely on the fact that the offer of compromise in *Maguire* failed to conform to the formal requirements of Rule 68. The court specifically recognized this distinction "so that appellee, before

[7]Claimant further avers that at the time the tender of judgment was accepted, claimant did not believe or state that he was accepting an offer of settlement. Claimant, however, has shown nothing to support this belief and a plethora of cases in existence prior to the execution of the Offer of Judgment in this case referred to an offer of judgment as a settlement agreement. *See, e.g., August* 450 U.S. at 346; *Marek*, 473 U.S. at 1; *Radecki*, 858 F.2d at 397; *Johnson*, 706 F.2d at 1205. Clearly, there was mutual assent between claimant and the third-party defendants in this case and thus, a meeting of the minds as to the terms of the Offer of Judgment. Accordingly, contract law establishes the existence of a contract for the purpose of settling the third-party claim. Claimant's assertion, therefore, does nothing to change the fact that the Rule 68 Offer of Judgment meets the definition of a settlement.

another trial, [might] avail itself of the benefit of this rule [68] by formal compliance with the provisions thereof," if it saw fit to do so. *Maguire*, 181 F.2d at 322. Moreover, the language of *August*, 450 U.S. at 352, indicates that Rule 68 could be interpreted to include a formal settlement offer, so long as that offer conforms with that rule's requirements. *See generally S.G.C. v. Penn-Charlotte Associates*, 116 F.R.D. 286 (W.D. N. C. 1987). Therefore, the holding in *Maguire* cannot stand, as claimant suggests, for the proposition that an offer of judgment is not a compromise between the parties.

Inasmuch as claimant failed to obtain employer's written approval before the Rule 68 settlement agreement was executed, we hold that the administrative law judge properly found that the claim is barred by the provisions of Section 33(g)(1). *Cowart*, 112 S.Ct. at 2589, 26 BRBS at 49 (CRT). We, therefore, affirm the administrative law judge's determination that claimant is not entitled to any further benefits due and/or owing as of the date of the approved Offer of Judgment and thereafter. Consequently, the administrative law judge's denial of claimant's Motion for Summary Judgment and granting of employer/carrier's Motion for Summary Judgment is affirmed as it accords with law.

Accordingly, the administrative law judge's Decision and Order - Denying Claimant's Motion for Summary Judgment and Granting Employer/Carrier's Motion for Summary Judgment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge