

BRB No. 92-1493

JUAN FORMOSO)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TRACOR MARINE, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
GALLAGHER BASSETT)	
INSURANCE SERVICE)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision and Order on Motion for Reconsideration of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

G. William Allen, Jr., Fort Lauderdale, Florida, for claimant.

Janet M. Greene (Underwood, Gillis & Karchner, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order on Motion for Reconsideration (91-LHC-0825) of Administrative Law Judge Clement J. Kichuk 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 if they 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).

Claimant injured his lower back while in the course of his employment with employer on

September 25, 1981. Employer voluntarily paid claimant compensation and medical benefits pursuant to the workers' compensation laws of Florida as of September 26, 1981. In November 1981, claimant was hospitalized at the Broward General Medical Center for treatment. On November 27, 1981, claimant sustained a compression fracture at L1/2 when he jumped out of a window at the hospital due to a psychotic reaction to prescription drugs administered at the hospital. Claimant subsequently filed a medical malpractice suit against both the hospital and Dr. Martin May, a staff physician. In response to this action, employer filed a lien with the Florida circuit court based on its prior voluntary payments of compensation and medical benefits to claimant. The state court action was scheduled for trial on May 2, 1988; however, at a settlement conference held on that day, the parties agreed to resolve the suit pending a release of employer's lien. Specifically, the hospital agreed to pay claimant \$12,500 in settlement of the suit, and Dr. May agreed to pay \$5,000. Although the parties informed the court of the settlement, they did not move for dismissal of the suit because the settlement was contingent on employer's releasing its lien.

Thereafter, counsel for claimant and employer exchanged correspondence regarding whether employer would accept \$500 in satisfaction of its lien; employer's attorney ultimately stated he had "no answer" from employer's claims representative regarding this matter. On December 14, 1988, the Florida circuit court, *sua sponte*, issued a Final Order of Dismissal, dismissing claimant's suit with prejudice. Claimant filed a motion to vacate the court's dismissal on March 2, 1989, but his motion was denied by the Florida court on March 15, 1989.

On September 5, 1989, employer filed a Notice of Suspension of Compensation with the Florida Department of Labor, indicating that it had terminated its payments of compensation under the state act to claimant as of August 30, 1989, since claimant had received over 350 weeks of total disability benefits. Claimant then filed a claim for benefits under the Act. Employer controverted the claim alleging, *inter alia*, that claimant's failure to obtain its written approval of the settlement between claimant, Broward General Medical Center, and Dr. May barred his claim pursuant to Section 33 of the Act, 33 U.S.C. §933.

In his Decision and Order, the administrative law judge initially found that employer never released its lien and that claimant never received any money from either the Broward General Medical Center or Dr. May. The administrative law judge therefore concluded that, because the proposed settlement was never executed, claimant was not barred by Section 33(g) from seeking benefits under the Act. The administrative law judge then determined that claimant is entitled to benefits for temporary total disability, 33 U.S.C. §908(b), from the date of injury to March 1982, and to permanent total disability benefits, 33 U.S.C. §908(a), thereafter. Employer was found entitled to a credit for benefits paid pursuant to the workers' compensation law of Florida. *See* 33 U.S.C. §903(e). Lastly, the administrative law judge found employer responsible for medical costs associated with claimant's continuing psychiatric treatment. 33 U.S.C. §907.

Employer thereafter moved for reconsideration of this decision. In his Decision and Order on Motion for Reconsideration, the administrative law judge reaffirmed his prior finding that claimant's medical malpractice suit did not proceed to settlement, and that claimant was thus not barred from receiving compensation under the Act. Additionally, the administrative law judge

found that employer did not establish prejudice from the dismissal of claimant's third-party action because employer offered no proof that the total settlement offer of \$17,500 was unfair or that a trial would have resulted in a greater damages award. Accordingly, the administrative law judge affirmed his award of compensation to claimant.

On appeal, employer contends that the administrative law judge erred in finding that Section 33(g) does not bar claimant's claim for benefits. Specifically, employer argues that the administrative law judge erred by failing to give full faith and credit to the Florida circuit court's Final Order of Dismissal. Employer also contends the administrative law judge's finding that the parties to the third-party suit did not enter into a settlement is not supported by substantial evidence. Claimant responds, urging affirmance.

I. Collateral Estoppel.

In considering the question of whether the administrative law judge properly determined that Section 33(g)¹ does not operate to bar claimant's entitlement to benefits, we first address employer's arguments on appeal that, pursuant to the Florida circuit court's Final Order of Dismissal, the instant claim is barred under Section 33(g) as a matter of law.² Specifically, employer argues the

¹Amended Section 33(g) provides in pertinent part:

- (g)(1) If . . . [a] person entitled to compensation (or the person's representative) enters into a settlement with a third person . . . 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 . . . 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.

33 U.S.C. §933(g) (1988).

²In its Reply Brief employer asserts that claimant's failure to respond to this argument should be

administrative law judge erred by not according full faith and credit to the Florida court's finding of a settlement. In this regard, employer asserts that whether or not there was an executed settlement was not at issue before the administrative law judge because the Florida court's finding of a settlement in its Final Order of Dismissal is entitled to full faith and credit and that, pursuant to that order, the administrative law judge was constrained to find the instant claim barred pursuant to Section 33(g)(1). We disagree.

While employer is correct in noting that factual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals, *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988), the doctrine of collateral estoppel bars only relitigation of a particular legal or factual issue that was necessarily litigated and actually decided in a previous suit.³ *See Walton Motor Sales, Inc. v. Ross*, 736 F.2d 1449, 1456 n.12 (11th Cir. 1984); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286, 291 (1994).

In the instant case, employer seeks to assert collateral estoppel effect to the Final Order of Dismissal issued by the Florida circuit court on December 14, 1988, which states, in relevant part, that "the Court having been notified that the matter was amicably resolved, . . . this matter . . . is . . . dismissed with prejudice." *See* RX 2. The plain language of this statement, however, indicates only a finding that the court received notice of a settlement and is not unambiguous evidence that the parties actually executed a settlement. *See Chavez v. Director, OWCP*, 961 F.2d 1401, 1412-1414, 25 BRBS 134, 139-141 (CRT)(9th Cir. 1990), *aff'g in part part Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990). Moreover, the Florida circuit court's order does not indicate that the issue of the existence of a third-party settlement was actually litigated and decided before it, nor does that order affirmatively state that there was an executed settlement. The record contains contradictory evidence that the parties to this third-party action argued against dismissal with prejudice before the circuit court judge prior to the issuance of her Final Order of Dismissal. *Compare* Tr. at 63-64 with CX 1 at 12-13. Accordingly, we hold that the statement contained in the Florida circuit court's Final Order of Dismissal that the court had been notified that the matter had been amicably resolved is not entitled to collateral estoppel effect in the instant case, as employer has failed to establish that the parties to the third-party action actually litigated before the state circuit court the issue of whether or not there was an executed settlement, which is the relevant issue addressed by the administrative law judge in his Decision and Order. *See Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT); *see also*

construed as an admission by claimant pursuant to Federal Rule of Appellate Procedure 28. The Board, however, is not bound by technical rules of pleading and procedure. *See* 33 U.S.C. §923(a); *see also Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 81 (1989).

³We note that the collateral estoppel doctrine provides the applicable principle, rather than the doctrine of full faith and credit, as full faith and credit does not apply to judicial findings but to judgments. *See Durfee v. Duke*, 375 U.S. 106, 109-111 (1963). Employer's argument on appeal rests on acceptance of a "finding" that a settlement occurred.

Vodanovich, 27 BRBS at 291. The administrative law judge, therefore, committed no error in failing to find that the instant claim was barred pursuant to Section 33(g) based upon the doctrine of collateral estoppel.

II. Settlement.

Employer, in the alternative, argues the administrative law judge erred in failing to find that a settlement had been executed between claimant, the Broward General Medical Center, and Dr. May, and that this executed settlement was sufficient to bar the instant claim for compensation pursuant to Section 33(g) of the Act. Employer also contends it was prejudiced by the settlement due to the Final Order of Dismissal, which irrevocably dismissed claimant's third-party medical malpractice suit.

The administrative law judge found that no settlement occurred based on the testimony of Donald Korman, who represented Dr. May in the third-party suit. Mr. Korman stated that the settlement was contingent on employer's agreeing to release its lien. As employer never agreed to a release, Mr. Korman testified that no money was paid by Dr. May to settle the case. Moreover, the administrative law judge also credited the absence in the record of either a Joint Stipulation for Voluntary Dismissal or an agreed Order of Dismissal, which the administrative law judge found is normally utilized to notify the court that the parties agreed to settle the case and that the case may be dismissed. The administrative law judge thus concluded that the proposed settlement of the suit was not executed and failed due to a lack of consideration. Lastly, the administrative law judge also rejected employer's allegation of prejudice; regarding this issue, the administrative law judge found that employer offered no proof of prejudice or evidence that the \$17,500 settlement offer was unfair or that a trial on the merits would have resulted in a larger award of damages.

We hold that the administrative law judge rationally determined that no third-party settlement between claimant, the Broward General Medical Center, and Dr. May had been executed for purposes of Section 33(g). The administrative law judge properly found, based upon the testimony of Mr. Korman, that the proposed settlement was contingent upon employer's release of its lien, that employer did not release that lien, and that claimant received no settlement funds from Dr. May. Moreover, the administrative law judge found that claimant had not signed any releases. We therefore affirm the administrative law judge's determination that, because no settlement of claimant's third-party suit was executed, there was no settlement within the meaning of Section 33(g), and the Section 33(g) bar is thus inapplicable. *See Chavez*, 961 F.2d at 1413, 25 BRBS at 139 (CRT); *Stadtmiller v. Mallott and Peterson*, 28 BRBS 304 (1994); *Rosario v. M.I. Stevedores*, 17 BRBS 150 (1985).

Finally, we reject employer's argument that it will be prejudiced if an executed settlement is found not to have been entered into by the parties to claimant's third-party suit, inasmuch as the dismissal of the action precludes its recovery of benefits paid from a third party. A claimant's termination of or failure to pursue a third-party action does not affect the rights or obligations of the parties under Section 33(g). *See Mills v. Marine Repair Service*, 22 BRBS 335 (1989)(decision on

recon). Section 33(g) is the sole statutory provision barring claimant's right of recovery under the Act as a result of third-party litigation, and it applies only where there has been a settlement or judgment. Thus, any prejudice resulting from claimant's failure to prosecute his third-party suit cannot terminate employer's liability. *Id.* at 339.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge