BRB No. 97-0261

JOSE PEREZ	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Glen Cove, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer.

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

BROWN, Administrative Appeals Judge:

Claimant appeals the Decision and Order (95-LHC-1012) of Administrative Law Judge Ralph A. Romano denying benefits 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).

Claimant suffered a back injury on February 23, 1987, during the course of his employment with employer in Jersey City, New Jersey. CX-1. Claimant received compensation from employer for temporary total disability from February 24, 1987 through October 2, 1988, and permanent total disability for 104 weeks from October 3, 1988,

through October 3, 1990, after which payments were made by the Special Fund pursuant to Section 8(f), 33 U.S.C. §908(f). *Id*.

Claimant filed a third-party action in New York state court against the Badgio Trucking Company, which in turn impleaded employer as a defendant to that action. *See* CX-23. Claimant and Badgio discussed a settlement of this lawsuit. During these negotiations, employer agreed to waive all but $35,000 of its $102,127 compensation lien, and accepted $35,000 in satisfaction of the lien. CXs-7, 13. The Office of Workers' Compensation Programs (OWCP) also agreed to waive a portion of the $18,486.20 lien which existed in favor of the Special Fund. An agreement to settle the case for $225,000 was reached, in 1991, and thereafter, claimant forwarded a Form LS-33 to employer for its signature and approval. CX-6A, 9. Employer, however, refused to sign the form or otherwise provide its consent to the settlement. *See* EXs-9(a), (c).

Compensation payments to claimant were suspended until the remainder of the Special Fund's credit was absorbed. *See* CX-17. On September 30, 1994, OWCP notified claimant that it was reinstating claimant's compensation benefits. *See* CX-19; EX-5. This decision met with employer's objection, and a dispute developed over whether claimant was entitled to continued benefits. After an informal conference, the district director agreed with employer that claimant's failure to obtain employer's written approval of the third-party settlement barred him from future compensation benefits pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g)(1994).[1] *See* EXs-1-4. This case was referred to the Office of Administrative Law Judges for a formal hearing, after which the administrative law judge issued a Decision and Order denying benefits on the grounds that claimant's right to future compensation was barred under Section 33(g) because of claimant's failure to obtain written approval of the settlement with the trucking company.

The administrative law judge emphasized that employer informed claimant that its waiver of a portion of the compensation lien should not be construed as an approval of the settlement. The administrative law judge found that claimant and employer in this instance effectively "struck a deal" under which employer would forgive the major portion of its lien in return for the termination of its obligation to pay future compensation. Decision and Order at 6. Distinguishing *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101

[1]Although the district director determined that Section 33(g) barred future compensation, the Director took a contrary view before the administrative law judge, arguing that "employer's participation in the tort proceedings, settlement negotiations, and settlement took the case outside the scope of the formal approval requirement." Director's Post-hearing Brief at 2. The Director has not participated on appeal.

(CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993), which was cited by both the Director and claimant as support for the argument that employer's "participation" in the settlement in this case absolved claimant's failure to obtain a written approval under Section 33(g)(1), the administrative law judge noted that in *Sellman,* the employer also was a plaintiff against the third party and settled its claim directly with the third party. Decision and Order at 5. In the instant case, the administrative law judge found that employer compromised its lien, and, while named as a defendant in the tort suit, its participation does not rise to the level of the employer's participation in *Sellman*. The administrative law judge relied heavily on the fact that employer specifically informed claimant that the compromise of its lien could not be construed as an approval of the settlement under Section 33(g). *See* CXs-13, 14; EX-9.

Claimant appeals the administrative law judge's finding that he is not entitled to further benefits due to the operation of Section 33(g). Claimant contends that the administrative law judge erred in finding this case distinguishable from *Sellman,* and that employer's participation in the settlement negotiations is sufficient to preclude application of the Section 33(g) bar. Employer responds, seeking affirmance of the administrative law judge's decision.

Section 33(g)(1) requires that an employee obtain his employer's written approval prior to entering into a third-party settlement for less than the amount to which he is entitled under the Act. Pursuant to Section 33(g)(2), the employee forfeits his right to future compensation if no written approval is obtained as required in Section 33(g)(1). He need only notify his employer under Section 33(g)(2) if he obtains a judgment against the third party or if he settles the third-party claim for an amount greater than that to which he is entitled under the Act. *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 26 BRBS 49 (CRT) (1992).

We affirm the administrative law judge's finding that employer's participation in the third-party action in this case does not amount to a constructive approval abrogating claimant's responsibility to secure employer's prior written approval of the settlement. Both *Sellman* and the Board's decision in *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), are distinguishable from the instant case. In *Sellman*, the employer initiated its own third-party suit and thus was a co-plaintiff with claimant. It participated in the settlement negotiations and recovered directly from the defendants, but refused to give claimant written approval of his companion settlement with the third party. The United States Court of Appeals for the Fourth Circuit, affirming the Board on this issue, held that Section 33(g) did not apply in this situation because employer also reached a settlement with the third-party, as Section 33(g) applies only when "the person entitled to compensation" reaches a settlement with the third party. The court of appeals observed that if employer directly participates in the settlement process and assents to its terms, it has assured, by its own

actions, the protection of the rights.[2] *Sellman*, 954 F.2d at 243, 25 BRBS at 106 (CRT). The court further distinguished the case before it from those in which the employer participated in the third-party litigation yet opposed the settlement. *Id.*, 954 F.2d at 243 n. 2, 25 BRBS at 106 n. 2 (CRT).

In *Deville*, 26 BRBS at 123, the Board, citing *Sellman*, held that Section 33(g) was inapplicable in that case because the employer intervened in the third-party suit on the side of the claimant, appeared at the hearing, and contributed to the settlement agreement

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[2]The Fourth Circuit observed that

> [employer] directly participated in the third-party action against the [defendants], and fully participated in the negotiations leading to the execution of "companion" settlement agreements which, as the Board stated, "were so intermeshed that they could be considered a joint settlement." After all this, and after accepting the settlement proceeds from [its agreement with the third-party defendants, employer] refused to give its written approval of the [parallel agreement between Sellman and the third-party defendants].

I.T.O. Corp. of Baltimore v. Sellman, 954 F.2d 239, 243, 25 BRBS 101, 106 (CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993).

which provided for its offset.[3] Accordingly, the Board held that employer's participation in third-party proceedings was sufficient to preclude the applicability of Section 33(g)(1). Further, even if Section 33(g)(1) did apply to the facts in that case, the employer in *Deville* gave written approval prior to the execution of the settlement by being an actual signatory to the agreement. *Id.* at 131-132; *see also Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994).

In this case, employer was impleaded as a third-party defendant in the tort litigation by the defendant trucking company, and participated to some extent in the settlement negotiations by agreeing to compromise its lien. *See* EX-9. Although employer's representative stated that it maintained an interest in all third-party actions, *see* CX-4, Mark Cummings, employer's risk manager, testified that it was

> not our position to become involved into the third party proceedings and to consent to these actions. We would much prefer to see the cases take their own natural course and waive a portion of our lien if and only if it would facilitate the settlement.

Tr. at 26. Mr. Cummings emphasized that employer was only waiving a portion of the lien, and was not otherwise interested in participating in the third-party action. *See* Tr. at 37. Employer also sought to resolve this case because it had been impleaded as a defendant, contrary to the provisions of the Act, *see* 33 U.S.C. §905(a), and its counsel was authorized to sign a "stipulation of discontinuance" to end this litigation. Tr. at 38.

The instant case thus is similar to *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996)(Brown, J., concurring in pert. part, dissenting on other grounds)(Smith, J., dissenting in pert. part, concurring on other grounds), in which a majority of the panel affirmed the administrative law judge's finding that Section 33(g) applied notwithstanding employer's participation in the settlement process. The administrative law judge in that case applied Section 33(g) to bar the employee's entitlement to future compensation because of his failure to obtain written approval of a third-party settlement. That employer, through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process. Its carrier's counsel was present when two "satisfactions of judgment" were executed, but unlike *Deville* did not intervene on claimant's side, and counsel refused to sign either document and indeed "took steps to distance himself from

[3]The Board noted that in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483, 26 BRBS 49, 53(CRT) (1992), the Supreme Court specifically declined to address the issue of the effect of employer participation in the settlement process as it was not included in the question on which *certiorari* was granted. *Deville*, 26 BRBS at 131 n.10.

the settlement negotiations." 30 BRBS at 188. In affirming the administrative law judge's application of Section 33(g), the Board upheld the findings that employer's participation was insufficient to preclude the application of Section 33(g)(1), "[a]s carrier did not appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so." *Id*.

Inasmuch as employer's actions in the present case are similar to that of the employer's actions in *Pool*, the administrative law judge's finding that Section 33(g) applies to this case affirmed. That employer waived part of its lien is insufficient to preclude application of Section 33(g), *see generally Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), especially in view of that fact that it was impleaded into the tort suit by the defendant, and employer's specific statement that the compromise of its lien was not to be construed as approval of the settlement. We therefore affirm the administrative law judge's determination that Section 33(g) bars claimant's entitlement to future compensation for his failure to obtain written approval of the third-party settlement.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring:

I agree with my colleagues' conclusion that employer's activities in connection with the third-party litigation do not preclude the application of Section 33(g) on the instant record. Nevertheless, I write separately to emphasize the distinctions between the facts of the instant case and those presented in *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996)(Brown, J., concurring in pert. part, dissenting on other grounds)(Smith, J., dissenting in pert. part, concurring on other grounds), wherein I would have held that employer's participation through its carrier in the "settlement process was sufficient to constitute a constructive approval of the settlement, thereby rendering the Section 33(g) bar inapplicable." *Pool*, 30 BRBS at 189. Employer/carrier in that case intervened in the third-party lawsuit, and, through counsel, was present at settlement negotiations and appeared with claimant before a notary to execute a release. Further, the carrier in *Pool* joined in claimant's motion to dismiss with prejudice the third-party action, and counsel executed a "Satisfaction of Judgment" acknowledging full satisfaction of the judgment in that case. *See* 30 BRBS at 190.

In this case, employer was impleaded as a defendant in the state lawsuit by the defendant trucking company. Although employer agreed to waive a portion of its lien, which action may have facilitated the termination of the tort action, employer never represented that it would approve the settlement, and indeed expressly stated that the satisfaction of its lien was not intended to constitute approval of the compromise with the third-party defendant. CX-13; EX-9; Tr. at 44.

In short, employer's participation in the state lawsuit was confined to its defense against the impleader and its grant of claimant's request that it waive a portion of its compensation lien. Employer's representative maintained that the tort litigation and the compensation claim were separate, *see* Tr. at 37, and reiterated that the decision to waive a portion of its lien does not equate to approval of the settlement. Tr. at 49. In view of employer's minimal participation in the tort action, the case for application of the Section

33(g) is more compelling than that in *Pool*. I therefore concur in the majority's decision to affirm the Decision and Order of the administrative law judge.

ROY P. SMITH
Administrative Appeals Judge