BRB No. 98-153

BRENT SCHAUBERT	)	
	)	
Claimant	)	DATE ISSUED: Oct. 14, 1998
v.	)	
	)	
OMEGA SERVICES INDUSTRIES	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
ELF AQUITAINE OPERATING INCORPORATED	)	
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Michael A. Varner (Brown, Sims, Wise & White, P.C.), Houston, Texas, for Elf Aquitaine and Cigna Insurance Company.

John A. Keller, Mandeville, Louisiana, for Omega Services Industries and Insurance Company of North America.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Elf Aquitaine (Elf) appeals the Decision and Order on Remand (95-LHC-1150) of Administrative Law Judge Richard K. Malamphy 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 Longshore Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (OCSLA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case, claimant was employed by Omega Services Industries (Omega), a labor supply company. Omega contracted with Elf to supply it workers, and claimant was assigned to work at Elf's offshore platform off the coast of Louisiana. On October 5, 1990, claimant injured, and later lost, his left thumb while working for Elf. Pursuant to the workers' compensation insurance policy between Omega and the Insurance Company of North America (INA), INA paid claimant disability and medical benefits.[1] Exhs. A, D. INA now seeks reimbursement from Elf, arguing that Elf is claimant's borrowing employer and is responsible for the payment of claimant's benefits.

In 1991, claimant filed a third-party civil suit against several defendants, including Elf, for his injuries. In September 1993, the district court granted Elf's motion for summary judgment, finding it to be claimant's borrowing employer and therefore not subject to civil action. Exh. K. Once the appropriate parties were named as defendants, Exhs. E-J, claimant, in February 1994, settled his third-party case, noting that settlement was made without written approval of Omega or its insurer and that he relinquished his rights under the Act except that he reserved

[1]INA paid claimant temporary partial disability benefits from October 5, 1990, through November 2, 1991, temporary total disability benefits from March 5 through May 26, 1992, and permanent partial disability benefits under the schedule for a 100 percent loss of the left thumb at a rate of $170.54 per week for 75 weeks. Exh. D. INA also paid claimant's related medical expenses between 1990 and 1992.

future claims against Elf.[2] Exh. L. INA attempted to intervene in the case to recover its compensation payments from Elf, but the district court dismissed the intervention as being derivative of claimant's rights which had been settled, and it noted that, in any event, the intervention had been filed after Elf had been dismissed as a party to the case. Exh. M.

Thereafter, INA filed a claim under the Act against Elf, seeking reimbursement of monies it paid to claimant. The administrative law judge granted Elf's motion for summary judgment on the grounds that he did not have jurisdiction to address this insurance contract dispute because claimant no longer had an active claim. INA appealed the decision to the Board. The Board distinguished its decisions in *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984), and *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981), from the instant case because it involves a meritorious claim for benefits for which claimant was fully paid, and the Board reversed the administrative law judge's determination that he lacked jurisdiction to address the issue. The Board held that the primary issue in this case is that of the responsible employer and that any issues related to insurance contracts are merely ancillary to this issue. Therefore, the Board concluded that, as claimant once had a meritorious claim for benefits, the administrative law judge has the authority to address the issue of the responsible employer under the borrowed employee doctrine and that his authority included addressing the ancillary contract issues. *Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997).

On remand, the administrative law judge determined that Elf, as the borrowing employer, is the responsible employer under the Act. Decision and Order at 4. He also addressed each of Elf's defenses against reimbursing INA; he held that INA did not waive its right to indemnification against Elf, that as a result, he need not address the applicability of the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. §9:2780, that Section 33(g), 33 U.S.C. §933(g), does not preclude INA's entitlement to reimbursement for payments it made to claimant prior to his third-party settlement, and that reimbursement between employers is permitted under the Act. Decision and Order at 4-9. Therefore, he ordered Elf to repay INA for all disability and medical expenses it paid to claimant. Decision and Order at 9. Elf appeals this decision, and INA responds, urging affirmance.

JURISDICTION

Elf first contends that the Department of Labor does not have jurisdiction over

[2]Neither Elf, Omega nor INA participated in the settlement process.

this case because it is strictly a contract case between an employer and an insurer, and claimant is not an interested party. Without addressing all of Elf's specific arguments, we reject this assertion, as it was fully addressed in the Board's previous decision, *Schaubert*, 31 BRBS at 24. Therefore, the issue has been decided, and it is the law of the case. *See Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

REIMBURSEMENT

Elf next contends that the Act does not permit the reimbursement INA seeks.[3] Moreover, it contends the administrative law judge erred in relying on *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), *aff'g Arabie v. CPS Staff Leasing*, 28 BRBS 66 (1994). INA argues that reimbursement between a borrowing employer and a lending employer has been upheld by the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises.

In *Total Marine*, the Fifth Circuit upheld the Board's decision that a borrowing employer is liable for a claimant's disability and medical benefits. *Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT). The court then concluded, without discussion:

> in the absence of a *valid and enforceable indemnification agreement*, the borrowing employer is required to reimburse an injured worker's formal employer for any compensation benefits it has paid to the injured worker.

Id. (emphasis added). In *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994), the Board affirmed an administrative law judge's determination that the borrowing employer is solely liable for the claimant's benefits; therefore, it was proper for the administrative law judge to join that employer to the claim and order it to reimburse the claimant's lending employer. Thus, as between borrowing and lending employers, reimbursement of funds paid is permissible in cases arising under the Act. Consequently, we reject Elf's argument to the contrary.

SECTION 33(g)

[3]We reject Elf's assertion that *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992), and *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992), support its position. Those cases involved employers seeking reimbursement from claimants and are not applicable to the facts of this case.

Elf next contends the administrative law judge erred in concluding that Section 33(g) does not apply to bar INA's right to recover benefits it paid to claimant for his work injury. Elf argues that claimant's failure to obtain pre-settlement approval from Omega, Elf or INA invokes the Section 33(g) bar and prevents Elf from being held liable in this case for benefits already paid by INA. INA argues that Section 33(g) does not bar its right to indemnity from Elf, as its right preceded the date of the settlement, its right was not derivative of claimant's rights, and it does not seek reimbursement for future benefits but only for those it paid before the settlement was reached. The administrative law judge found that although Section 33(g) may preclude INA's claim of reimbursement for amounts paid to claimant after he entered into his third-party settlement, it does not bar INA's claim for reimbursement of those benefits it paid prior to the execution of claimant's third-party settlement. Decision and Order at 7-8.

Although the administrative law judge did not determine whether Section 33(g) applies to this case, any error is harmless as Section 33(g) applies in determining whether a claimant's right to benefits is barred by his entry into an unapproved third-party settlement.[4] Section 33(g) is not a basis for denying reimbursement between the potentially liable employers or carriers in this case. *See generally I.T.O. Corp. of Baltimore v. Sellman,* 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *modified in part on reh'g*, 967 F.2d 971, 26 BRBS 1 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993). Thus, Section 33(g) is inapposite to the issue of INA's request for reimbursement.

Since a third-party recovery is at issue, however, the pertinent question is whether INA has a lien right under Section 33(f), 33 U.S.C. §933(f), against claimant's settlement recovery. Section 33(f) states:

If the person entitled to compensation institutes proceedings within the

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[4]Section 33(g)(1) states in pertinent part:

> 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).

> 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).

33 U.S.C. §933(f). This section has been interpreted as granting an employer both a lien against the settlement recovery for payments previously made, as well as a credit or offset against the settlement recovery for accrued or future benefits yet to be paid.[5] *Brown v. Forest Oil Corp.*, 29 F.3d 966, 28 BRBS 78 (CRT) (5th Cir. 1994) (lien); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980) (credit); *Miller v. Rowan Cos., Inc.*, 815 F.2d 1021 (5th Cir. 1987) (lien); *American Home Assurance Co. v. Aldredge*, 501 F.Supp. 266 (E.D.La. 1980) (lien); *Russo v. Flota Mercante Grancolombiana*, 303 F.Supp. 1404 (S.D.N.Y. 1969) (lien); *Kaye v. California Stevedore & Ballast,* 28 BRBS 240 (1994) (credit); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993) (distinguishing between lien and credit).

[5]The Board and the Fifth Circuit have held that, even if an employer waived its right to subrogation, it did not necessarily waive its right to an offset or credit under Section 33(f), as those rights are separate and distinct, one affecting reimbursement of previously paid monies and one affecting liability for accrued or future benefits owed. *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163 (CRT) (5th Cir. 1988); *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986); *Peters v. North River Ins. Co. of Morristown, N.J.*, 764 F.2d 306, 17 BRBS 114 (CRT) (5th Cir. 1985); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980); *Kaye v. California Stevedore & Ballast,* 28 BRBS 240 (1994); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993).

Section 33(b) of the Act provides that if a claimant receives benefits pursuant to an award, the employer is assigned the claimant's rights for damages against third parties. 33 U.S.C. §933(b). This right of subrogation under the Act is also granted if the claimant was paid compensation without a formal award. *The Etna*, 138 F.2d 37 (3d Cir. 1943); *see Allen v. Texaco, Inc.*, 510 F.2d 977, 979-980 (5th Cir. 1975). Section 33(h) transfers this right of subrogation to the insurance carrier who assumed the employer's payments. 33 U.S.C. §933(h); *Aldredge*, 501 F.Supp. at 266. Indeed, the courts have held that this statutory lien on the claimant's third-party recovery is inviolate, *Bloomer v. Liberty Mutual Life Ins. Co.*, 445 U.S. 74 (1980);[6] *Bartholomew v. CNG Producing Co.*, 862 F.2d 555 (5th Cir. 1989), although it may be waived contractually, *Treto,* 26 BRBS at 193, and that it does not require intervention by the employer to initiate the indemnification, *Miller*, 815 F.2d at 1028-1029; *Aldredge*, 501 F.Supp. at 269; *Russo*, 303 F.Supp. at 1406.[7]

In this case, INA paid claimant benefits. Thus, INA has a Section 33(f) lien right against claimant's third-party settlement recovery absent a contractual waiver of its rights. Further, INA attempted to intervene in claimant's third-party suit to recover benefits it had paid, although it apparently named Elf in intervening, rather than the appropriate third-party or claimant. The district court dismissed INA's intervention as derivative of claimant's already-settled claim, and it noted that Elf had been dismissed as a party. After the unsuccessful intervention, INA filed this claim against Elf under the Act, seeking reimbursement from it for benefits paid. Significantly, INA does not seek reimbursement from claimant, who has recovered both from INA and the third-party defendants. Since Elf recovered nothing as a result of the third-party litigation, and INA's claim for reimbursement was dismissed

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[6]In *Bloomer*, the Supreme Court held that a stevedore's lien is not to be reduced by an amount which represents the employer's share of the longshoreman's legal fees in the third-party claim. In reaction to the holding, Congress amended Section 33 of the Act to provide that an employee may retain his costs of litigation and the employer shall recoup its payments of compensation from the remainder of the third-party recovery. 33 U.S.C. §933(f)(1994). This, in effect, validated the Supreme Court's attempt to "negate the 'suggestion that [a] stevedore's lien has priority over the longshoreman's expenses.'" *Session v. I.T.O. Corp. of Ameriport*, 618 F.Supp. 325, 329 (D.N.J. 1985), *aff'd,* 800 F.2d 1138 (3d Cir. 1986) (table), *cert. denied*, 479 U.S. 1086 (1987).

[7]In *Miller*, *Aldredge* and *Russo*, the insurers were either made parties to the civil suit or acted quickly enough thereafter to protect their rights. Thus, the courts determined that the lienholders need do no more, and need not act any sooner, to ensure their lien rights.

by the court, INA cannot rely on its lien rights under Section 33(f) in seeking reimbursement in this case.

INSURANCE ISSUES

INA's right of reimbursement rests on the fact that Elf is claimant's borrowing employer and thus is liable for benefits unless relieved of this obligation by contract. Elf contends that the administrative law judge erred in resolving the contract issues, and we agree. Specifically, we hold that the contract between Elf and Omega precludes INA from obtaining reimbursement from Elf.

In the contract between Omega and Elf, wherein Omega agreed to supply labor to Elf for work on its offshore oil platforms, Omega agreed "to indemnify, defend and hold harmless" Elf against "any and all claims, demands or suits" brought by an employee of Omega

> occurring in, growing out of, incident to, or resulting directly or indirectly from the operations of [Omega], for damages on account of injury or death of persons, even though the liability or responsibility arises from the work or services to be performed, or as the result of some condition of the premises or property of [Elf.]

Exh. B, para. 9(a)(1). In the following subparagraph, Elf agreed to indemnify Omega for claims by Elf's employees. *Id.* at para. 9(b). The contract also called for Omega to carry insurance covering injuries arising under the Longshore Act and OCSLA, and required that this insurance "be sufficiently endorsed to waive any and all claims by the underwriters or insurers against [Elf] . . . for injuries, death, losses and/or damages covered by such policies." *Id.* at para. 10.

Subsequently, Omega contracted an insurance policy with INA. The insurance contract between Omega and INA contains a "Waiver of Our Right to Recover from Others" Endorsement ("Others" endorsement) which states in its entirety:

> We [INA] have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that [Omega] perform[s] work under a written contract that requires [Omega] to obtain this agreement from us.)
>
> This agreement shall not operate directly or indirectly to benefit any one

not named in the Schedule.

Schedule

BLANKET PER SCHEDULE

Exh. C. Indeed, Elf argues that this endorsement is in compliance with the Elf-Omega contract that Omega's insurance include a waiver clause, and that pursuant to the schedule, which shows blanket coverage, Elf is protected from INA's attempt to recover payments it made. Elf asserts that the administrative law judge erred in construing the Omega-INA contract by reading this clause in conjunction with the "Alternate Employer" endorsement,[8] as the two are unrelated. Moreover, Elf argues that Omega paid an additional premium to INA as consideration for the "Others" endorsement waiver; therefore, the waiver is valid. Exh. C.

To the contrary, INA argues that it is not bound by the contract between Omega and Elf. Further, it argues that its waiver of subrogation clause applies only to claims against third-party tortfeasors for reimbursement of compensation and medical benefits where the third party is at fault. It asserts that this clause does not apply to claims for indemnity or contribution against the borrowing employer for

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[8]The "Alternate Employer" endorsement, *see* Exh. C, states in part:

> This endorsement applies only with respect to bodily injury to your employees while in the course of special or temporary employment by the alternate employer in the state named in the schedule.
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> * * *
>
> The insurance afforded by this endorsement is not intended to satisfy the alternate employer's duty to secure its obligations under the workers compensation law.
>
> * * *
>
> We will not ask any other insurer of the alternate employer to share with us a loss covered by this endorsement.
>
> * * *
>
> Premium will be charged for your employees while in the course of special or temporary employment by the alternate employer.
>
> * * *
>
> Schedule
>
> 1. Marathon Oil . . . .
> 2. Texaco Inc. . . . .
> 3. Union Oil . . . .

benefits for which the borrowing employer has primary responsibility. Instead, INA argues that the "Alternate Employer" Endorsement in the INA-Omega contract applies in those instances, but that, as Elf is not identified in the schedule, it does not benefit from the endorsement and is subject to a claim for reimbursement for workers' compensation payments made.

The administrative law judge considered both endorsements of the policy. He determined that, as Elf's name does not appear in either schedule, or anywhere in the Omega-INA policy, Elf is not covered by the contract. Specifically, he appears to have read the two endorsements together to conclude that Omega's increased premiums apply only as to the named employers in the "Alternate Employer" schedule. Therefore, he found that the waiver of indemnification does not apply to Elf and that INA has an indemnification right against Elf. Decision and Order at 5-6. Despite stating that Elf may have a cause of action against Omega under the Omega-Elf contract, the administrative law judge declined to resolve that issue.

Initially, we hold that the administrative law judge had the authority to construe all the relevant contracts in order to resolve the issue of the employer and carrier liable for benefits. In this regard, although Elf and INA dispute which endorsement of the Omega-INA contract is applicable, the case before us may be resolved without addressing those clauses, as the contract between Elf and Omega is dispositive. In that contract, Omega agreed to comply with workers' compensation laws, obtain insurance, and obtain sufficient endorsements to "waive any and all claims by the underwriters or insurers against [Elf]. . . for injuries . . . covered by such policies." Exh. B. Omega specifically agreed to indemnify Elf for all claims of Omega employees, "even though the liability or responsibility arises from the work or services to be performed, or as the result of some condition of the premises or property of [Elf]." *Id.* Thus, Omega agreed to protect Elf from suits and workers' compensation claims filed by Omega employees. Elf had a right to rely on this agreement, and by its terms, the contract relieves Elf of liability on this claim by a borrowed Omega employee. In fact, consistent with Elf's agreement with Omega, INA voluntarily paid claimant benefits after his injury.

A similar situation occurred in *Pilopovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997). In *Pilipovich*, the claimant, who was employed by CPS, a temporary employment agency, was injured during the course of his work as a shipfitter at Avondale. The administrative law judge determined that both Avondale and Wausau, CPS's carrier, were liable for the claimant's benefits. *Pilipovich*, 31 BRBS at 170. Both Avondale and Wausau appealed, *inter alia*, the finding of liability. After affirming the finding that Avondale was the borrowing employer, the Board held that the contract between Avondale and CPS required CPS to provide workers' compensation insurance and that CPS contracted with

Wausau to provide this coverage. Further, the Board held that the administrative law judge correctly found that CPS paid an extra premium to Wausau in return for "a waiver of its right of recovery from anyone liable for an injury covered by the policy." *Id.* at 172. From the contractual agreements, the Board held that Wausau was solely liable, as it waived its right to seek reimbursement from Avondale. Therefore, the Board modified the administrative law judge's decision to reflect Wausau's liability to the claimant. *Id.*

Similarly, in this case, Omega agreed to indemnify and hold Elf harmless against all claims brought by Omega employees, including workers' compensation claims. Further, Omega agreed to carry workers' compensation insurance which would contain sufficient endorsements waiving any claims the insurer may have against Elf. Exh. B. Therefore, we agree with Elf that Omega and its insurer were entrusted to protect and indemnify Elf from liability for workers' compensation claims and are liable for claimant's benefits herein. This holding is consistent with the import of *Total Marine* that the lending employer and its insurer may be liable to claimant under a contract indemnifying the borrowing employer. *Total Marine,* 87 F.3d at 779, 30 BRBS at 66 (CRT). Consequently, we reverse the administrative law judge's determination that INA is entitled to reimbursement from Elf. As this conclusion can be reached without addressing the nuances of the Omega-INA contract,[9] we need not address or resolve the ambiguities therein.[10]

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[9]If INA is not properly the insurer for claimant's injury under the terms of its contract with Omega, then its remedy for this contractual problem lies with Omega, not Elf.

[10]We reject INA's arguments that the "Others" endorsement of its contract with Omega, if found applicable to Elf, should be invalidated by the Louisiana Oilfield Indemnity Act (LOIA) and that the case should be remanded for the administrative law judge to consider the applicability of the LOIA. The LOIA provides that certain indemnification provisions contained in some agreements relating to oil, gas or water wells or drilling for minerals are invalid due to the inequity between independent contractors and oil companies. La. Rev. Stat. Ann. §9:2780. To invalidate a contractual clause as being against public policy, a party must show that the contract requires "defense and/or indemnification, for death or bodily injury to persons, *where there is negligence or fault (strict liability) on the part of the indemnitee*, ..." La. Rev . Stat. Ann. §9:2780(A) (emphasis added). Both the Fifth Circuit and the Louisiana Supreme Court have held that if the indemnitee is not at fault, the LOIA does not apply to invalidate a waiver of subrogation in its favor. *Tanksley v. Gulf Oil Corp.*, 848 F.2d 515 (5th Cir. 1988); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988); *Meloy v. Conoco, Inc.*, 817 F.2d 275 (5th Cir. 1987) (Fifth Circuit based its decision on answers to questions it certified to Supreme Court of Louisiana); *Kerr v. Smith Petroleum Co.*, 896 F.Supp. 608 (E.D.La. 1995). The Fifth Circuit has determined that there must either be a trial on the merits which concludes

that a party is free from fault or there must be a bar to such a trial, otherwise the LOIA can apply to nullify an indemnity agreement between a contractor and an oil company. *Tanksley*, 848 F.2d at 517-518. Although there was a settlement rather than a trial in the case at bar, Elf, the responsible employer, was not a party to it because the case against Elf was dropped as being barred by the Act. Because there is a bar against finding Elf at fault, the LOIA, a fault-based statute, cannot apply to this case arising under the Act, a no-fault statute. *Melancon*, 834 F.2d at 1246-1248.

Accordingly, the administrative law judge's decision awarding reimbursement to INA from Elf is reversed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge