BRB Nos. 99-0127
and 99-0127A

LORETTA SMITH (Widow of DONALD SMITH) Claimant-Petitioner v. JONES OREGON STEVEDORING COMPANY Self-Insured Employer-Respondent Cross-Respondent BRADY HAMILTON STEVEDORING and SAIF CORPORATION Employer/Carrier- Respondents Cross-Respondents BRADY HAMILTON/STEVEDORING SERVICES OF AMERICA and EAGLE PACIFIC INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners	)	DATE ISSUED: DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Paul A. Mapes,

Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Pozzi Wilson Atchison, LLP), Portland, Oregon, for claimant.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Oregon Stevedoring Company.

Norman Cole (SAIF Corporation), Salem, Oregon, for Brady Hamilton Stevedoring and SAIF Corporation.

Delbert J. Brenneman (Hoffman, Hart & Wagner, LLP), Portland, Oregon, for Brady Hamilton/Stevedoring Services of America and Eagle Pacific Insurance Company.

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

PER CURIAM:

Claimant appeals, and Brady Hamilton/Stevedoring Services of America (Brady Hamilton/SSA) cross-appeals, the Decision and Order Denying Benefits (97-LHC-2531) of Administrative Law Judge Paul A. Mapes 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).

Donald Smith began working as a longshoreman in the late 1950's at various facilities in the Portland, Oregon area. One of the facilities, International Terminals, was located on the Willamette River next to a scrapping facility. Mr. Smith was allegedly exposed to asbestos while working at International Terminals when World War II era ships were being dismantled at the adjoining scrapping facility. In June 1992, shortly after he underwent surgery for prostate cancer, Mr. Smith was diagnosed with mesothelioma. On August 25, 1992, Mr. Smith (decedent) died as a direct consequence of his mesothelioma.

Thereafter, Mr. Smith's widow (claimant) filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, naming several potentially liable employers; the remaining employers are Jones Oregon Stevedoring Company (Jones Oregon), and Brady

Hamilton/SSA.[1] In addition, claimant filed civil actions against more than a dozen asbestos manufacturers and distributors. On September 15, 1994, claimant signed a third-party settlement with Center for Claims Resolution (CCR) for $35,000, and signed a second third-party settlement on January 25, 1996, with Bartells Company (Bartells) for $40,000. Thereafter, claimant consented to the federal court order which dismissed the actions against CCR and Bartells with prejudice. The text of a letter dated July 15, 1994, from CCR's counsel to claimant's counsel indicates that the parties agreed that the settlement was subject to the approval of the responsible longshore carrier, and that if the carrier objected to the settlement, the settlement funds would be returned to CCR. Similarly, Article X of the settlement with Bartells states that the agreement is subject to the approval of the responsible longshore carrier, and that if such approval is not provided, the agreement is null and void and that the funds tendered to claimant shall be returned to Bartells. Thus, the agreed upon settlement amounts with regard to claimant's third-party settlements with CCR and Bartells were paid into a trust account under the exclusive control of claimant's attorneys. On February 20, 1998, claimant's counsel sent a letter to all employers named in the instant case, representing that the funds from the CCR and Bartells settlements were being held in trust. The letter further requested that the employers formally approve the settlements, and stated that if the forfeiture provision under Section 33(g) of the Act, 33 U.S.C. §933(g)(1994), were to be invoked by any of the employers, the third-party settlements would be voided. It is uncontested that none of the employers named in the instant case approved the two third-party settlements. At the hearing, the Section 33(g) bar was raised by all employers/carriers except SAIF; thereafter, claimant's attorney testified that on March 13, 1998, the settlement funds that were being held in trust were returned to CCR and Bartells respectively. No party disputes that these funds were in fact returned to CCR and Bartells.

In his Decision and Order, the administrative law judge, relying on the Board's decision in *Barnes v. General Ship Service*, 30 BRBS 193 (1996), found that claimant had

[1]Jones Oregon is a self-insured employer. SAIF Corporation (SAIF) insured Brady Hamilton from January 1, 1977 to December 31, 1979. Subsequent to 1980, Brady Hamilton combined with Stevedoring Services of America, and this entity is referred to as Brady Hamilton/SSA. Eagle Pacific Insurance Company (Eagle Pacific) was the insurer for Brady Hamilton/SSA for the entire period from January 1, 1980 through July 31, 1992.

waived any conditions precedent to the third-party settlements, and that the settlements had been fully executed. The administrative law judge further found that the Section 33(g) bar was not rendered inapplicable by the return of the settlement proceeds to CCR and Bartells, or by the fact that the settlements had not been approved by the Oregon probate court. Thus, the administrative law judge concluded that since claimant settled her actions against Bartells and CCR for less than the amount of compensation to which she would have been entitled under the Act, without obtaining approval of the responsible employer, claimant's entitlement to compensation under the Act was barred by Section 33(g). This determination notwithstanding, the administrative law judge noted that since SAIF did not raise the Section 33(g) defense, an inquiry into whether SAIF could be the responsible employer was required. In this regard, the administrative law judge concluded in a footnote that if there were any causal relationship between decedent's mesothelioma and his employment, the responsible employer would either be Jones Oregon or Brady Hamilton/SSA, since decedent was exposed to asbestos while working for both Jones Oregon and Brady Hamilton/SSA subsequent to January 1, 1980.

On appeal, claimant challenges the administrative law judge's finding that her claim for benefits is barred by Section 33(g). Specifically, claimant contends that contrary to the administrative law judge's determination, the third-party settlements were not fully executed agreements. Claimant provides two reasons for this conclusion: (1) pursuant to the settlements, these agreements were voided when the named employers in the instant case denied approval of the agreements, and (2) under Oregon law, approval by the state probate court was required in order for the settlement agreements to become fully executed, a requirement that was not fulfilled. Brady Hamilton/SSA, Jones Oregon and SAIF respond, urging affirmance of the administrative law judge's decision. In a reply brief, claimant reiterates her contention that the third-party settlements were not fully executed, and therefore, the Section 33(g) bar should not apply.[2] In its cross-appeal, Brady Hamilton/SSA challenges the administrative law judge's finding that either Jones Oregon or Brady Hamilton/SSA could be the responsible employer. Specifically, Brady Hamilton/SSA asserts that the responsible employer/carrier is either SAIF, since it did not raise the Section 33(g) bar, or Jones Oregon, since that was the last employer to expose decedent to asbestos. SAIF and Jones Oregon each respond to this cross-appeal. Jones Oregon contends that there is no evidence that decedent was exposed to injurious levels of asbestos while employed by Jones Oregon. SAIF contends that the contention that it should be the responsible carrier because it did not raise the Section 33(g) bar as a defense was never raised before the administrative law judge and should not therefore be considered on appeal. Alternatively, SAIF argues that

[2]In her reply brief, claimant withdrew her contention raised on appeal that since SAIF did not raise the Section 33(g) bar as a defense, SAIF should be determined to be the responsible carrier.

the administrative law judge's finding that, if claimant's claim was not barred by Section 33(g), either Jones Oregon or Eagle Pacific should be responsible for the payment of compensation to claimant, is supported by substantial evidence.

The threshold issue raised by the instant appeal is whether claimant entered into fully executed third-party settlements without the approval of the responsible employer, and thus, whether Section 33(g) bars claimant's claim for compensation. Section 33(g) provides a bar to claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than her compensation entitlement without obtaining employer's prior written consent.[3] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). Specifically, where written approval of a third-party settlement is obtained "before the settlement is executed," the statutory bar will not apply. 33 U.S.C. §933(g)(1)(1994). In practical terms, until there is an agreement between the claimant and the third party, there is nothing for the employer to approve. *See Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992). Third-party settlements can be conditioned on some action by employer. *See Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995)(third-party settlement conditioned on employer's release of its lien). In order to determine whether the Section 33(g) bar applies, inquiry must be made, on the facts of each case, into whether the third-party settlement was executed prior to its submission to the employer for its approval. *See Barnes*, 30 BRBS at 196. Employer bears the burden of proving that claimant entered into fully executed settlements without its prior written approval in order to bar claimant's receipt of benefits. *See Mallot & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997); *Barnes*, 30 BRBS at 196.

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

> (1) If the person entitled to compensation . . . 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 . . . 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). 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)(1994).

In the instant case, claimant signed third-party settlements on September 15, 1994, with CCR, and on January 25, 1996, with Bartells. Article X of the agreement with Bartells contemplates that the settlement may be contingent upon the approval of the responsible employer or carrier. Specifically, that provision of the settlement states:

> The parties acknowledge that this agreement, where applicable, may be subject to the approval of a workers' compensation carrier. When this agreement is subject to approval of a workers' compensation carrier, the parties agree that, in the event that the compensation carrier does not approve the settlement of Plaintiff's claims, or any portion thereof, the agreement is rendered null and void as to Plaintiff's claims. In the event this agreement is null and void due to the carrier's failure or refusal to approve the settlement of Plaintiff's claims, funds, if any, tendered to Plaintiff or Plaintiff's representative pursuant to this agreement shall be returned to the E.J. Bartells Company. Plaintiff's attorneys agree that they shall exercise good faith and best efforts to obtain any necessary approval from workers' compensation carriers.

Brady Hamilton/SSA Ex. 2. While no such provision is contained in the settlement with CCR, in a letter sent to claimant's attorney on July 15, 1994, CCR's attorney confirmed that settlements had been reached with several plaintiffs, further stating:

> In addition, you asked me to add that understand (sic) that some of these cases are subject to the approval of the Longshore and Harbor Workers compensation carrier. That means that we have agreed that if the carrier objects to the settlements, the settlements are void, you will return any settlement funds and dismiss our clients. You will send me a letter confirming this agreement.

Cl. Ex. 14. While the record does not contain such a confirmation letter, claimant's counsel testified at the hearing that the letter was sent. Tr. at 244. Subsequent to each settlement, claimant consented to court orders dismissing the actions against CCR and Bartells with prejudice, *see* Brady Hamilton/SSA Ex. 4, and, with respect to each settlement, funds were directed to claimant's attorney. In a letter dated February 20, 1998, claimant's counsel notified the named employers in the instant case that the settlement funds were being held in trust pending the outcome of the instant proceeding, and that if any employer wished to

invoke the Section 33(g) bar defense, the third-party settlements would be voided. In addition, the letter asked the employers to approve the settlements, and stated: "If I don't hear from you, the settlements will be voided." Cl. Ex. 12A. At the hearing, the remaining employers and carriers, with the exception of SAIF, raised the Section 33(g) bar as a defense. On March 13, 1998, the second day of the hearing, claimant's attorney testified that the settlement funds being held in trust had been returned to CCR and Bartells that morning. *See* Tr. at 249. That these funds were in fact returned to CCR and Bartells is not disputed.

In his decision, the administrative law judge initially found that the parol evidence rule did not preclude enforcement of the agreement described in the July 15, 1994 letter from CCR's counsel, and as a result, claimant's third-party settlement with CCR was, under Oregon law, contingent upon the approval of a longshore carrier. *See* Decision and Order at 7 n.9. This finding is unchallenged on appeal. Nevertheless, the administrative law judge found that since claimant agreed to the dismissal of the civil actions against CCR and Bartells, the condition precedent requiring employer approval of the third-party settlements was waived. The administrative law judge found that the inference of waiver was supported by the fact that no serious attempt to obtain approval of the settlements was made until more than three years after the CCR agreement and two years after the Bartells agreement. In addition, the administrative law judge found that both CCR and Bartells carried out their obligations under their respective agreements by paying the agreed-upon sums to claimant's attorneys, and that claimant carried out her obligation by seeking dismissals of the actions against CCR and Bartells. Thus, the administrative law judge determined that the third-party settlements with CCR and Bartells were fully executed, and that the Section 33(g) bar was not rendered inapplicable.[4] The administrative law judge also rejected the contention that Section 33(g) cannot apply because the third-party settlements were not approved by an Oregon probate court, since Oregon law required approval only insofar as the agreements settled the claims of decedent's estate, not the claims of claimant as a surviving widow.

[4]Similarly, the administrative law judge found that Section 33(g) was not made inapplicable by Rule 54(b) of the Federal Rules of Civil Procedure, FED. R. CIV. P. 54(b), which provides that an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is subject to revision before the entry of judgment adjudicating all the claims, where there has been no express determination that there is no just reason for delay and no express direction for the order. *See* FED. R. CIV. P. 54(b).

In rendering his decision, the administrative law judge relied on the Board's holding in *Barnes*. In *Barnes*, the claimant, a widow, signed releases in which she released and discharged several third-party defendants from her wrongful death claims and agreed to request dismissal of her civil action with prejudice. Cover letters accompanying the releases sent to the third-party defendants stated that the settlement agreements were contingent upon the required consent under the Longshore Act, and that if the agreements were required to be rescinded, the settlement funds would be returned. Thereafter, the third-party action against the defendants was dismissed with prejudice. The record established that settlement proceeds were paid to claimant's attorney as trustee for claimant; at the time of the hearing, the claimant had not received any of the funds as the settlement monies were still being held in trust for her. In affirming the administrative law judge's finding that the Section 33(g) bar applied to the third-party settlements, the Board held that since the settlement agreements themselves contained no provision requiring that employer's approval be obtained, and the proceeds were paid to the claimant's attorney and the civil actions dismissed, the agreements signed by the claimant had been fully executed. The Board rejected the claimant's argument that the cover letters setting forth the employer consent contingency, which allowed the claimant to return the settlement proceeds to the defendants and rescind the agreements should employer approval not be obtained, created a condition precedent. The claimant's agreement to return the funds in the absence of employer approval was of no consequence, the Board held, because the dismissal of the third-party action precluded the return of the claimant's rights to the *status quo ante*. *Barnes*, 30 BRBS at 197-198.

Contrary to the administrative law judge's determination, we hold that employer has not satisfied its burden of proving that claimant entered into fully executed third-party settlements prior to obtaining employer's written approval. Two distinctions between *Barnes* and the instant case compel our holding. First, in *Barnes*, the Board specifically acknowledged that the third-party releases contained no specific provision requiring that employer's approval be obtained, noting that the "case would not be before the Board in this posture had the settlement release stated, on its face, that it was conditioned on employer's approval of the settlement and that the agreement would be void if employer's approval was not obtained within a specified period."[5] *Barnes*, 30 BRBS at 198 n.10. In the instant case,

[5]The administrative law judge in the instant case was persuaded by footnote 13 in the Board's decision in *Barnes*. The Board stated: "In light of our holding that claimant's counsel's receipt of funds and the dismissal of the three lawsuits effectuated completion of the settlements, we need not address all of the administrative law judge's findings with respect to the parol evidence rule and the existence of consideration for claimant's attempt to modify the original settlement agreement." *Barnes*, 30 BRBS at 198 n.13. The administrative law judge interpreted this to mean that the Board had determined that even if the settlement

although no specified period is mentioned, the settlement with Bartells specifically conditioned the agreement on approval by the responsible longshore employer or carrier. With regard to CCR, the administrative law judge found that the July 15, 1994, letter, which stated that the settlement would be void and the funds returned if the longshore carrier objected to the settlement, was enforceable and that the third-party settlement between claimant and CCR was contingent upon the approval of a longshore carrier. Thus, unlike the situation in *Barnes*, a specific condition precedent existed in each third-party settlement, the approval of the responsible employer, a condition which was never performed. Second, unlike the situation in *Barnes*, in the instant case the settlement proceeds have in fact been returned to CCR and Bartells. Thus, as the conditions precedent on the faces of the releases have not been satisfied, the agreements signed by claimant have not been fully executed.[6]

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agreements had in fact been conditioned on the approval of the employer, the fact that the parties had carried out their obligations under the agreement before obtaining approval under Section 33(g) made the existence of such a condition precedent irrelevant. *See* Decision and Order at 8. We disagree with the administrative law judge's interpretation, in light of the quoted portion of footnote 10 of *Barnes*.

[6]In contending that the settlement agreements were not fully executed as they were not approved by the Oregon probate court, claimant cites to Section 30.070 of the Oregon Revised Statutes. This section provides:

> The personal representative of the decedent, with the approval of the court of appointment, shall have full power to compromise and settle any claim of the class described in ORS 30.030, whether the claim is reduced to judgment or not, and to execute such releases and other instruments as may be necessary to satisfy and discharge the claim. The party paying any such claim or judgment, whether in full or in part, or in an amount agreed upon in compromise, shall not be required to see that the amount paid is applied or apportioned as provided in ORS 30.030 to 30.060, but shall be fully discharged from all liability on payment to the personal representative.

OR. REV. STAT. §30.070 (1998). This section appears to concern the power of a personal representative of a decedent to settle claims. In the instant case, claimant, acting in her capacity as a surviving widow, settled her own claims for wrongful death with CCR and Bartells. Accordingly, we agree with the administrative law judge that the approval of the settlements by the Oregon probate court does not

Based on these factors, we agree with claimant that the instant case is similar to the situation in *Formoso*, where a third-party settlement contingent upon the employer's agreement to release its lien was held to be not fully executed as the release was not obtained and the claimant did not receive any settlement funds. *Formoso*, 29 BRBS at 108; *see also Chavez*, 961 F.2d at 1413, 25 BRBS at 139 (CRT)(no third-party settlement existed, where the claimant did not receive any settlement monies, evidence established no settlement agreement was reached, and no releases were signed by claimant). In this regard, we note that in rendering his decision, the administrative law judge relied in part on the fact that the actions against CCR and Bartells were dismissed. Nevertheless, a claimant's termination of or failure to pursue a third-party action does not affect the rights or obligations of the parties, and thus, a dismissal alone of a third-party action is insufficient to invoke the Section 33(g) bar. *See Mills v. Marine Repair Service*, 22 BRBS 335 (1989); *Rosario v. M.I. Stevedores*, 17 BRBS 50 (1985).

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constitute a condition precedent under law, and we reject claimant's argument in this regard.

For these reasons, the administrative law judge's determination that Section 33(g) bars claimant's claim for benefits is reversed, and the case must be remanded to the administrative law judge for consideration of the remaining issues, including the issue of responsible employer. In this regard, we note that the administrative law judge, in his decision, found that claimant established a causal connection between decedent's mesothelioma and his employment, which is unchallenged on appeal, and that either Jones Oregon or Brady Hamilton/SSA was the responsible employer. *See* Decision and Order at 5 n.7. However, the administrative law judge did not specifically determine the last employer to expose decedent to injurious stimuli prior to his awareness of his occupational disease, and thus, did not make a specific determination as to which employer/carrier is responsible for payment of compensation to claimant. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955); *see generally Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, on remand the administrative law judge must make a determination as to which employer and/or carrier is responsible for payment of compensation to claimant.[7]

Accordingly, the administrative law judge's finding that claimant's claim is barred by Section 33(g) is reversed. The Decision and Order Denying Benefits is vacated, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[7]Thus, we need not address the specific contentions raised on appeal by the various employers and carriers with regard to this issue.