BRB Nos. 99-0960
and 99-0960A

BRAD VALDEZ	)	
JOSHUA VALDEZ	)	
(Children of MANUEL VALDEZ, JR.)	)	
	)	
Claimants-Petitioners	)	
Cross-Respondents	)	
	)	
v.	)	
	)	
CROSBY & OVERTON	)	DATE ISSUED: June 9, 2000
	)	
and	)	
	)	
CIGNA COMPANIES	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Phil Watkins (Law Offices of Phil Watkins, P.C.), Corpus Christi, Texas, for claimants.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimants appeal, and employer cross-appeals, the Decision and Order Denying Benefits (98-LCH-1016) of Administrative Law Judge Clement J. Kennington 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).

Manuel Valdez, Jr. died in an explosion on June 5, 1979, while working for employer as a painter aboard the vessel *S.S. Newark* which was docked in navigable waters at the Sea-Land terminal facility in the Port of Seattle. He was survived by his wife, Margaret Valdez, and two dependent children, Brad and Josh. Brad was born on July 8, 1972, and Josh was born on January 15, 1975.

Margaret Valdez subsequently filed a claim for death benefits under the Act on behalf of herself and her two sons. On August 14, 1980, the district director issued a Compensation Order awarding death benefits to Mrs. Valdez, at the rate of $182.69 per week, and to Brad and Josh, each at the rate of $30.46 per week.[1] She thereafter filed a third-party suit against Sea-Land Service, Incorporated (Sea-Land) and the vessel, which settled on February 17, 1983. In exchange for the payment of $140,000, Mrs. Valdez released Sea-Land and the *S.S. Newark* of all liability. The settlement agreement guaranteed employer's lien. The carrier's representative, Carolyn Miller, approved the settlement agreement prior to the time it was approved by the judge. Employer's Exhibits (EXS) 6, 7. Thereafter, the Stipulation and Agreed Order of Dismissal, together with the Order Approving Settlements, Apportionments, Fees and Costs, was approved by United States District Court Judge Coughenour on February 17, 1983. *Id.* This judge apportioned the net proceeds as follows: 83 1/3 percent to Margaret Valdez, 8 1/3 percent to Brad, and 8 1/3 percent to Josh.

As of March 1, 1983, employer/carrier had paid death benefits to Mrs. Valdez and her sons totaling $56,200.03. On that date, carrier filed an LS-208 form suspending payment of compensation under Section 33 of the Act, 33 U.S.C. §933. The Form LS-33, concerning the settlement and carrier's approval thereof, was not signed by claimant's attorney until March 30, 1983, after which it was signed by carrier's attorney on April 1, 1983, and filed with the district director on April 5, 1983.

[1]Mrs. Valdez received 50 percent, and Brad and Josh each received 8 1/3 percent, of Manual Valdez's average weekly wage of $365.38, pursuant to Section 9(b), 33 U.S.C. §909(b).

Employer waived its lien on the $56,200.03 and allowed Mrs. Valdez to retain the entire amount of the net third-party settlement ($91,352.54). Employer took a credit for the net settlement proceeds by withholding payment of additional benefits from March 1, 1983, through November 4, 1986, at which time the entire third-party settlement was offset. The records reflect that when Mrs. Valdez remarried on July 29, 1983, she was credited with a two-year lump sum payment of $25,168, 33 U.S.C. §909(b), and the remaining portion of the settlement of $59,284.54 was offset against payments due to Brad and Josh.[2] When payments resumed in November 1986, Brad and Josh received $740 bi-weekly, reflecting increases for cost of living and the fact that following the remarriage of their mother, they became entitled to 2/3 of the decedent's average weekly wage. 33 U.S.C. §909(b).

On May 19, 1991, Brad Valdez graduated from Norfolk Catholic High School at the age of 19. During the summer of 1990, he served on active duty in the United States Army Reserve. Following his graduation, Brad spent nine additional weeks in the Army at Fort Lee, Virginia. He later attended Southeast Community College in Lincoln, Nebraska from January through June 1994, where he earned a total of 3 credit hours. In 1995, he registered for classes in the spring and summer sessions at North Lake College in Dallas, Texas but failed to attend or pay any tuition. Josh Valdez graduated from Norfolk Catholic High School in May 1993, and subsequently attended the University of Nebraska at Lincoln for four semesters from 1993 to 1995 completing 40 of the 44 credit hours he attempted. In the summer and fall of 1995, he took and completed 17 additional credit hours at Allan Hancock College in Santa Maria, California, and thereafter attended the University of California at Santa Barbara for the winter, spring and fall quarters in 1996 together with a summer session in 1996 completing 41 credit hours. In 1997, Josh completed the spring and fall quarters, and took an additional four hours in a summer session in 1998 for a total of 58 credit hours. In all, Josh successfully completed 143.5 college credits.

Meanwhile, carrier made repeated written requests to Mrs. Valdez and her sons to verify their attendance in college. Carrier continued to make intermittent payments of compensation first to Mrs. Valdez, on behalf of her sons until September 9, 1991, and then to Brad until July 8, 1995, and to Josh until September 22, 1997. The present proceedings were initiated as a result of a phone call by Mrs. Valdez, on behalf of her children, on October 23, 1997, wherein she indicated that her sons wished to appeal the termination of their benefits. Thereafter, Brad and Josh Valdez (claimants)[3] alleged an improper withholding or underpayment of dependent survivor's benefits by employer between 1983 and 1986. Additionally, Josh Valdez argued that his student benefits should not have ceased on

[2]The record also reflects that prior to Mrs. Valdez's remarriage on July 29, 1983, the amount of the credit taken against employer's liability was $6,900.

[3]By order dated November 24, 1998, the administrative law judge denied employer's motion to join Margaret Valdez as a party to these proceedings.

September 22, 1997. Employer countered by asserting that Section 33(g), 33 U.S.C. §933(g), precluded claimants' entitlement to any additional benefits and that they are entitled to an offset or reimbursement for benefits paid to Brad during his stint in the Army, and to Josh for those periods, following his 18th birthday, during which he was not enrolled in college as a full-time student.

In his decision, the administrative law judge initially determined that the proper allocation of the net settlement proceeds was, as contended by employer, 1/3 to each beneficiary based on the commingling of the funds by Mrs. Valdez, and that claimants' failure to timely file the form with carrier's approval of the third-party settlement with the district director, *see* 33 U.S.C. §933(g)(1), precluded their claims for additional compensation. The administrative law judge, in the alternative, considered claimants' entitlement to benefits following their graduation from high school, concluding that Brad Valdez was overpaid a total of $42,481.72, and that Josh Valdez was underpaid $12,193.12 in benefits.[4] In addition, the administrative law judge found that employer is not entitled to recoup its overpayment to Brad Valdez nor is it entitled to fees and costs payable by claimants pursuant to Section 26 of the Act, 33 U.S.C. §926.

On appeal, claimants challenge the administrative law judge's denial of benefits. In its cross-appeal, employer argues that the administrative law judge erred in finding that it is not entitled to reimbursement of the overpayment to Brad Valdez or to costs and fees under Section 26, and that Josh Valdez is entitled to benefits during substantial periods of time when he was enrolled in school for fewer than 12 credit units, and after four years following his 18th birthday.

Section 33(g)

Claimants assert that the administrative law judge erred in determining that their claims are barred because the LS-33 form with carrier's approval of the third-party settlement was not filed within 30 days of the settlement agreement. Claimants argue that although the LS-33 was filed late, employer was not prejudiced by this late filing since the record clearly

[4]Specifically, the administrative law judge found that Brad Valdez was not entitled to student benefits during those times he served in the Army Reserve and that he made no effort to become and remain a full-time student. In contrast, the administrative law judge found that Josh Valdez was entitled to student benefits from the time of his high school graduation in May 1993, until the date of his 23rd birthday, January 15, 1998, since during that entire time he was attempting to pursue a full-time educational course. Thus, the administrative law judge found that employer should have paid benefits to Josh Valdez during the following periods: eight weeks in the summer of 1990; May 20, 1991, to September 8, 1991; January 7, 1992, to September 30, 1992; January 10, 1993, to January 1, 1994; and while he attended the fall quarter of 1997 at the University of California at Santa Barbara.

shows that it was an active participant in the third-party settlement, and as such its rights were protected and thus the purpose of Section 33(g) was fulfilled.

Section 33(g)(1) requires that a "person entitled to compensation" obtain the 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.[10] 33 U.S.C. §933(g)(1). Section 33(g) is intended to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT) (4th Cir.), *modified on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (4th

[10]Specifically, Section 33(g)(1) provides:

> (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 [district director] within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1998). It is not contended that the gross settlement was for more than claimant's compensation entitlement. *See generally Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). The Board has held that employer's interests, identified by the United States Court of Appeals for the Fifth Circuit in *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 646-647, 18 BRBS 67, 71 (CRT)(5th Cir. 1986), as employer's right to recoup its compensation liability from the third-party tortfeasors and employer's right to offset against its compensation liability under 33 U.S.C. §933(f) for any amount received by the employee from the third-party tortfeasors, are preserved in cases where employer is a party to the third-party action. *See Deville v. Oilfield Industries*, 26 BRBS 123, 131 (1992).

The administrative law judge found that claimants' failure to timely file the form with the carrier's approval of the settlement precluded them from claiming additional compensation. In so finding, the administrative law judge found that the language of Section 33(g)(1) is clear and does not permit non-compliance on the theory that employer was not harmed or prejudiced. In addition, the administrative law judge observed that there do not appear to be any extenuating circumstances permitting a late filing, particularly since carrier's representative, Ms. Miller, promptly signed and returned the Form LS-33 upon its receipt.

We reverse the administrative law judge's finding that the failure to timely file the Form LS-33 bars additional recovery, based on the facts of this case. Critical to this holding is the fact that employer actually approved the settlement agreement prior to the third-party suit's dismissal by the district judge, agreed to waive its lien, and acknowledged its approval on the proper form. The carrier's representative, Ms. Miller, acknowledged approval of the settlement agreement by signing a Receipt and Release on February 1, 1983, and the petition for and subsequent Order Approving Settlements, Apportionments, Fees and Costs dated February 17, 1983.[11] EXS 6, 7. In these documents, employer's rights were protected as the settlement clearly indicates that carrier, INA, has a lien in respect to the net proceeds from the contemplated settlement. *Id.* Moreover, Ms. Miller testified that although she did not participate in the settlement of the third-party claim, she did approve the settlement subject to INA's lien and credit rights. She further testified that INA agreed to permit claimants to keep the entire net settlement up front with INA crediting the entire settlement amount of $91,352.54 against future benefits until the credit for that amount was satisfied. EX 17. Thus, it is clear from Ms. Miller's testimony that she approved the settlement subject to INA's lien and credit rights and that employer acted directly to ensure, by its own action, the protection of its rights to offset and/or recoupment. *See generally Sellman*, 954 F.2d at 242, 25 BRBS at 106(CRT); *Deville*, 26 BRBS at 131.

Furthermore, the Form LS-33 was signed by claimants' counsel on March 30, 1983,

[11]In fact, the petition explicitly states that "INA, through their designated claims representative, Carolyn Miller, has and does approve with respect to the contemplated settlements herein." EX 6.

then by Ms. Miller on April 1, 1983, and filed with the district director on April 5, 1983. In this case, the parties complied with the requirements of Section 33(g) in all material respects. The filing of the Form LS-33 is a ministerial act, as no further action is required of the district director thereafter. Under these circumstances, the late filing does not trigger the Section 33(g) bar. This result is consistent with case law establishing that where employer through its actions approves a settlement, Section 33(g) does not bar the claim. *See, e.g.*, *Sellman*, 954 F.2d at 239, 25 BRBS at 106 (CRT); *Deville*, 26 BRBS at 131. Therefore, based on the facts of this case, the administrative law judge's finding that Section 33(g) bars claimants' claim to additional benefits is reversed.

Section 33(f)

Claimants further assert that the administrative law judge erred in apportioning the net third-party recovery equally among the three recipients, *i.e.*, 1/3 each to Mrs. Valdez, Brad Valdez and Josh Valdez, and thus erred by allowing employer to offset the recovery of Mrs. Valdez against claimants' future entitlement to compensation. Specifically, claimants argue that pursuant to the apportionment of the settlement agreement set by District Judge Coughenour, *i.e.*, 83 1/3 percent to Mrs. Valdez, and 8 1/3 percent each to Brad and Josh Valdez, employer was entitled to a credit against the future compensation owed claimants only in the amount of $7,609.66 per child.

Section 33(f) states:

> If the person entitled to compensation institutes proceedings within the 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). Thus, employer is entitled to offset benefits due under the Act against the net amount of the third-party recovery pursuant to Section 33(f). In *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, affirmed the Board's holding that Section 33(f) allows employer to offset only that portion of a third-party settlement attributable to a "person entitled to compensation," which means that there must be apportionment of damages among parties to the settlement if employer is to be entitled to any credit. In *Sellman*, the Fourth Circuit held that when the settlement agreement fails to address the issue of apportionment, the administrative law judge should, under such circumstances, determine the portion intended for claimant and the portion intended for the decedent or other family members; employer's offset rights are limited to the portion

intended for each individual. *Sellman*, 967 F.2d at 973, 26 BRBS at 9 (CRT). In both *Sellman* and *Force*, the courts held that the burden of proof to establish apportionment is upon employer as employer remains liable for the full amount of the compensation unless claimant receives compensation from a third party. *Sellman*, 967 F.2d at 973, 26 BRBS at 9 (CRT); *Force*, 938 F.2d at 981, 25 BRBS at 13 (CRT); *see also Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT)(4th Cir. 1998).

In resolving the apportionment issue in the instant case, the administrative law judge noted Ms. Miller's testimony that there was an understanding between herself and Mr. Stafford, who represented both Mrs. Valdez and her two sons at the time of the settlement, that in exchange for not asserting its lien rights, employer/carrier would deduct the entire net amount of the third-party settlement from future benefit payments. The administrative law judge further found that Mr. Stafford never questioned this procedure and even Mrs. Valdez, when she had Mr. Stafford inquire into the appropriateness of the offset, was told by the Office of Workers' Compensation that the offset was proper. The administrative law judge credited Ms. Miller's testimony and found it consistent with the conduct of Mr. Stafford and Mrs. Valdez. Decision and Order at 13. In addition, he found it highly unlikely that employer/carrier, being aware of its lien rights on the $55,000 already paid to Mrs. Valdez, would voluntarily waive that right without guaranteeing its ability to recoup that amount from future payments due all the claimants, especially since employer/carrier was aware of the definite possibility that Mrs. Valdez could remarry thereby limiting her rights to a two-year lump sum payment. The administrative law judge also found that the absence of something in writing to spell out the repayment agreement between employer/carrier and Mr. Stafford is not unusual given the considerable passage of time and the inability of either Mr. Stafford or the carrier to recreate the entire tort or insurance file more than 16 years post-settlement.

The administrative law judge further discussed the Ninth Circuit's decision in *Force*, particularly noting the court's language that it will accord considerable deference to the administrative law judge's apportionment determination, based on the record and the administrative law judge's own experience. *Force*, 938 F.2d at 985-86, 25 BRBS at 20 (CRT). Specifically, the Ninth Circuit stated that "the ALJ should look to such objective factors as how the settlement sum was actually distributed among the family members, and the going rate for settlements or judgments for the same types of injuries." *Force*, 938 F.2d at 985-86, 25 BRBS at 20 (CRT). Based on this reasoning, the administrative law judge proceeded to find that even though the Order Approving Settlement contained a stated apportionment of the net settlement, *i.e.*, 83 1/3 percent to Mrs. Valdez and 8 1/3 percent each to Brad and Josh, a proper allocation of the net settlement proceeds was, as suggested by employer, 1/3 to each beneficiary. In making this determination, the administrative law judge found that Mrs. Valdez made no attempt to segregate any of the funds allegedly attributed to each child but instead commingled all funds and spent them on herself and her two children. Moreover, he noted that Mrs. Valdez testified that she was not aware of any apportionment and that claimants produced no witnesses or documents to explain the actual

allocation.[12] As such, he concluded that employer acted appropriately offsetting the remaining portion of the settlement of $59,284.54 against payments credited to Brad and Josh.

We affirm the administrative law judge's finding that employer is entitled to a complete recovery of the net amount of the settlement, as the terms of the settlement agreement clearly demonstrate an intent to provide employer with such by virtue of the guarantee of employer's lien, despite its later waiving it. *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring). Additionally, the administrative law judge's finding that the apportionment of the settlement was 1/3 each to Mrs. Valdez, Brad, and Josh, is affirmed as it is rational based on the testimony that the funds were never segregated as delineated in the judge's order, and as the administrative law judge is permitted by law to establish an apportionment other than that contained in documentary evidence. *See generally Sellman*, 967 F.2d at 973, 26 BRBS at 9 (CRT); *Force*, 938 F.2d at 981, 25 BRBS at 13 (CRT).

Section 2(18)

Claimants also argue that the administrative law judge erred in denying Brad Valdez benefits while he was in the Army Reserve and student benefits during his initial attempt at college. First, claimants argue that the "Armed Forces exclusion" is inapplicable to the instant case since the time of Brad Valdez's tour in the Army Reserve was less than five months and he was clearly still a high school student before and after that tour of duty. Second, claimants aver that Brad Valdez's failed attempts at college were due to psychological problems and/or excessive drinking and as such he should be entitled to

[12]In this regard, we note that the administrative law judge improperly placed the burden of establishing the proper apportionment of the settlement agreement in this case on claimants, particularly since the agreement itself already contained the requisite apportionment. *See generally Sellman*, 967 F.2d at 973, 26 BRBS at 9 (CRT); *Force*, 938 F.2d at 981, 25 BRBS at 13 (CRT). However, the administrative law judge's ultimate conclusion on this issue is supported by substantial evidence, and thus the burden of proof is not dispositive. Accordingly, the administrative law judge's error in this instance is harmless.

student benefits so long as he showed a *bona fide* intention of continuing to pursue a full-time education.

Section 2(14) defines "child" in pertinent part as follows: "Child . . . include[s] only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined [by the Act] . . . ." 33 U.S.C. §902(14). The statute thus divides children into two groups: those under eighteen years of age, and those over eighteen who are students or who meet certain requirements of dependency. *See Doe v. Jarka Corp. of New England*, 21 BRBS 142, 144 (1988). The provision defining the word "student" is found at Section 2(18) of the Act, which provides:

> The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is–
>
> > (A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,
> >
> > (B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,
> >
> > (C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or
> >
> > (D) an additional type of educational or training institution as defined by the Secretary . . .

33 U.S.C. §902(18)(A)-(D). Section 2(18) further provides that a person forfeits his status as a student after he reaches the age of twenty-three or has completed four years of education beyond the high school level, and that:

> [a] child shall not be deemed to have ceased to be a student during any interim between school years if the interim period does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which . . . he is prevented by factors beyond his control from pursuing his education. *A child shall not be deemed to be a student under the Act during a period of service in the Armed*

Forces of the United States.

33 U.S.C. §902(18)(D) (emphasis added).

The record shows that Brad Valdez was 18 years old when he went on active duty in the United States Army Reserve in the summer of 1990 at Fort Jackson, South Carolina. Following this period of active duty, he returned to complete his senior year of high school and upon graduation in May 1991, went back to active duty in the Army for nine additional weeks at Fort Lee, Virginia. The administrative law judge denied benefits for the time that Brad Valdez served in the Army Reserve since the Act clearly excludes periods when a person serves in the Armed Forces. Contrary to claimants' contention, and as the administrative law judge correctly stated, the statutory language on this issue is clear in its exclusion of time served in the United States Armed Forces, and thus, the administrative law judge's denial of benefits for the period that Brad Valdez served in the Army Reserve after age 18 but before he graduated from high school is affirmed. *See generally Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992).

The administrative law judge further determined that following graduation, Brad Valdez engaged in a pattern of deception with carrier by repeatedly filing registration forms giving the appearance of attending college while in reality withdrawing shortly after registration and being reimbursed tuition. The administrative law judge also found that the only time that Brad actually enrolled was for the 1st and 2nd quarters of 1994 at Southeast Community College completing only one 3 hour course. The administrative law judge discredited claimants' assertion that Brad was unable to attend classes due to psychological or substance abuse problems as no medical records were timely submitted to support this allegation. Moreover, the administrative law judge found that during part of the time when he was paid student benefits, Brad Valdez was working full-time earning substantial sums of money.[13] Consequently, the administrative law judge found that Brad was overpaid a total of $42,481.72. As the administrative law judge's findings are rational and supported by substantial evidence, they are affirmed.

In its appeal, employer argues that the administrative law judge erroneously found that Josh Valdez is entitled to the benefits he received during substantial periods of time that he was enrolled in college taking fewer than 12 credits. Alternatively, employer argues that pursuant to Section 2(18), Josh Valdez is entitled to student benefits only for four years of education beyond the high school level and thus, any amounts paid to him beyond that point represent an overpayment to which employer is entitled to a reimbursement or offset.

[13]For instance, the administrative law judge found that while he was receiving benefits as a full-time student in 1993-1995, he successfully worked full-time for H and K Furniture, Barry Jewelers as an assistant sales manager, and at New Horizons as a senior account executive, where his annual salary was $110,000.

In his decision, the administrative law judge acknowledged that the catalogs for the undergraduate institutions that Josh Valdez attended, *i.e.*, the University of Nebraska and the University of California at Santa Barbara, require a minimum of 12 credit hours per semester to matriculate as a full-time student, but further observed that neither of these universities requires the completion of 12 hours per quarter or semester. The administrative law judge looked to Josh's conduct during his entire college tenure to determine if he had a *bona fide* intention of pursuing full-time studies on a continuous basis.

He found that there is no reason to believe that Josh was not attempting to pursue a full-time educational course during the disputed periods, since Josh Valdez attended and earned college credits during these times. The administrative law judge further found that while Josh may have had difficulty with upper level courses his academic record before, during, and after this time is indicative of a person earnestly pursuing a full-time course of studies towards obtaining a college degree. As such, he found no basis for disqualifying Josh Valdez during any of the disputed periods, and therefore found, based on the entire record, that Josh was underpaid $12,193.12 during those periods. Contrary to employer's contention, the administrative law judge's findings regarding Josh Valdez's status as a full-time student are rational and supported by substantial evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert denied*, 373 U.S. 954 (1963).

The administrative law judge, however, did not explicitly address employer's contention that Josh Valdez's benefits should have ceased upon his completion of four years of education beyond the high school level. Employer's contention is rejected as it lacks merit. In pertinent part, Section 2(18) defines the term "student" as:

> a person regularly pursuing a full-time course of study or training at an institution . . . but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period.

33 U.S.C. §902(18). The legislative history regarding Section 2(18) expresses Congress's intent to extend "to age 23 years the limit to which surviving dependent children, of fatally injured workers, seeking a higher education may continue to receive compensation payments."[14] 1972 U.S.C.C.A.N. 4706. The legislative history provides no insight into the

[14]It continues by noting that "[t]oday children are constantly urged to continue their education as long as possible, and, with the increasing number of children continuing their education into college, the 18 years of age limit is unnecessarily restrictive." 1972 U.S. Code Cong. and Adm. News, p. 4706.

additional alternative language of Section 2(18), "or has completed four years of education beyond the high school level." Thus, given the express intent set out in the legislative history, the statutory language supports the conclusion that student benefits continue through age 23 or cease prior to that time if the individual has obtained a four-year college degree. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In the instant case, the administrative law judge determined that Josh Valdez was throughout all relevant periods of time up to his 23rd birthday attempting to pursue a full-time educational course. Thus, we reject employer's contention that Josh Valdez's eligibility for student benefits ceased four years after he graduated from high school and affirm the administrative law judge's finding that Josh Valdez was entitled to benefits during the periods disputed by employer and, thus, underpaid $12,193.12.[15]

Reimbursement and Sections 19, 27, and 31

Employer next argues that, contrary to the administrative law judge's determination, it is entitled to recoup the overpayment in benefits made to Brad Valdez, since they were obtained through a pattern of deception. Specifically, it maintains that for four years Brad Valdez repeatedly registered for classes, sent the registration forms to the carrier, and then withdrew shortly after registration and before attending classes, thereby receiving reimbursement for the tuition he paid, but not informing employer that he had withdrawn from classes. Moreover, employer notes that during these periods of time he was earning a significant amount of money working full-time. Employer further argues that based on the particular facts in this case, the rulings of the courts in *Stevedoring Services of America v. Eggert*, 953 F.2d 552 (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992), *Petroleum Helicopters v. Nancy T. Garrett*, 23 F.3d 107, 28 BRBS 40 (CRT) (5th Cir. 1994), and *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992), are inapposite to the case at hand, and that Sections 19, 27 and 31 of the Act, 33 U.S.C. §§919, 927, 931, should be read so as to provide employer some relief from the fraud perpetrated in this case.

[15]The district director is ultimately responsible for calculating the amount of benefits owed to Josh Valdez in this case. We note herein that employer may be entitled to a credit for the overpayment it made to Brad Valdez against the additional compensation owed to Josh Valdez in this case. 33 U.S.C. §§914(j), 909(b); *Hawkins v. Harbert International, Inc.*, 33 BRBS 198 (1999); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

It is well-settled that there is no provision in the Act allowing an employer to obtain reimbursement of overpayments of compensation from a claimant. *See Eggert*, 953 F.2d at 552, 25 BRBS at 92 (CRT);[16] *see also Garrett*, 23 F.3d at 107, 28 BRBS at 40 (CRT); *Cooper*, 957 F.2d at 1199, 25 BRBS at 125 (CRT);[17] *Vitola v. Navy Resale & Services Support Office*, 26 BRBS 88 (1993). The Act provides only for a credit of excess payments against unpaid compensation due. *See Eggert*, 953 F.2d at 556-557, 25 BRBS at 97-99 (CRT); 33 U.S.C. §§908(j), 914(j), 922. Thus, contrary to employer's contentions the decisions in *Eggert, Garrett*, and *Cooper* preclude employer's reimbursement of the overpayments to Brad Valdez in this case. Moreover, we reject employer's contentions that it is entitled to relief against the fraud committed by Brad Valdez in this case under Sections 19, 27, and 31 of the Act.

[16]The court in *Eggert* also noted that "it appears likely that Congress has expressed its intent to preempt state common law claims by employers against claimants for *repayment* of alleged overpayments of disability compensation." *Eggert*, 953 F.2d at 558 n. 7, 25 BRBS at 100 n.7 (CRT) (emphasis in original).

[17]The court in *Ceres Gulf* also rejected the employer's attempt to recoup overpayments under the general federal question statute, 28 U.S.C. §1331.

Section 31(a) provides the sole remedy against a claimant who has allegedly filed a false claim.[18] Section 31(a) of the Act specifically provides that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony, punishable by a fine of not more than $10,000 or imprisonment not to exceed five years or both. 33 U.S.C. §931(a)(1). The United States Attorney for the district in which the injury is alleged to have occurred is to make every reasonable effort to investigate promptly any complaint made under this subsection. 33 U.S.C. §931(a)(2). Consequently, employer has no direct remedy for reimbursement against Brad Valdez under the Act in this case. Its only remedy is to file a complaint with the appropriate United States Attorney.

Section 26

Employer lastly argues that the administrative law judge erred in denying it attorney's fees and costs under Section 26 of the Act for employer's defense of the fraudulent claim brought by Brad Valdez. Employer's contention lacks merit. Neither the district director, administrative law judge nor the Board has the authority to impose costs and fees under Section 26; costs under Section 26 can be assessed only by a court of appeals or upon enforcement of an order by the district court. *Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43 (CRT)(5th Cir. 1995); *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT) (9th Cir. 1993). Moreover, Section 26 implicitly precludes a sanction for bad faith claims under Rule 11 of the Federal Rules of Civil Procedure. *Id*. The administrative law judge's denial of employer's request for Section 26 fees and costs for the proceedings against Brad Valdez is therefore affirmed.

Accordingly, the administrative law judge's finding that Section 33(g) bars claimants' claim to additional benefits is reversed. In all other regards, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[18]Thus, contrary to employer's contention, Sections 19 and 27 cannot be used to address Brad Valdez's false claim in this case.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge