BRB No. 04-0272

WALTER J. MARMILLION	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A.M.E. TEMPORARY SERVICES	)	DATE ISSUED: 12/13/04
	)	
and	)	
	)	
SUPERIOR NATIONAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer/Carrier's Motion for Summary Decision of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Jeffrey E. Faludi, Jr., Baton Rouge, Louisiana, and Jerry L. Hermannn (Kopfler & Hermann, L.C.), Houma, Louisiana, for claimant.

Timothy B. Guillory (Rabablais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Granting Employer/Carrier's Motion for Summary Decision (2003-LHC-2359) of Administrative Law Judge C. Richard Avery 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 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).

Claimant suffered a crush injury to his arm in a work-related accident on April 18, 2000; this injury required several operations. Claimant was employed by A.M.E. Temporary Services (A.M.E.), who had contracted claimant's services to ADM/Growmark (ADM). ADM loaded and unloaded grain barges on the Mississippi River. Following claimant's injury, A.M.E. paid some benefits, and claimant filed a claim under the Act naming A.M.E. as his employer. In September 2000, benefits ceased, and medical providers began to bill claimant. Claimant's counsel was informed by employer's counsel that A.M.E.'s carrier had gone out of business, and that A.M.E. did not have reserves in place to make further payments to claimant. EX K. Employer's counsel wrote, "I wish I could be of more help, but I am afraid that your clients have little recourse of recovery, particularly if they are asserting maritime claims which are not covered by the Louisiana Insurance Guaranty Association statute." EX N.

Claimant subsequently filed a suit in state court under the Jones Act and general maritime law against A.M.E. and ADM, as well as against Faith Towing, the owner of the tugboat M/V Faith. Claimant alleged that A.M.E. and ADM were owners *pro hac vice* of the M/V Faith and that Faith Towing was a nominal defendant. Claimant stated he later amended his suit to allege a Section 5(b) cause of action against A.M.E. and ADM. 33 U.S.C. §905(b). The claim against Faith Towing was based on its ownership of the tugboat chartered by A.M.E and ADM for use to maneuver grain barges; claimant, however, was not on the tugboat on the day of the accident. The suit against Faith Towing was settled on September 12, 2001, for $1,500, and was subsequently dismissed on the parties' motion. The suit against A.M.E. and ADM proceeded to trial, and resulted in dismissal of claimant's claim. Prior to the settlement of claimant's suit against Faith Towing, claimant's attorney and employer's attorney discussed settling the Longshore Act claim. At some point, claimant contended he was notified that there was still insurance coverage for this claim.

Employer filed a motion for summary decision with the administrative law judge, seeking to bar claimant's entitlement to benefits pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Employer attached to its motion claimant's admission that he entered into a settlement agreement with Faith Towing without obtaining the approval of A.M.E. Claimant opposed employer's motion on the ground that Section 33 is applicable only when claimant settles with a "third person" without employer's approval. Claimant alleged that the Jones Act suit in which Faith Towing was a defendant necessarily required that Faith Towing be considered one of claimant's "employers." Claimant further averred that employer acted in bad faith by informing claimant that carrier was defunct and then informing him, after the lawsuits were terminated, that there was indeed a carrier on the risk.

The administrative law judge granted employer's motion for summary decision. The administrative law judge rejected claimant's contention that Faith Towing was one of

claimant's employers and therefore was not a "third party," because claimant averred in his pleadings that "in truth and in fact [Faith] had absolutely no liability or connection to this accident." The administrative law judge found that Faith Towing was a "third party" even if it had no liability to claimant. The administrative law judge also rejected claimant's "bad faith" contention. Lastly, the administrative law judge rejected the contention that A.M.E. had participated in the settlement of the suit against Faith Towing. The administrative law judge found that the settlement was for less than claimant's compensation entitlement and that Section 33(g)(1), (2) bars claimant's entitlement to further compensation and medical benefits.

On appeal, claimant contends that Section 33(g) is not applicable because employer's "fraudulent" conduct forced claimant to file suit in state court in the hope of obtaining something for his work injuries, as he was being pursued by the hospital for his outstanding medical bills.[1] Claimant contends that under the circumstances of this case, it would have been "vain and useless" to seek carrier's approval as it was purportedly out of business Claimant further contends that, at a minimum, employer is obligated to pay his medical benefits pursuant to Section 7(h) of the Act, 33 U.S.C. §907(h), because that obligation arose prior to the third-party settlement. Employer responds that there are no exceptions to Section 33(g) and that claimant's apparent reliance on actions and statements by employer does not excuse his failure to get approval of the settlement with Faith Towing.

Section 33(g) bars claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining the prior written consent of employer and

[1] By Order dated July 14, 2004, the Board denied the motion to intervene filed by River Parishes Hospital. The Board stated that since the case was in denial status, employer could not be held liable for the medical bills and that the Act does not provide a cause of action against claimant. The Board stated that in the event that the case is remanded, the hospital may move to intervene before the administrative law judge.

its carrier.[2] Claimant is undisputedly a "person entitled to compensation" and does not contend that the settlement with Faith Towing was for an amount greater than his compensation entitlement under the Act. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). 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). *See United Brands Co. v. Melson*, 569 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

We must remand this case for the administrative law judge to reconsider the applicability of Section 33(g). Initially, Section 33(g) cannot apply to a settlement of a lawsuit that does not fall within Section 33(a) of the Act. Section 33(a) states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a). In finding that Faith Towing was not one of claimant's employers, and therefore was a third party, the administrative law judge implicitly found that Faith Towing was not potentially liable to claimant, stating "there exists no allegation that Faith had any responsibility whatsoever to claimant under the Act. . . . Decision and Order at 2. In order for Section 33 as a whole to apply, the entity against whom the lawsuit is filed must be potentially liable to both claimant and employer for the compensable work-related injury. *See, e.g.,* 33 U.S.C. §933(b); *United Brands*, 594 F.2d

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[2] Section 33(g)(1) states:

> 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). 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).

at 1074, 10 BRBS at 498-499; *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004); *Goody v. Thames Valley Steel Corp*., 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *see also* 33 U.S.C. §905(b); *Bundens v. J.E. Brenneman Co*., 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995) (an action against the vessel pursuant to Section 5(b) is a third-party suit within the meaning of Section 33). On remand, the administrative law judge must first explicitly determine whether Faith Towing was potentially liable to both claimant and employer for the injury claimant sustained at work.[3] If the suit against Faith Towing does not fall within Section 33(a), claimant's claim cannot be barred pursuant to Section 33(g). *United Brands*, 594 F.2d at 1074, 10 BRBS at 498-499.

With regard to claimant's specific contentions regarding Section 33(g), we reject claimant's contention that employer's alleged "bad faith" in advising him that carrier was out of business and that employer could not pay compensation due to a lack of reserves precludes employer's reliance on Section 33(g). Equitable considerations generally are not applicable to the Section 33(g) inquiry. *See Petroleum Helicopters, Inc. v. Collier, 784* F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). Moreover, the doctrine of equitable estoppel does not apply in this case. This doctrine prevents one party from taking a position inconsistent with that which it took in an earlier action such that the other party would be at a disadvantage. It typically holds a person to a representation made, or a position assumed, where it would be inequitable to another, who has in good faith relied upon that representation or position. *See Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004). To apply this doctrine to claims under the Act, four elements are necessary:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must act so that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Rambo v. Director, OWCP, 81 F.3d 840, 843, 30 BRBS 27, 29(CRT) (9th Cir. 1996), *vacated and remanded on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997); *see also Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 504 (4th Cir. 1999). Although claimant contends he filed his lawsuits in response to his inability to obtain compensation from employer and/or carrier, employer's correspondence with claimant is insufficient to establish that employer

[3] Employer bears the burden of producing evidence on this issue as Section 33(g) is an affirmative defense. *See Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

intended that claimant take this action. Therefore, at least one element of equitable estoppel is inapplicable, and we reject claimant's contention in this regard.

Claimant next contends that it would have been pointless to attempt to obtain carrier's written approval of the settlement with Faith Towing because he had been advised that the company was out of business. Section 33(g) specifically requires that claimant obtain written approval of a third-party settlement from employer *and* its carrier. 33 U.S.C. §933(g)(1); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004). The administrative law judge did not discuss the Board's decision in *Meaux v. Frank's Casing Crew & Rental Tools, Inc.*, 35 BRBS 17 (2001), which is relevant to this case. In *Meaux*, the claimant entered into a third-party settlement and obtained his employer's approval of the settlement. The claimant had been advised prior to entering into the settlement that carrier was insolvent, and claimant had no knowledge that LIGA was potentially liable for his longshore claim until many years after the settlement was effected. The Board held that upon its carrier's insolvency, employer became liable for claimant's benefits under Section 4 of the Act, 33 U.S.C. §904. Employer was essentially both employer and carrier, and as claimant obtained employer's approval of the third-party settlement, the Board rejected LIGA's contention that claimant's claim was barred pursuant to Section 33(g). *Meaux*, 35 BRBS at 20-21.

In this case, claimant was told by employer's counsel that carrier was out of business and that employer did not have the reserves to pay benefits. At some point after claimant filed suit against Faith Towing, it appears claimant was informed that there was insurance coverage for his claim and the parties discussed a settlement of the Longshore Act claim. As similarities exist between this case and *Meaux*, we remand this case for the administrative law judge to address its applicability to the facts herein.

Claimant lastly contends that, pursuant to Section 7(h) of the Act, 33 U.S.C. §907(h), employer remains liable for medical benefits even if Section 33(g) is applicable because its liability for medical benefits arose prior to the third-party settlement. Section 7(h) states:

> The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or that suit has been brought against such third party. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in section 933(b) of this title.

33 U.S.C. §907(h).

We reject claimant's contention that Section 7(h) preserves his entitlement to medical benefits that accrued prior to the settlement with Faith Towing. Section 7(h) requires only that employer remain primarily liable for medical benefits pursuant to Section 7 as a whole, notwithstanding that claimant and/or employer has a cause of action against a third party, and it explicitly accords employer the right to pursue a third-party action under Section 33(b), a right which Section 33(g) protects by requiring employer's approval of settlements of Section 33 actions. Section 7(h) thus does not preclude the applicability of the Section 33(g)(1) bar to both compensation and medical benefits. *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281. Moreover, the Board has held that when Section 33(g)(1) is applicable, both accrued and future compensation benefits are barred. *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998) (Smith, J., dissenting). Section 7(h) does not support a conclusion that this holding is inapplicable to medical benefits. Therefore, if on remand, the administrative law judge again finds Section 33(g) applicable, both accrued and future compensation and medical benefits are barred.

Accordingly, the administrative law judge's finding that claimant claim is barred by Section 33(g) is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring:

I concur fully in the decision of my colleagues except insofar as it relates to the effect of Section 33(g) on the compensation and medical benefits that accrued prior to claimant's settlement with Faith Towing. For the reasons fully expressed in my dissenting opinion in *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998), I would hold that accrued benefits are not barred by Section 33(g)(1). However, as *Wyknenko* has not been overruled, I am bound to follow it.

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ROY P. SMITH
Administrative Appeals Judge