BRB No. 03-0751

GEORGE ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TORCH RIG SERVICES	)	DATE ISSUED: July 28, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Motion for Summary Decision of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Steven M. Hoffberg (Rose, Klein & Marias, L.L.P.), Ventura, California, for claimant.

Lisa M. Conner (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Motion for Summary Decision (2003-LHC-1804) of Administrative Law Judge Alexander Karst 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).

On March 30, 2000, claimant suffered injuries to his left arm, shoulder and hip while working as a crane operator for employer. Employer voluntarily paid temporary total disability benefits from March 31, 2000, through June 4, 2001, and permanent partial disability benefits from June 5, 2001 to February 13, 2003. Emp. Ex. 5. On March 30, 2001, claimant filed a personal injury lawsuit against a third party who he alleged caused his injuries. The third party offered to settle the lawsuit for $19,750, which is less than the amount of compensation due to claimant under the Act. Claimant accepted the settlement offer. Thereafter, employer controverted claimant's entitlement to further benefits under the Act based on claimant's failure to obtain its written approval of the settlement agreement pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g).

In his decision, the administrative law judge granted employer's motion for summary decision, finding that claimant does not dispute that he did not obtain employer's written approval of the settlement agreement. The administrative law judge rejected claimant's contention that employer's oral agreement to the terms of the settlement agreement, if any, prior to the finalization of the settlement is sufficient to satisfy the requirements of Section 33(g). Therefore, the administrative law judge found that claimant's rights to compensation and medical benefits under the Act are terminated.

On appeal, claimant contends that the administrative law judge erred in finding that Section 33(g) applies in this case, as employer's representative orally agreed to the terms of the third-party settlement. Employer responds, urging affirmance of the administrative law judge's decision.

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 his compensation entitlement without obtaining employer's prior written consent. The section 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), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev'd on other grounds*, 784 F.2d 644, 18 BRBS 67(CRT)(5th Cir. 1986). Section 33(g)(1) requires that employer's prior written approval be made on a form provided by the Secretary, and that it be filed in the district director's office within thirty days after the settlement is entered into. 33 U.S.C. §933(g)(1). In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), the Supreme Court held that an employee is not required to obtain employer's prior written approval of a settlement with a third party in two situations: (1) where the employee obtains a judgment, rather than a settlement, against a third party; and (2) where the employee settles for an amount greater than or equal to

employer's total liability under the Act. Under these circumstances, the claimant must give notice of the settlement to employer under Section 33(g)(2). *Id.*, 505 U.S. at 481, 26 BRBS at 53(CRT).

Claimant contends that the Court in *Cowart* did not mandate a bar to further compensation under facts such as are present in the instant case. Claimant contends that his third-party attorney and an adjuster at Frank Gates Acclaim (FGA), a third-party administrator, held discussions concerning the settlement of the third-party claim, and that a representative of FGA orally gave her express approval to settle the third-party case.[1] Claimant also contends that the representative of FGA faxed a form to claimant's counsel entitled "Approval of Compromise of Third Person Cause of Action," but that the form was not submitted to FGA for signature and filing. We reject claimant's contention that the administrative law judge erred in finding that Section 33(g) is applicable under the facts in this case. The Board considered a case in which the claimant did not dispute that he failed to obtain his employer's written approval of a third-party settlement, but claimed that employer's claims examiner had given oral approval. *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986). The Board held that the 1972 and the 1984 amendments to Section 33(g) evince clear Congressional intent to prevent claimant from relying on equitable principles to avoid strict compliance with the written consent requirement of the statute. *Id*. at 179. Accordingly, the Board affirmed the administrative law judge's finding that as the claimant did not obtain employer's written approval as required by the statute, the claimant had no right to further compensation under the Act.[2] *Id*.

In the present case, the administrative law judge found that Section 33(g) is not satisfied by employer's oral agreement to the settlement as to hold otherwise would ignore the word "written" as it appears in Section 33(g)(1).[3] The administrative law

[1] For purposes of deciding the motion for summary decision, the administrative law judge assumed that this verbal approval of the third-party settlement was given. Order Granting Motion for Summary Decision at 3.

[2] We reject claimant's contention that the Board's holding in *Nesmith* is distinguishable on the basis that carrier's counsel specifically advised plaintiff's attorney not to settle the third-party suit in that case. The Board's decision turned on the lack of written approval rather than oral disapproval of the settlement. *See Nesmith*, 19 BRBS at 179.

[3] Employer stated it did not orally agree to the third-party settlement. However, as noted previously, the administrative law judge did not rule on this issue, but assumed the facts most favorable to claimant for purposes of considering the motion for summary decision.

judge found that "this is underscored by the statutory requirement that not only should the approval be in writing, it must be on a specific form which must then be submitted to the [district director]." Decision and Order at 4. We hold that this reasoning is rational and is in accordance with law. *Lindsay v. Bethlehem Steel Corp.*, 22 BRBS 206 (1989); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *see also Morauer & Hartzell, Inc. v. Woodworth*, 439 F.2d 550 (D.C. Cir. 1970); *Gibson v. ITO Corp. of America*, 18 BRBS 162 (1986). The requirement that employer shall be liable for compensation only if written approval is obtained from employer is mandated by the Act under Section 33(g)(1). *See Mapp v. Transocean Offshore USA, Inc.*, __ BRBS __, BRB No. 03-0607 (June 16, 2004). Moreover, contrary to claimant's contention, there is no exception for the application of equitable principles to the requirement that claimant obtain employer's actual written approval of a third-party settlement pursuant to Section 33(g). *See generally Hartzell*, 439 F.2d at 553; *Gibson*, 18 BRBS at 264. Therefore, as it is undisputed that claimant did not obtain employer's prior written approval of the third-party settlement, we affirm the administrative law judge's granting of summary decision denying claimant further benefits under the Act. *See Lindsay*, 22 BRBS at 209.

Accordingly, the Order Granting Motion for Summary Decision of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge