BRB No. 07-0991

| | | |
|---|---|---|
| H.S. | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PACORINI USA, INCORPORATED | ) | DATE ISSUED: 06/30/2008 |
| | ) | |
| and | ) | |
| | ) | |
| AMERICAN LONGSHORE MUTUAL ASSOCIATION, LIMITED | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

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

Seth H. Schaumburg (Favret, Demarest, Russo & Lutkewitte), New Orleans, Louisiana, for claimant.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claimant's Motion for Summary Judgment and Granting Employer/Carrier's Motion for Summary Judgment (2007-LHC-1518) 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).

On April 21, 2005, claimant was injured while in the course of his employment with employer. Employer voluntarily paid claimant temporary total disability benefits commencing on the date of claimant's injury. 33 U.S.C. §908(b). EX 1. On February 11, 2006, claimant filed a lawsuit in federal district court against Oasis Navigation Company, the owner of the vessel on which he was performing stevedoring services at the time of his injury, pursuant to Section 5(b) of the Act, 33 U.S.C. §905(b); claimant alleged in this lawsuit that the injuries sustained in his April 21, 2005 work accident were caused by the negligence of the vessel owner. EX 2. Thereafter, as the result of claimant's testimony in a discovery deposition taken in the third-party action, CX F, claimant and his counsel determined that the vessel owner (the third-party defendant) was not, in fact, negligent in causing claimant's injuries. *See* EX 4; CX A.

In a May 12, 2006 letter to claimant's counsel, the third-party defendant's attorney confirmed that the parties had reached an agreement to settle claimant's third-party lawsuit; counsel stated that he would seek authority from his client to "settle the matter completely" for $7,500, and he noted his understanding that claimant's agreement to settle the third-party suit was contingent upon employer's waiving its lien. EX 3. By letter dated May 15, 2006, claimant's attorney informed Erica Jannsen, the claims adjuster for employer, of his position that the vessel owner had not been negligent in causing claimant's injuries and that, therefore, claimant was attempting to enter into a nominal settlement with the third-party defendant to cover the costs of pursuing the third-party action;[1] claimant's attorney then inquired as to employer's willingness to waive its lien in the third-party action. EX 4; CX A. In a May 24, 2006 letter, claimant's counsel advised Ms. Jannsen that claimant would settle the third-party suit only if employer's lien was waived, that settlement was being sought only to recover the costs of pursuing the third-party action, and that regardless of whether employer agreed to waive its lien, claimant would not pursue his third-party lawsuit against the vessel owner. EX 5; CX B. On June 2, 2006, Ms. Jannsen informed claimant's counsel that "we have authority to waive the third party lien in this matter," EX 6; CX C; claimant's attorney subsequently advised Ms. Jannsen that he would proceed with having the third-party action resolved and dismissed. EX 7; CX D.

[1] Claimant's counsel indicated that out of the proposed settlement amount of $7,500, $4,171.86 would be allocated to cover the costs of litigation incurred in the third-party suit, with the remaining $3,328.14 to be divided between claimant and his counsel for attorney's fees. EX 4; CX A.

On the basis of the parties' representations that they had agreed upon a compromise in the third-party lawsuit, United States District Court Judge Martin L.C. Feldman dismissed claimant's lawsuit against the vessel owner without prejudice on August 23, 2006. EX 8. On September 15, 2006, claimant filed a Motion to Dismiss with Prejudice with the district court, attesting that "the parties have mutually agreed to settle all disputed issues of fact and law in the above-captioned matter." EX 9. Judge Feldman dismissed the case with prejudice on September 19, 2006. EX 10.

On March 14, 2007, employer controverted claimant's entitlement to further benefits under the Act based on claimant's failure to obtain the written approval of employer and its longshore carrier to the third-party settlement pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g); CX E. Following the referral of the case to the Office of Administrative Law Judges, claimant filed a Motion for Summary Judgment, contending that Section 33(g) is inapplicable to this case. Employer filed both an opposition to claimant's motion and its own Motion for Summary Judgment, asserting that claimant's failure to comply with Section 33(g) bars his entitlement to further benefits.

In his decision, the administrative law judge granted employer's motion for summary decision, finding that the undisputed material facts establish that claimant entered into a settlement of his third-party action without obtaining the written approval of employer and its carrier. Therefore, the administrative law judge denied claimant's claim for further benefits under the Act.

On appeal, claimant makes alternative arguments. First, he contends that the resolution of his third-party lawsuit should be regarded as a simple dismissal of his lawsuit against the third-party defendant, rather than as a settlement, and, thus, Section 33(g)(1) does not apply to his claim for benefits under the Act. In the alternative, claimant urges that the Board find that an exception to the Section 33(g)(1) requirement that claimant obtain the written approval of employer and its carrier to the third-party settlement is appropriate under the specific circumstances of this case. Claimant also urges that the Board adopt a construction of Section 33(g)(2) according to which claimant would have satisfied the requirements of that statutory provision, and, thus, his claim would not be barred. Employer responds, urging affirmance of the administrative law judge's decision.

Section 33(g)(1) of the Act[2] bars claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than the disability compensation to which he would be entitled under the Act without obtaining the prior written approval of employer and its longshore carrier. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004); *Esposito v. Sea-Land Serv., Inc.*, 36 BRBS 10 (2002). 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), *aff'd in pert. part and vacated on other grounds on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

We will initially address claimant's argument that the resolution of his third-party lawsuit should be construed as a dismissal, rather than a settlement, of the lawsuit, making Section 33(g)(1) inapplicable to his claim for benefits under the Act. Cl. P/R and brief at 11-13. First, although claimant relies on the Board's decision in *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997), to support this argument, *Gremillion* is inapposite. The Board held in *Gremillion* that where the claimant had sustained an adverse judgment in his third-party lawsuit, Section 33(g) was inapplicable since the claimant could not have bargained away funds to which the employer was entitled. 31 BRBS at 167. In contrast to *Gremillion*, in which the third-party suit was dismissed by the district court based on an adverse judgment on the merits of the case, there was no

---

[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).

adverse judgment on the merits of the third-party action in the present case. *See* EX 9; *see also* EXs 8, 10. Thus, the Board's decision in *Gremillion* does not support claimant's position that Section 33(g) is inapplicable to his claim.

Second, the administrative law judge considered claimant's contention that the resolution of his third-party lawsuit was not, in fact, a settlement, and he rejected this contention outright. Decision and Order at 3-4. In this regard, the administrative law judge observed that the parties consistently referred to the proceedings as a settlement and that the allocation of a portion of the proceeds to claimant personally establishes that, in fact, a settlement of the third-party lawsuit occurred. *Id.* We therefore reject claimant's argument that the events that transpired with respect to his third-party lawsuit should be construed simply as a dismissal of that lawsuit. Claimant's characterization of the resolution of his third-party suit as something other than a settlement is not supported by the evidence submitted in this case which, as found by the administrative law judge, conclusively establishes that claimant did, in fact, enter into a settlement agreement with the third-party defendant. Decision and Order at 3-5; *see* EXs 3-5, 8-10; CXs A, B. Thus, Section 33(g)(1) is applicable to claimant's claim for benefits under the Act.

We next consider claimant's argument that an exception to the Section 33(g)(1) approval requirement is appropriate in this case. In this regard, claimant first contends that following his discovery deposition in the third-party action, it became apparent that he did not have a meritorious Section 5(b) suit against the vessel owner and, thus, he did not bargain away funds to which employer or its carrier might be entitled. Cl. P/R and brief at 7-8. Claimant's argument is unavailing. Regardless of the merits of a particular third-party lawsuit, where claimant settles a suit arising from the same injury as under the Act, the administrative law judge is not required to look behind the pleadings and result in order to ascertain whether such a third party is in fact liable to both claimant and the employer. Determining whether a third-party suit which claimant files and chooses to settle is actually meritorious is beyond the scope of the administrative law judge's authority. *See generally Equitable Equip. Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999), *aff'g* 32 BRBS 200 (1998). In the absence of a judgment that the third party is not liable to the claimant, *see Gremillion*, 31 BRBS 163, it is sufficient for purposes of Section 33(a) that the claimant filed a suit naming the third party as a defendant for the same disabling injury at issue in the compensation claim and obtained a settlement from that defendant.

Claimant next asserts that the Board should craft an exception to the Section 33(g)(1) approval requirement on the basis that employer was not prejudiced by the third-party settlement in that it had notice of the settlement and agreed to waive its lien. Cl. P/R and brief at 8-10. This argument also is rejected, as there is no requirement that employer establish prejudice in order for Section 33(g) to bar a claim for benefits under

the Act.[3] *See Marlin v. Cardillo*, 95 F.2d 112 (D.C. Cir. 1937); *Fisher v. Todd Pacific Shipyards Corp.*, 21 BRBS 323, 327 (1988). Moreover, the administrative law judge properly determined that employer's agreement to waive its lien against the third-party settlement does not obviate the requirement that the written approval of the settlement by employer and its carrier be obtained. Decision and Order at 4-5. In this regard, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that subrogation rights are but one of the interests employer or carrier has in a settlement between an injured employee and a third-party. *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); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980). The employer and carrier also have a right to offset the amount of the settlement against the obligation for future payments, and this right is separate from the right of subrogation. *Id.*; *see also* 33 U.S.C. §933(f); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993). We therefore reject claimant's contention that the particular circumstances of this case warrant an exception to the Section 33(g)(1) approval requirement.

Lastly, claimant argues that by providing employer with notice of the third-party settlement, he satisfied the requirements of Section 33(g)(2). Cl. P/R and brief at 10-11. Section 33(g)(2) of the Act provides:

> *If no written approval* of the settlement *is obtained* and filed as required by paragraph (1), *or if the employee fails to notify the employer of any settlement* obtained from or judgment rendered against a third person, *all rights to compensation and medical benefits under this chapter shall be terminated,* regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under the chapter.

33 U.S.C. §933(g)(2)(emphasis added). Claimant construes the disjunctive wording of the first phrase of Section 33(g)(2) to mean that he need comply with only one of the alternatives, *i.e.,* provide written approval *or* notice. This construction of Section 33(g)(2) has been definitely rejected. Pursuant to the Supreme Court's decision in *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT), if claimant *either* fails to comply with the written approval requirement of Section 33(g)(1) *or* fails to give notice to employer in

[3] Claimant's related contention that equity dictates that an exception to the approval requirement should be made is unavailing as equitable considerations are inapplicable to the operation of Section 33(g). *Bockman v. Patton-Tully Transportation Co.*, 41 BRBS 34, 40 (2007).

the instances where written approval is not required, *i.e.*, a settlement exceeding compensation entitlement or a judgment, the forfeiture provision applies. *See Esposito*, 36 BRBS at 15. Based on this controlling precedent the construction of Section 33(g)(2) urged by claimant must be rejected.

We therefore affirm the administrative law judge's determination that, as claimant did not obtain written approval from employer and its carrier prior to executing the third-party settlement which was for an amount less than the compensation to which he was entitled under the Act, Section 33(g) bars his claim for further benefits under the Act. *Mapp*, 38 BRBS 43; *Esposito*, 36 BRBS 10.

Accordingly, the administrative law judge's Decision and Order Denying Claimant's Motion for Summary Judgment and Granting Employer/Carrier's Motion for Summary Judgment is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge