BRB No. 02-0434

SHIRLEY A. DILTS (Widow of HENRY C. DILTS) Claimant-Petitioner v. TODD SHIPYARD CORPORATION and EAGLE PACIFIC INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: MAR 12, 2003 DECISION and ORDER

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

James F. Leggett (Leggett & Kram), Tacoma, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting the Employer/Carrier's Motion for Summary Decision (2000-LHC-0995) of Administrative Law Judge Richard K. Malamphy 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, decedent's widow, appeals a denial of death benefits. Decedent worked as a boilermaker at employer's shipyard from 1965 to 1994. During this time, claimant alleges that the decedent was exposed to asbestos. Decedent left work in 1994 as a result of a reduction in force. He subsequently developed lung cancer and died on July 22, 1999. Before his death, decedent filed a claim for benefits under the Act on February 17, 1999. After his death, claimant filed a number of third-party suits against asbestos manufacturers, as well as a claim for death benefits under the Act. 33 U.S.C. §909. Prior to the hearing, claimant settled several third-party suits and released the third-party defendants from further liability. Two of the checks received by claimant were from bankrupt manufacturers, Owens Corning Fibreboard and W.R. Grace.

In his Decision and Order granting employer's motion for summary decision, the administrative law judge found that the projected value over her lifetime of claimant's claim under the Act is approximately $343,308, and claimant does not contest this finding on appeal. Employer contended that the gross value of the third-party settlements is approximately $60,000. The administrative law judge found that even if the proceeds received from the two bankrupt manufacturers are excluded from consideration, claimant has settled her third-party claims to date for the sum of $16,970, which is less than the value of her compensation under the Act. The administrative law judge considered claimant's post-hearing submission of letters from the third-party defendants that the settlements were contingent on employer's approval, but found that the earlier releases between claimant and the third parties did not state that they were conditioned on the approval of employer. Thus, the administrative law judge concluded that the settlements were entered into without the prior knowledge or approval of employer. In addition, the administrative law judge rejected claimant's defense that the total amount of all third-party settlements may exceed the current gross estimate, $60,000, as it is unsubstantiated. Therefore, the administrative law judge granted summary decision and found that claimant's claim for death benefits under the Act is barred pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1).

On appeal, claimant contends that the administrative law judge erred in finding

[1] Claimant was represented by different counsel in the third-party suits than in the proceedings under the Act.

that the claim is barred pursuant to Section 33(g). Claimant contends that employer waived the requirements of Section 33(g) by failing to respond to the request that it approve the settlements and that employer would not have approved the settlements anyway, so failure to obtain employer's approval should not be a bar to her receipt of compensation. In addition, claimant contends that employer was not prejudiced by the judge-approved settlements. Claimant also contends that the non-bankrupt settling defendants agreed that the settlements would not be final until employer approved them and that the administrative law judge erred in denying claimant's request for a subpoena to determine when employer first learned of the settlements and whether they were a party-in-interest with the third-party defendants. Finally, claimant contends that Section 33(g) is unconstitutional because employer is "unfettered" to deprive claimant of property rights without due process of law.

Claimant contends that, under the facts of this case, employer waived the forfeiture provisions of Section 33(g) as it did not respond to her requests for approval of the third-party settlements, and that, moreover, any attempt to secure approval by employer would be futile. 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. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992). 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 part, vacated in part on recon.*, 967 F.2d 971, 26 BRBS 7(CRT) (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). As claimant initiated the third-party proceedings after her husband's death, she is a "person entitled to compensation" under the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

Contrary to claimant's contention, waiver of the requirements of Section 33(g)(1) have not been found under circumstances similar to those in the present case. In the cases cited by claimant, *Dudley v. O'Hearne*, 212 F.Supp. 763 (D.C.Md. 1963); *Robinson Terminal Warehouse Corp. v. Adler*, 314 F. Supp. 405 (E.D.Va. 1970), the employers participated in the third-party suits and joined in the

[2] Initially, we deny claimant's motion to reconsider our Order of October 8, 2002, in which the Board rejected the submission of new evidence which was not presented before the administrative law judge. As the Board stated in its previous order, the Board cannot accept in its review of a case on appeal any evidence which was not already accepted into the record during the proceedings before the administrative law judge. 20 C.F.R. §802.301.

settlements. *See also Deville v. Oilfield Industries,* 26 BRBS 123 (1992). In the present case, employer was unaware that claimant had settled a number of the third-party cases until claimant testified at the hearing on June 19, 2001. While claimant's counsel submitted letters dated July 2001 from the various third-party defendants stating that the settlements were contingent upon employer's approval, the administrative law judge properly found that the actual releases signed by claimant were not conditioned upon employer's approval. *See* Emp. Ex. 3. Several of the original settlement agreements stated that employer would be entitled to a credit against benefits under the Act for the amount of the settlement, *see* 33 U.S.C. §933(f), but did not reserve completion of the settlement until employer's approval was obtained. Moreover, claimant testified that her counsel in the third-party suits informed her that cashing the checks from Worthington and Sepco was all that was necessary to release those defendants from further liability. The Board considered similar facts in *Barnes v. General Ship Service*, 30 BRBS 193 (1996), and held that cover letters setting forth the employer consent contingency, which post-dated claimant's signing of the actual releases, cannot be considered to create a condition precedent to the effectiveness of the settlements. In the instant case, as in *Barnes*, moreover, the settlement checks were cashed by claimant, rather than held by claimant's counsel in a trust account. Therefore, we affirm the administrative law judge's finding that claimant settled her third-party suits against Garlock, Dresser, Worthington and 3M without reserving the condition of employer's prior approval, as it is supported by substantial evidence and in accordance with law. *Esposito v. Sea-Land Service, Inc.,* 36 BRBS 10 (2002); *Barnes,* 30 BRBS 193.

Claimant also contends that the *"de minimis"* settlements cannot prejudice employer as it will receive an off-set against any compensation due for the amount received. However, the aim of Section 33(g)(1) is to disallow claimant from bargaining away funds to which employer may be entitled. There is no requirement under Section 33(g) that employer establish prejudice in order for Section 33(g) to bar a claim for compensation. *See Marlin v. Cardillo,* 95 F.2d 112 (D.C. Cir. 1937); *Fisher v. Todd Pacific Shipyards Corp.*, 21 BRBS 323 (1988). Moreover, contrary to claimant's contention, employer is not required to prove that it could have achieved a higher settlement with the third party in order to be protected by Section 33(g), and employer's mere knowledge of settlement proceedings does not act as a waiver of the requirement that claimant obtain employer's approval. *See Nesmith v. Farrell American Station*, 19 BRBS 176 (1986).

We also reject claimant's contention regarding the effect of her settlements with bankrupt third-party defendants. While two of the third-party defendants, Owens Corning Fibreboard and W.R. Grace, were in bankruptcy, claimant also signed releases with other non-bankrupt companies and received, and cashed, checks from 3M, Garlock, Dresser, Worthington and Sepco. These settlements

were not a result of a bankruptcy court-ordered payment schedule. Thus, as claimant settled her third-party suits for a gross amount less than that which she was entitled to receive as compensation under the Act, we affirm the administrative law judge's finding that claimant's failure to obtain employer's prior written approval for the settlement of suits against these third-party defendants acts as a bar to compensation under the Act pursuant to Section 33(g) as it is supported by substantial evidence and in accordance with law. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Linton v. Container Stevedoring Co.,* 28 BRBS 282 (1994).

Finally, we reject claimant's contention that Section 33(g) is unconstitutional because it deprives claimant of property without due process of law, as it permits employers to deny or ignore requests for approval of third-party settlements. We need not address this contention. There is no evidence in this case that claimant sought employer's written approval prior to entering into the third-party settlements. The evidence presented to the administrative law judge establishes that employer was not informed of the third-party settlements until after the settlements were executed and claimant had received the proceeds. Thus, the constitutional issue

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[3] In *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), the Board held that the payments from a trust fund set up as a result of the manufacturers' bankruptcy are similar to the judgment and remittitur in *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968)(Supreme Court held that a remittitur is not the equivalent of a mutual agreement among the parties but is a judicial determination of recoverable damages). The Board held that the absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that the offers from the trust funds should not be considered settlements, but rather, should be likened to "judgments," to which Section 33(g)(2), rather than Section 33(g)(1), applies. *Williams*, 35 BRBS at 97. The administrative law judge in the instant case did not make a finding regarding the effect of the settlements from Owens Corning and W.R. Grace, which were allegedly bankrupt at the time of the settlements, but properly found that the issue was irrelevant given that claimant's settlement with the other non-bankrupt companies was less than the compensation to which she would be entitled under the Act.

[4] In addition, we reject claimant's contention that the administrative law judge erred in refusing to issue a subpoena to determine when employer first learned of the settlements and whether it was a party-in-interest with the third-party defendants. The relevant question is not when employer first learned of the settlements, but whether employer's prior written approval of the settlements was obtained. Moreover, mere participation by an employer in a third-party action is not sufficient to affect the applicability of Section 33(g)(1). *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); *Pool v. General America Oil Co.*, 30 BRBS 183 (1996)(Smith and Brown, JJ., concurring and dissenting).

raised by claimant is not presented by the facts of this case. In this case, claimant's entitlement to benefits under the Act is forfeited only because she did not follow the requirements of the Act, pursuant to Section 33(g).

Accordingly, the administrative law judge's finding that claimant entered into settlements with third-party defendants without the written approval of employer for an amount less than the compensation to which she was entitled is affirmed. Therefore, the administrative law judge's denial of benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] We note, moreover, that in order to establish a due process violation claimant would have to show that "state action" was involved. *See Kreschollek v. Southern Stevedoring Co.,* 223 F.3d 202 (3d Cir. 2000).