BRB No. 98-1254

MICHAEL LEE SCHAD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TETRA TECHNOLOGIES, INCORPORATED	)	DATE ISSUED: May 12, 1999
	)	
	)	
and	)	
	)	
HOME INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Michael C. Palmintier (deGravelles, Palmintier & Holthaus, L.L.P.), Baton Rouge, Louisiana, for claimant.

Craig W. Marks (Briney & Foret), Lafayette, Louisiana, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Decision (98-LHC-1025) of Administrative Law Judge Larry W. Price 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.,* as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, employed as fluids engineer by Tetra Technologies, Incorporated (Tetra, employer) sustained a lower back injury on April 25, 1994, while working aboard an off-shore oil rig on a platform owned by Enron Corporation (Enron). Enron contracted with Tetra to provide completion fluid monitoring services and claimant's presence on the platform was in furtherance of that contract. After six weeks of conservative treatment, claimant returned to full, unrestricted duty with employer. In April 1995, claimant allegedly re-injured his back while in the course and scope of his employment with employer.

On February 12, 1996, claimant filed suit against Enron, Marine Drilling Company,[1] and Tetra for injuries sustained as a result of the April 25, 1994, accident. The claim against Tetra was dismissed on December 20, 1996, as claimant was unable to establish the requisite seaman status under the Jones Act, 46 U.S.C. §688 *et seq*. On September 19, 1997, claimant entered into a third-party settlement for $8,000 with the remaining litigants without first obtaining employer's written consent.

Meanwhile, on March 5, 1997, claimant filed a claim for benefits under the Longshore Act, in response to which employer moved for dismissal pursuant to Section 33(g), 33 U.S.C. §933(g). Claimant opposed employer's motion by arguing that while the third-party settlement foreclosed any recovery under the Act for injuries sustained in the April 25, 1994, accident, his claim was viable as he sought compensation solely for injuries sustained as a result of the April 1995 accident. The administrative law judge determined that the only claim before him concerns the April 25, 1994, accident, and thus, in light of claimant's unapproved third-party settlement, he dismissed the claim pursuant to Section 33(g).

On appeal, claimant challenges the administrative law judge's dismissal of his claim. Employer responds, urging affirmance.

Claimant argues that the administrative law judge's interpretation of the language "person entitled to compensation" in dismissing his claim under Section 33(g) is far too harsh as it precludes him from obtaining a complete recovery for his work-related injuries. In support of his argument, claimant urges the Board to adopt the Director's "alleged" interpretation of a "person entitled to compensation," *i.e.*, that written approval is only required when employer or its carrier is actually *paying* benefits at the time of settlement, as argued before the Fifth Circuit in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT)(5th Cir. 1991)(*en banc*), and adopted by the dissent in that opinion. In addition, claimant argues that it is in the interests of justice to interpret the statute liberally and to allow his claim for

[1]Enron contracted with Marine Drilling Company to provide the rig and to conduct drilling operations.

compensation under the Act. Claimant's contentions lack merit, inasmuch as the Supreme Court specifically rejected the interpretation of Section 33(g) espoused by claimant.

Section 33(g)(1) requires that a "person entitled to compensation" obtain employer's prior written consent where he enters into third-party settlements for an amount less than the compensation to which he would be entitled under the Act.[2] *See Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 26 BRBS 49 (CRT)(1992). The United States Supreme Court has held that an individual becomes a "person entitled to compensation" at the moment his right to recovery vests, and he need not be receiving compensation or have had an adjudication in his favor in order to be such . *Id.*, 505 U.S. at 477, 26 BRBS at 51 (CRT). *See also Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates],* 519 U.S. 248, 31 BRBS 5 (CRT)(1997). The right to recovery vests when the claimant satisfies the prerequisites attached to that right, *i.e.*, when the claimant suffers the work-related injury. *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52 (CRT); *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd sub nom. Thames Valley Steel Corp.*, 131 F.3d 132 (2d Cir. 1997). In *Yates,* the Supreme Court reiterated that a "person entitled to compensation" means only that the person satisfies the prerequisites attached to the right to compensation regardless of whether the right "has been acknowledged or adjudicated." 519 U.S. at 258-59, 31 BRBS at 8(CRT), *citing Cowart*, 505 U.S. at 477, 26 BRBS at 51 (CRT).

As the administrative law judge found, it is clear from the record in the instant case that claimant sought compensation only for those injuries sustained as a result of the work-related accident occurring on April 25, 1994.[3] Specifically, the administrative law judge observed that claimant's Claim for Compensation (Form LS-203) describes only the accident of April 25, 1994. In addition, the administrative law judge found that there is no evidence that the claim included an accident occurring in April 1995. As such, claimant became a "person entitled to compensation" with regard to the instant claim at the time of his work-related injury on April 25, 1994. *Cowart*, 505 U.S. at 469, 26 BRBS at 49 (CRT). Consequently, as the unapproved third-party settlement was executed subsequent to that date, the administrative law judge properly concluded that claimant forfeited all rights to compensation under the Act for that accident by operation of Section 33(g).[4] *Id*. We therefore affirm the

[2]Pursuant to Section 33(g)(2), claimant need only notify employer of a judgment or of a settlement for an amount more than his compensation entitlement. *Cowart,* 505 U.S. 481, 26 BRBS at 53 (CRT).

[3]Claimant does not contend otherwise on appeal.

[4]Inasmuch as claimant conceded before the administrative law judge that the unapproved third-party settlement foreclosed any recovery under the Act for injuries sustained in the April 25, 1994, accident, it was unnecessary for the administrative

administrative law judge's dismissal of claimant's claim under Section 33(g).

Accordingly, the Order Granting Employer's Motion for Summary Decision issued by the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

law judge to determine whether the settlement involved amounts which were less than claimant would have been entitled to under the Act.