

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 17-0551

LUZ VERDUCCI)
(Widow of BERT VERDUCCI))

Claimant-Petitioner)

v.)

DATE ISSUED: 10/30/2018

BAE SYSTEMS SAN FRANCISCO SHIP)
REPAIR, INCORPORATED)

and)

SIGNAL MUTUAL INDEMNITY)
ASSOCIATION, LIMITED)

Employer/Carrier-)
Respondents)

CONTINENTAL MARITIME SAN DIEGO)
f/k/a SAN FRANCISCO WELDING AND)
FABRICATION)

and)

AMTRUST NORTH AMERICA)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order Denying Death Benefits of William J. King, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell, L.L.P.), Novato, California, for claimant (on brief).

Joshua T. Gillelan, II (Longshore Claimants' National Law Center), Washington, D.C., for claimant (oral argument).

Frank B. Hugg, Oakland, California, for BAE Systems San Francisco Ship Repair, Incorporated and Signal Mutual Indemnity Association, Limited.

Brett A. Gilstrap (Hannah, Brophy, MacLean, McAleer & Jensen, LLP), Bakersfield, California, for Continental Maritime of San Diego.

Mark A. Reinhalter, Counsel for Longshore (Kate S. O'Scamlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Death Benefits (2015-LHC-00508) of Administrative Law Judge William J. King 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).¹ We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹The Board held oral argument in this case, as well as in a companion case, *Hale v. BAE Systems San Francisco Ship Repair*, __ BRBS __, BRB No. 17-0523 (Oct. 10, 2018), in San Francisco, California, on June 26, 2018. Claimant, the Director, Office of Workers' Compensation Programs, and BAE Systems participated.

Statutory Framework -- Section 33 of the Longshore Act

This case involves Section 33 of the Act, which recognizes that “a person entitled to compensation” (PETC) may file a claim for benefits and simultaneously seek to recover damages from third parties ultimately at fault for the disability or death at issue. Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if she determines that the third party may be liable for damages for the work-related injuries. Section 33(g) is intended to ensure that an employer’s rights are protected in a third-party settlement and to prevent the claimant from unilaterally bargaining away funds to which the employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *Parfait v. Director, OWCP*, 903 F.3d 505 (5th Cir. 2018); *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).

To protect an employer’s right to offset any third-party recovery against its liability for compensation under the Longshore Act, 33 U.S.C. §933(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the employer’s and carrier’s prior written approval of the third-party settlement. 33 U.S.C. §933(g);² *Estate of Cowart v. Nicklos*

²Section 33(g), 33 U.S.C. §933(g) (emphasis added), is titled “Compromise obtained by person entitled to compensation” and states:

(1) *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.*

(2) *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 this chapter.*

Drilling Co., 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988).

Pursuant to Section 33(g)(1), prior written approval of the settlement is necessary when the PETC enters into a settlement with a third party for less than the amount to which she is entitled under the Act. 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT); *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281. Failure to obtain prior written approval of a “less than” settlement results in the forfeiture of benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). Section 33(g) is an affirmative defense, and the employer bears the burden of proving that the claimant entered into a “less than” settlement with a third party without obtaining prior written approval from it and its carrier. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); *Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). The current dispute involves whether claimant was a party to settlements that triggered Section 33’s notice and forfeiture procedures.

Factual Background

The underlying facts of this case are not in dispute. On November 5, 2011, claimant’s husband, Bert Verducci (decedent), died from conditions relating to his alleged occupational exposure to asbestos and other toxins. Prior to his death, decedent filed personal injury actions against various third parties - asbestos manufacturers, distributors, and related entities - alleging that his exposure to asbestos and asbestos-containing products caused him severe and permanent injuries, including lung cancer and asbestosis.³ Decedent entered into inter vivos settlements with 58 defendants. EX 3. Claimant filed a claim for death benefits dated September 26, 2012, asserting that decedent’s death was hastened by his exposure to asbestos while working in covered employment with BAE Systems (BAE) and/or Continental Maritime San Diego (CM). EX 5.

³Decedent was diagnosed with lung cancer and asbestosis in May 2004. He stopped working at that time due to his lung cancer. On June 21, 2004, decedent filed his personal injury actions in San Francisco Superior Court.

On May 7, 2014, claimant signed a disclaimer which purported to renounce her interest in third-party settlements in favor of recovery under the Act.⁴ EX 10.16; HT at 58-59. It states that claimant read and fully understood its contents and that the law firm that represents claimant in the current proceeding, as well as the estate in the civil lawsuits, advised her of her rights. EX 10.16. Claimant also “agree[d] to disclaim all of [her] interests in any ongoing or future third-party civil lawsuits based on injuries and death caused by [her] spouse’s asbestos exposure.” *Id.* The disclaimer was not filed in any court or provided to any other party.⁵

On June 27, 2014, Alexandra Verducci, who is claimant’s step-daughter, executed settlements with Pfizer, Incorporated (Pfizer) and with Zurn Industries, LLC (Zurn). BAE EX 3.25-3.30, 3.52-3.63.⁶ In return for \$7,000, as “personal representative of the estate of Bert Verducci,” and “on behalf of the estate, for myself, and the decedent’s heirs,” Alexandra Verducci released Pfizer from “any and all claims of any kind whatsoever” including “future lost wages or prospective earnings, the loss of companionship and consortium and funeral expenses[,]” and “all further or future Claims . . . including death. . . .” *Id.* at 3.25-3.24. The Pfizer settlement further stated that Alexandra Verducci recognized that the “[r]elease is binding on me, the decedent’s *heirs*, executors, beneficiaries, administrators, successors and assigns in every way. . . .” *Id.* at 3.30 (emphasis added); *see also id.* at 3.25 (identifying release as being on behalf of same groups).⁷

⁴In April 2014, claimant’s counsel mailed three forms to her consisting of: (1) a waiver of interest in her claim under the Act; (2) a “Disclaimer of Participation in Third-Party Lawsuit in Favor of Claim;” and (3) a “Disclaimer of Interest in Estate in Favor of Longshore and Harbor Workers’ Compensation Act.” HT at 161-163; Supp. HT at 58-59. Claimant only signed the “Disclaimer of Interest in Estate in Favor of Longshore and Harbor Workers’ Compensation Act.” *Id.*

⁵The disclaimer was disclosed during claimant’s testimony at the February 2, 2016 formal hearing, *see* HT at 152-154, 156-157, but was not made available to employers until after the administrative law judge issued his February 9, 2016 order. *See* Order Compelling Production of Documents and Setting Post-Hearing Deadlines at 1-2. The disclaimer was entered into the record at the March 21, 2016 Supplement Hearing. *See* Supp. HT at 57.

⁶The Pfizer release appears to be an attachment to another settlement document, but that other document is not in the record. BAE EX 3.25-3.30.

⁷The signature line “For spouse releasing loss of consortium claim” is crossed out and unsigned. BAE EX 3.29. There is no indication who, when, or why the signature line was crossed out. In addition, the “heirs” are not identified by name.

In return for \$5,000, Alexandra Verducci, as “Decedent’s Successor-In-Interest” and the “Plaintiff,” released Zurn from “any and all claims, demands, actions, or causes of action, known or unknown,” including a “complete discharge from and waiver of any potential and future claims of the heirs of Bert Verducci.” BAE EX at 3.52. The Zurn release identifies decedent’s heirs as “Alexandra Verducci and any heirs other than those set forth as defined by California Code of Civil Procedure section 377.60,” and further adds that “I, on behalf of decedent’s estate, agree to indemnify and hold harmless Zurn Industries, LLC against any claims presented in the future by said heirs.” *Id.* at 3.61; *see also* Cal. Civ. Proc. Code §377.60.

The same law firm, Brayton Purcell, has been the exclusive representative for claimant with respect to her longshore claim,⁸ as well as the exclusive representative of Alexandra Verducci in the third-party actions, at all relevant times. At the hearing before the administrative law judge, claimant testified that, at the time of signing, she was not aware of the releases; however, she was “okay with” and respected what Alexandra Verducci did when she entered into the third-party agreements. HT at 151-152; Supp. HT at 49.

The ALJ’s Decision

In this case, no party disputes claimant’s status as a PETC under the Act after decedent’s death. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000). Additionally, no party disputes that decedent’s representative (his daughter, Alexandra Verducci)⁹ entered into the Pfizer and Zurn settlements, claimant did not sign either of them, and Alexandra Verducci has not filed a claim for benefits under

⁸Claimant supplemented her representation by adding appellate counsel specifically for purposes of the oral argument.

⁹The term “representative,” as that term is used in Section 33(g)(1), pursuant to Section 33(c), means “legal representative of the deceased” and does not refer to an attorney. 33 U.S.C. §933(c), (g)(1); *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Williams v. Ingalls Shipbuilding, Inc.* 35 BRBS 92 (2001). Thus, Section 33(g)(1)’s phrase “the person entitled to compensation (or person’s representative),” refers to a claimant or to a legal representative of the deceased, and does not refer to a “representative” of the claimant under agency principles. Therefore, “person’s representative” in this case refers to Alexandra Verducci as the representative of decedent, not of claimant.

the Act.¹⁰ Further, it is undisputed that the aggregate of the proceeds from the Pfizer and Zurn settlements is far less than claimant's entitlement under the Act,¹¹ and none of the employers or carriers gave prior written approval of either settlement.¹² See *Mapp*, 38 BRBS 43.

Thus, the sole issue is whether claimant, or someone with the authority to do so on her behalf, "enter[ed] into a settlement with a third person." 33 U.S.C. §933(g). If she did, Section 33(g) bars her claim. *Mapp*, 38 BRBS 43. If she did not, her claim for benefits under Section 9 would not be barred. *Newton-Sealey*, 49 BRBS 17.

After a hearing on the issue, the administrative law held that Section 33(g) barred claimant's Longshore claim. Based on the language of the settlements, he found that claimant settled with Pfizer and Zurn for amounts less than her entitlement under the Act without obtaining prior written approval from the longshore employers and carriers. Decision and Order at 9-11. The administrative law judge reasoned: 1) claimant is the surviving spouse of decedent and thus, is one of decedent's heirs under state law; 2) Alexandra Verducci represented the heirs in signing the agreement; 3) the Pfizer and Zurn settlements terminated the wrongful death claims against those parties and affected the rights of claimant; 4) Alexandra Verducci acted on behalf of claimant when she received the benefit in the third-party settlements; and 5) there is no evidence that claimant disclosed the disclaimer to the third parties; consequently, it has no effect on the settlements. Therefore, the administrative law judge concluded that claimant entered into and was bound by the Pfizer and Zurn settlement agreements, and her failure to obtain the requisite

¹⁰No party asserts that Alexandra Verducci is eligible for benefits under the Act, as she is an independent adult. See 33 U.S.C. §§902(14), 909(d).

¹¹The aggregate, gross, apportioned amounts of the settlements are to be compared with the total amount to which the claimant would be entitled under the Act. See *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The administrative law judge calculated that, as of February 2, 2016, claimant would be entitled to over \$81,000 under the Act, not including annual adjustments. Decision and Order at 11. In comparison, he found the two settlements at issue grossed a total of \$12,000. *Id.* In any event, claimant does not dispute that the agreements were for an amount less than the longshore benefits she would otherwise receive.

¹²Claimant, purportedly, has not received any money from the post-death third-party settlements.

prior approval when the settlements were executed violated Section 33(g). Decision and Order at 11.

This Appeal

Claimant appeals the administrative law judge's finding that her claim for death benefits is barred by Section 33(g). BAE¹³ and the Director, Office of Workers' Compensation Programs (the Director), separately respond, urging affirmance of the administrative law judge's denial of benefits. CM, by letter dated June 7, 2018, notified the Board that it was adopting BAE's response brief. Claimant filed a reply brief.

Claimant asserts the administrative law judge erred in relying on the California definition of the term "heirs" to conclude she is bound by the third-party settlements before independently determining whether she "entered into" those settlements under the language of the Act. She contends she did not "enter into" any third-party settlements under the Act, and she did not authorize anyone to do so for her. Claimant alternatively argues that if California law governs the interpretation of the settlements, they are ambiguous, and the administrative law judge erred by disregarding parole evidence,¹⁴ which, she claims, establishes that she was not a party to the settlements.

Employers assert that California law applies to determine the existence of a contract for the purposes of determining whether claimant "entered into" a third-party settlement under the Act. They contend claimant demonstrably is an "heir" under California law, and the straightforward settlement language unambiguously binds her, eliminating any need to consider parole evidence. Moreover, even if the third-party settlements were somehow ambiguous, employers assert that extrinsic evidence, such as claimant's failure to publicize or file the disclaimers, supports the administrative law judge's decision. They argue that because claimant was not specifically excluded from the third-party settlements, which were for amounts less than the amount to which she would be entitled under the Act, and

¹³In a pleading dated July 31, 2018, the Board was informed that BAE Systems San Francisco Ship Repair, Incorporated, now doing business as San Francisco Ship Repair, Incorporated, filed a voluntary Chapter 11 petition in bankruptcy court.

¹⁴Claimant's proffered parole evidence consists of her testimony detailing "her understanding of the documentation or circumstances" surrounding the third-party settlement agreements and the signed disclaimer. Cl. Brief at 23-26; HT at 139-142, 145-155, 159-165; Supp. HT at 47-49; EX 11.

she did not seek prior written approval of those settlements, Section 33(g) mandates forfeiture of her claim for death benefits.¹⁵

The Director agrees with employers and urges the Board to affirm the administrative law judge's decision. She likewise asserts that California law applies to determine whether claimant entered into a settlement under the Longshore Act and that California law looks within the four corners of documents to determine their objective intent. Thus, there is no need to look at subjective intent or extrinsic evidence because the language here is not open to interpretation. The Director also asserts that the administrative law judge correctly gave little weight to the signed disclaimers because they were signed only by claimant and not by the third-party defendants. Therefore, they cannot modify the settlements under the law of contracts, and Section 33(g) bars claimant's claim for death benefits.¹⁶

In *Hale v. BAE Systems San Francisco Ship Repair*, __ BRBS __, BRB No. 17-0523 (Oct. 10, 2018), the administrative law judge addressed essentially the same Pfizer settlement agreement and purported disclaimer at the heart of this appeal.¹⁷ The Board held the administrative law judge properly found that the employers showed the existence of a fully-executed third-party settlement with Pfizer which extinguished the claimant's claim against the third party for the decedent's death and, thus, affected the employers' rights under the Act. Noting that the aggregate of the settlements entered into in *Hale* is less than the amount to which claimant Hale would have been entitled to under the Act, the Board affirmed the administrative law judge's finding that the claimant's unapproved third-

¹⁵Employers note that Section 33 was designed to protect their interests, as the existence of third-party settlements may affect their liability under the Act. 33 U.S.C. §933(f), (g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Banks v. Chicago Grain Trimmers*, 390 U.S. 459 (1968); *Treto v. Great Lakes Dredge & Dock Co.*, 26 BRBS 193 (1993).

¹⁶The Director agrees with employers that the purposes of Section 33 are to prevent double recovery *and* to protect employers from liability when another party is at fault, as the employers are the real parties-in-interest when a third-party settlement might reduce their liability. *See Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT).

¹⁷The language of the Pfizer settlements is identical in both cases, but for names of the decedents and their personal representatives. Additionally, as in *Hale*, the Pfizer release in this case was executed in California, thereby presumably rendering it enforceable by California courts, subject to California law as to whether a valid contract exists. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (Cal. 1992); Cal. Civ. Proc. Code §1550.

party settlement with Pfizer invoked the Section 33(g)(1) forfeiture provision and barred her entitlement to death benefits under the Act. *Hale*, slip op. at 17; *see also Parfait*, 903 F.3d at 510.

In this case, as in *Hale*, the Pfizer settlement released Pfizer from all liability, including liability for any claims claimant may have been entitled to file,¹⁸ for consideration, and the parties did not return to the *status quo ante*. Moreover, there is no allegation that the parties lacked the authority to consent or that the agreement is in anyway unlawful or otherwise unenforceable. Therefore, for the reasons expressed in *Hale*, claimant, as decedent's surviving spouse is an "heir" under California law and the plain language of the Pfizer agreement establishes that she is a party to the settlement.¹⁹ Employers have shown the existence of a fully-executed third-party settlement with Pfizer which extinguished claimant's claim against the third party for decedent's death and, thus, affects employers' rights under the Act. Because the aggregate of the Pfizer and Zurn settlements in this case is less than the amount to which claimant would be entitled under the Act, *see* n.10, *supra*, we need not address the nature of the Zurn agreement. We therefore affirm the administrative law judge's finding that claimant's unapproved third-party settlement with Pfizer invokes the Section 33(g)(1) forfeiture provision and bars claimant's entitlement to death benefits under the Act. *Parfait*, 903 F.3d at 510.

¹⁸The release covered decedent's personal injury suit as well as the survivors' wrongful death claims. Under California law, wrongful death is a statutory claim, *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807 (Cal. Ct. App. 1997), and each heir has a personal and separate wrongful death cause of action, but the actions are deemed "joint, single and indivisible and must be joined together in one suit." *Corder v. Corder*, 41 Cal. 4th 644, 652 (Cal. 2007); *see* Cal. Civ. Proc. Code §377.60(a). Section 377.60 provides in relevant part: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: (a) The decedent's surviving spouse. . . ." Cal. Civ. Proc. Code §377.60(a). Thus, the decedent's personal representative may bring a wrongful death cause of action on behalf of the decedent's surviving spouse, and all known heirs must be joined into the single suit. *Ruttenberg*, 53 Cal. App. 4th at 808.

¹⁹Similarly, we reject claimant's contention that parole evidence establishes she was not a party to the settlement. *Hale*, slip op. at 14-16.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge