BRB No. 00-575

FREDDIE MEAUX Claimant-Respondent v. FRANKS CASING CREW AND RENTAL TOOLS, INCORPORATED Employer-Respondent LOUISIANA INSURANCE GUARANTY ASSOCIATION Carrier-Petitioner	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Karl W. Bengsten (Shelton Law Firm), Lafayette, Louisiana, for claimant.

James A. Lochridge, Jr. (Voorhies & Labbé), Lafayette, Louisiana, for employer.

Henry G. Terhoeve (Guglielmo, Marks, Schutte, Terhoeve & Love), Baton Rouge, Louisiana, for Louisiana Insurance Guaranty Association.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McATEER, Administrative Appeals Judges.

PER CURIAM:

Louisiana Insurance Guaranty Association (LIGA) appeals the Decision and Order Awarding Benefits (99-LHC-443) of Administrative Law Judge Clement J. Kennington 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 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).

This case has a lengthy procedural history. Claimant injured his back on November

13, 1983, while working for employer aboard a jackup drilling vessel. Employer and its carrier, Transit Casualty Company (Transit), began the voluntary payment of disability benefits under the Act. On November 13, 1984, claimant filed a third-party suit in United States District Court against Pennzoil Production Company, Pennzoil Oil & Gas, Inc., and Global Marine Drilling Company (Global). Pennzoil Production Company, as Global's indemnitor, filed an answer on January 21, 1985. On September 17, 1985, employer, as indemnitor of Pennzoil Oil & Gas, Inc., assumed its defense. Thus, employer defended Pennzoil Oil & Gas, Inc. and Pennzoil Production Company in the third-party suit, and agreed to indemnify them under the master service agreement.[1]

On December 3, 1985, Transit was declared liquidated, and compensation payments, as well as medical expenses, were voluntarily paid by employer. Claimant and claimant's counsel were notified on December 24, 1985, by Crawford Risk Management of the liquidation and that Crawford would no longer be handling claimant's case. They were directed to send any further correspondence regarding the claim to the appointed receiver for Transit. J. Exs. 2-4. At this time, however, Transit informed the parties that all policies were effectively cancelled.

In January 1986, employer requested that LIGA take over its Longshore claims, including that of claimant, due to Transit's insolvency. LIGA generally refused to do so on the grounds that the claims constituted "Ocean Marine" claims, which were excluded from coverage under LIGA law. Consequently, employer filed suit against LIGA in state court on September 16, 1986. Claimant was not a party to the action filed by employer, nor was he notified by any of the parties to that action that a claim for payment had been asserted or that the suit was filed. Between January and March 1987, LIGA reversed its position on the Longshore claims and began accepting employer's claims. Specific information was forwarded at various times to LIGA regarding each claim, and the information concerning claimant's claim was submitted on May 6, 1987, by employer, describing the claim and payments made. Neither claimant nor his counsel was contacted by LIGA. Moreover, during this period, employer represented to claimant that there was no carrier, and employer gave its prior written approval on April 7, 1987, to claimant's proposed settlement with

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[1]On January 27, 1986, Global filed for bankruptcy, staying claimant's third-party suit against Global.

Pennzoil. On April 13, 1987, claimant settled with Pennzoil for $5,000.[2] J. Exs. 5-7.

By 1988, LIGA had accepted all of employer's Longshore claims except that of claimant. LIGA refused to accept claimant's claim, asserting that claimant forfeited his right to continued compensation benefits under the Act as he failed to obtain the written consent of Transit or LIGA prior to settling his suit against Pennzoil.

On January 30, 1989, the bankruptcy court issued an order lifting the automatic stay on claimant's proceedings against Global. *See* n. 1. Employer filed an intervention in this suit, and claimant asserted as a defense that employer had consented to such a settlement on April 13, 1987. *See* n. 2. On March 14, 1990, claimant settled with Global and the Insurance Company of Pennsylvania for $150,000, from which claimant received a net recovery of $85,559.44. Thereafter, LIGA filed a Notice of Controversion pursuant to the Act on June 25, 1991, stating that this action did not "in any way imply or acknowledge acceptance of [claimant's] claim by or on behalf of LIGA."

On August 28, 1995, the state court rendered judgment in favor of employer and against LIGA only to the extent of payments, $22,158.11, made by employer to claimant up to April 13, 1987, the date of the consent settlement between claimant and Pennzoil, as the court noted that claimant did not obtain carrier's consent for the settlement agreement. J. Exs. 10, 11. Employer appealed this decision to the Louisiana First Circuit Court of Appeals, which reversed the trial court ruling and ordered LIGA to reimburse employer the full amount employer had paid to claimant for medical expenses and compensation benefits. LIGA was further ordered to make continuing compensation payments to claimant in the amount of $551.59 every two weeks. The Louisiana Supreme Court summarily denied LIGA's *writ of certiorari*.

On April 15, 1998, LIGA filed a petition in state court to annul the prior state court decisions on the basis that the courts did not have jurisdiction over the subject matter of the suit. LIGA was required to deposit $289,038.65 into the 19th Judicial District Court Registry, pursuant to the First Circuit Court of Appeals' executory judgment. As a result of the deposit, claimant's counsel was made aware, for the first time since the 1983 injury, of

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[2]At this time, employer also agreed to any future settlement claimant might agree to with Global Marine, retaining only the right to reimbursement from a third-party settlement which exceeds $200,000. J. Ex. 6.

LIGA's potential liability for claimant's claim. On May 13, 1999, the Louisiana district court granted summary judgment in favor of employer, effectively denying LIGA's petition to annul the prior Louisiana state court decisions. LIGA appealed this decision, and the appeal remained pending at the time of the administrative law judge's hearing in the instant case.

The parties agreed that the gross amount of claimant's third-party settlements is less than claimant's compensation entitlement under the Act. In his Decision and Order Awarding Benefits, the administrative law judge found that claimant properly obtained the written approval of employer prior to entering into the third-party settlements. Moreover, he found that it was claimant's reasonable belief that there was no carrier on the claim. Thus, the administrative law judged found that claimant's entitlement to benefits is not barred by Section 33(g) of the Act, 33 U.S.C. §933(g).

On appeal, LIGA contends that the administrative law judge erred in finding that claimant was not aware of the existence of a carrier, as claimant had notice of the receiver in charge of Transit's liquidation. In addition, LIGA contends that the administrative law judge erred in finding that approval of employer alone is sufficient to fulfill the requirements of Section 33(g). Claimant and employer respond urging affirmance of the administrative law judge's decision.[3]

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[3]Employer also contends that LIGA's appeal should be dismissed because the state court has already addressed the issue raised by LIGA. We reject this contention. The state court of appeals specifically did not address claimant's entitlement to benefits under the Act. *See* LIGA Ex. 15 at 74. Rather, the court held that LIGA is liable for the payment of claimant's continuing compensation as well as reimbursement to employer for compensation and medical benefits already paid. The court rejected LIGA's contention that employer's waiver of its subrogation rights up to $200,000 relieves LIGA of its obligations under the contract. However, the issue in the instant case involves whether claimant's entitlement to benefits is barred pursuant to Section 33(g) for failure to obtain both employer's and carrier's consent to the third-party settlement.

Section 33(g) bars 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 the prior written consent of employer and its carrier. 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); *United Brands Co. v. Melson*, 569 F.2d 214, 8 BRBS 239 (5th Cir. 1978). Section 33(g) specifically requires written approval of employer and its carrier:

> 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) (emphasis added). It is undisputed that employer gave its prior written approval in this case in accordance with Section 33(g).[4] LIGA contends that claimant's claim is barred pursuant to Section 33(g) because claimant did not obtain the prior written approval of a carrier, in addition to obtaining employer's approval.

LIGA relies on the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), to argue that claimant was required to seek a carrier's approval of the settlements, even though it had not yet admitted liability for the claims. The *Cowart* decision states that

> the natural reading of the statute supports the Court of Appeals' conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies,

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[4]The administrative law judge also found that employer's agreement, in approving the Pennzoil settlement, to any future settlement provided certain lien rights were protected amounted to employer's participation in the settlements such that Section 33(g) is inapplicable. This finding is not challenged on appeal.

> and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.

Cowart, 505 U.S. at 477, 26 BRBS at 51(CRT). Moreover, the Court stated that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen." *Id*. However, in *Cowart*, the Court was addressing the definition of a "person entitled to compensation," and when such person was required to obtain written consent prior to entering into a third-party settlement. *Id.,* 505 U.S. at 483, 26 BRBS at 53(CRT). The *Cowart* court was not presented with the issue presented herein: whether claimant is required to obtain the written consent of an arguably unknown carrier, in addition to the consent of his employer.

As the administrative law judge stated, the letter received by both claimant and claimant's counsel in 1985 stated that any further inquiries regarding claimant's claim should be sent to Transit's receiver in St. Louis, but it also stated that Crawford would no longer handle claimant's case and that Transit's policies were cancelled. Emp. Ex. 2-3. Employer and claimant apparently interpreted this letter to mean that the claim would not be covered by the receiver, and thus did not contact the receiver regarding the third-party settlements. Employer noted on the LS-33 Form that it signed on April 7, 1987, approving claimant's settlement with Pennzoil, that there was no carrier on the claim. Moreover, when employer filed suit in state court in 1986 against LIGA to enforce coverage for its Longshore claims in the place of the bankrupt Transit, it did not include claimant as a party or inform claimant that the suit had been filed. While LIGA did eventually accept coverage of employer's Longshore claims, it was not until after claimant had settled his third-party suit against Pennzoil, with employer's written approval. Claimant also was not informed of LIGA's potential coverage until after he settled the third-party suit with Global in 1990. LIGA filed a notice of controversion in 1991 and the state court ruled LIGA liable in 1995. The administrative law judge found, based on the totality of these circumstances, that claimant did not have knowledge that any carrier was potentially liable for his claim. He concluded, therefore, that the absence of a carrier's written approval of the third-party settlements does not bar claimant's claim under the Act. The administrative law judge was not persuaded that the *Cowart* decision mandated a different outcome, as the Court recognized that there may be exceptions to the strict rule requiring prior written approval, *see Cowart,* 505 U.S. at 483, 26 BRBS at 53(CRT), and the administrative law judge found the facts of this case warranted such an exception.

While claimant must obtain employer's written approval even if the employer has not accepted liability for the claim, *Cowart*, 505 U.S. at 477, 26 BRBS at 51 (CRT), there have been no decisions which address the question, as presented under the facts of this case, regarding the effect of claimant's failure to obtain the written approval of a carrier where the

named carrier is insolvent and claimant is not aware that there is another potentially liable carrier. In the present case, the administrative law judge's finding that claimant did not have knowledge of LIGA's potential liability is rational and supported by substantial evidence. Employer informed claimant in 1987, at the time of the Pennzoil settlement, that there was no carrier on the claim. In view of this fact, and in light of the 1985 letter effectively canceling Transit's insurance policy due to its insolvency, claimant was not required to contact Transit's receiver to obtain its approval of the third-party settlements. Under the Act, where employer has contracted with an insurer to secure the payment of compensation, in accordance with the requirements of Section 4, 33 U.S.C. §904, and its carrier becomes insolvent, employer is directly liable for the payment of benefits. *B.S. Costello, Inc. v. Meagher,* 867 F.2d 722, 22 BRBS 24(CRT)(1st Cir. 1989). Thus, once Transit became insolvent and gave notice that employer's insurance policy was cancelled, it no longer secured payments under the Act, and employer was solely responsible for the payment of benefits. Under these circumstances, employer's consent to the settlement satisfied Section 33(g), as it in essence became the employer and carrier. The argument that separate consent by Transit or its receiver was required is thus rejected.

As to LIGA, the argument that claimant was required to obtain its consent is also rejected. LIGA entered the case not by operation of the provisions of the Longshore Act, but via state law and only after substantial litigation regarding its obligations to employer. LIGA does not allege error in the administrative law judge's finding that claimant was unaware of LIGA's potential liability until 1998, long after the third-party settlements were executed. Therefore, it is manifestly unreasonable to suggest that claimant's failure to obtain LIGA's approval of his third-party settlements bars his claim pursuant to Section 33(g). Inasmuch as substantial evidence supports the administrative law judge's finding that claimant was unaware of LIGA's potential liability on the claim at the time of the third-party settlements, we affirm the administrative law judge's finding that claimant's entitlement to benefits is not barred pursuant to Section 33(g) for failure to obtain LIGA's written approval of the third-party settlements.[5]

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[5]LIGA also contends that at the time of the settlement with Pennzoil, LIGA was the

statutory successor to Transit, and thus assumed all of its rights, duties and obligations of the insolvent insurer. *See* La. R.S. 22:1382(1)(b), 1385. We reject this contention as at the time of the settlement with Pennzoil, LIGA contended that it was statutorily restricted from accepting coverage of Longshore claims as they were considered "Ocean Marine" claims. Moreover, the administrative law judge found that these provisions only apply when claimant is aware of carrier's existence. In addition, given our disposition of this case, we need not address claimant's contention, or employer's responsive argument, as to whether Transit or LIGA was a "carrier" as defined in Section 32(a) of the Act, 33 U.S.C. §932(a), at the time claimant entered into the third-party settlements.

Accordingly, the decision of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge