BRB No. 94-0439

BEATRICE STADTMILLER (Widow of DELBERT STADTMILLER) Claimant-Respondent v. MALLOTT AND PETERSON and INDUSTRIAL INDEMNITY COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Anne Landwehr (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration (92-LHC-2755) of Administrative Law Judge Paul A. Mapes 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 if they 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). The Board held oral argument in this case in San Francisco, California, on August 4, 1994.

Decedent, who was exposed to asbestos while working for employer from 1940 through 1946, filed a claim under the Act in June 1990 for asbestos-related cancer. He died from this work-related condition on December 21, 1990. Decedent's widow, the claimant in the current appeal, filed a claim for decedent's disability benefits and death benefits on her own behalf on December 10, 1991. 33 U.S.C. §§908, 909. In February 1993, the parties submitted a proposed stipulation, settling all issues then in dispute, and requested that the matter be remanded to the district director. The case was remanded on February 26, 1993. On March 5, 1993, however, the employer filed a motion for rescission of the stipulations and entry of summary judgment denying the claim. As a basis for this motion, employer alleged that it discovered that in 1992, claimant had entered into a settlement agreement with a third party, without receiving advance approval from employer. Accordingly, employer argued that claimant's right to compensation was barred under Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), based on this unauthorized settlement. In response to employer's motion, the administrative law judge issued an order vacating the order of remand and directed the district director to return the record to the Office of Administrative Law Judges. Claimant thereafter replied to employer's motion, urging that it be denied.

Claimant had filed a civil suit against several asbestos companies, including Waldron Duffy, Incorporated. She was represented in the third-party action by Harry Wartnick, an attorney representing numerous plaintiffs; claimant's claim against Waldron Duffy was consolidated with numerous similar actions brought by the other plaintiffs. Claimant asserted that she did not authorize Mr. Wartnick to settle her civil action, did not sign any settlement agreement, and did not receive any settlement money. Claimant further stated that although Mr. Wartnick did receive funds from Waldron Duffy which were offered in return for a settlement of approximately 60 claims against the company, including claimant's suit, she had not been informed of the offer and had neither accepted nor rejected the proposed settlement. These representations were supported by a declaration signed by the claimant on March 8, 1993, and by Mr. Wartnick on March 19, 1993. Thereafter, claimant's counsel submitted a letter, asserting that no further inquiry into this matter was warranted and requesting that employer's motion be denied.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer replied to claimant's response, asserting that the representations of claimant and her attorneys were "highly suspect" and were contradicted by the fact that Mr. Wartnick had moved to dismiss claimant's civil action against Waldron Duffy, with prejudice, after he had received Waldron Duffy's settlement offer and funds. Employer also noted that the representations that claimant was not informed of the settlement offer were not consistent with the requirements of the California Business Professional Code that members of the state bar "promptly communicate" all settlement offers to their clients. Finally, employer emphasized that the provisions of Section 33(g) apply to settlements entered into by a claimant as well as settlements entered into by a claimant's "representative."

Based on the affidavits submitted by claimant and Mr. Wartnick denying that a settlement had occurred, the administrative law judge denied employer's motion for summary judgment and scheduled a hearing. Evidence presented at the hearing indicated that Mr. Wartnick accepted two lump-sum checks from Waldron Duffy's carriers which were intended to cover compensation for the approximately 60 asbestos plaintiffs which the law firm represented. Tr. at 110. Of the amount tendered, $4,500 was supposedly earmarked for claimant. All of the money was placed in the law firm's trust account. While Mr. Wartnick did agree to file a dismissal of claimant's suit against Waldron Duffy, he testified that the attorney for the asbestos carrier, Mr. Jones, had also agreed that the dismissal would be vacated if claimant refused the settlement offer. Mr. Wartnick also testified that he agreed to sign requests for dismissals with the understanding that if a client rejected the offer, Waldron Duffy would reenter the litigation. This procedure was allegedly adopted to facilitate the handling of the large number of cases.[1] Moreover, Mr. Wartnick stated that the dismissal was filed "with prejudice" in error. Finally, the record reflects that on May 20, 1993, the order dismissing the lawsuit was vacated by the California Superior Court for Alameda County pursuant to a stipulation between claimant and Waldron Duffy. Cl. Ex. 5 at 124-125; Tr. at 98.

After the hearing, in an Order Denying Motion for Rescission of Stipulations, the administrative law judge found that neither claimant, nor her "representative" as that term is defined in Section 33(g), entered into a settlement agreement with Waldron Duffy. The administrative law judge further determined that claimant was not vicariously bound by the actions of her attorney inasmuch as Mr. Wartnick lacked actual or apparent authority to enter into the settlement on claimant's behalf and claimant had not ratified the unauthorized settlement. Accordingly, the administrative law judge concluded that as claimant was not bound by the unauthorized efforts of her counsel to settle her case, her right to benefits under the Act was not barred under Section 33(g). Accordingly, he found it unnecessary to decide whether Mr. Wartnick's actions, did, in fact, constitute the execution of a settlement. The administrative law judge further determined that even if, as employer contended, the dismissal with prejudice could not be vacated even with the consent of the parties because it became final under California law, and, as a result, employer might be unable to obtain any recovery from Waldron Duffy, the result would not be that claimant's claim is

[1]Mr. Wartnick alleged that this practice was common in the California courts, condoned by them, and grew out of concern that a large percentage of recovery money went toward litigation rather than plaintiffs' recovery.

barred under Section 33(g) inasmuch as Section 33(g) applies only where a person "entitled to compensation" or that person's "legal representative" either directly or through the authorized actions of an attorney enters into an third-party settlement. In an Order Denying Motion for Reconsideration dated November 26, 1993, the administrative law judge reaffirmed his finding that Mr. Wartnick was not claimant's legal representative under Section 33(g) and that claimant had done nothing to ratify his unauthorized settlement.

On appeal, employer, incorporating its post-trial brief, argues that claimant's attorney in the civil lawsuit, Harry Wartnick, is her "representative" as that term is used in Section 33(g) and that because a settlement occurred under California law, claimant is precluded from receiving benefits under the Act. Employer argues, in the alternative, that under California agency law, claimant is bound by the actions of her attorney, who dismissed the civil action against Waldron Duffy with prejudice, and cashed the settlement check and retained the proceeds, conduct consistent with the execution of a settlement. Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of claimant's civil action on May 20, 1993, because under Section 473 of the California Code of Civil Procedure such an action had to have been instituted within six months of the initial order of dismissal.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond that the administrative law judge properly found that Section 33(g) was inapplicable on the bases that claimant did not execute a third-party settlement, Mr. Wartnick was not her legal representative under Section 33(g), and she was not otherwise bound by his unauthorized actions. They thus assert that his Order Denying Motion for Rescission should be affirmed. Both employer and claimant have filed reply briefs which essentially reiterate the arguments made in their other briefs.

"Representative" Under Section 33(g)

Initially, we reject employer's assertion that Harry Wartnick, claimant's counsel in the third-party suit, was her "representative" as that term is used in Section 33(g)(1) of the Act. Section 33(g)(1), as amended in 1984, 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 district director within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1988). In his Order Denying Employer's Motion for Reconsideration, the administrative law judge considered and rejected employer's argument, which it reiterates on appeal, that the term "representative" in subsection 33(g) includes attorneys, as other sections of the Act and other laws enacted by Congress use the term "representative" to refer to attorneys.

In so concluding, the administrative law judge noted that Section 33(c) of the Act, 33 U.S.C. §933(c), explicitly states that as used in Section 33, the term "representative" shall mean the "legal representative" of a decedent. He reasoned that since statutory terms should be given their ordinary meaning, and "legal representative" is a term that ordinarily does not include attorneys, Congress thereby indicated that it did not intend to include attorneys in the term "representative." The administrative law judge further determined that interpreting the term "representative" to mean "legal representative" of the decedent allows for a reasonable interpretation of the portion of Section 33(g)(1) which refers to a settlement with a third person "for an amount less than the *compensation to which the person (or the person's representative) would be entitled* under this Act." (emphasis added). The administrative law judge noted that if this portion of Section 33(g) were interpreted as referring to attorneys, as urged by the employer, this provision would not make any sense, as attorneys can only recover attorney's fees, but are never entitled to recover "compensation," defined in subsection 2(12) of the Act as "the money allowance payable to an employee or his dependents." 33 U.S.C. §902(12). Finally, the administrative law judge relied upon *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517 (11th Cir. 1987), and *Mobay Chemical Company v. Hudson Foam Plastics Corp.*, 277 F. Supp. 413 (S.D.N.Y. 1967). Both cases involve interpretation of Federal Rule of Civil Procedure 60(b) which states that a "court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . ." In both cases, the court recognized that a legal representative is one who stands in the place of, or instead of, another such as an heir at law and does not include legal counsel within the context of the attorney-client relationship. *Kem*, 817 F.2d at 150; *Mobay*, 277 F.Supp. at 416.

Employer argues on appeal that while "legal representative" most commonly denotes an executor or administrator of an estate, according to *Black's Law Dictionary*, the term is given different meanings in differing contexts. Employer asserts that the administrative law judge erred in construing the term narrowly in interpreting Section 33(g). Citing *Graves v. United States Coast Guard*, 692 F.2d 91 (9th Cir. 1982), employer contends that "legal representative" may include an attorney and that the administrative law judge erred in concluding otherwise. Employer further asserts that Section 33(c) is not even applicable in the present case, because it deals only with the situation where a death occurs without survivors, in which case the compensation payments are made to the Special Fund. Employer asserts that in such a case the person entitled to compensation is the administrator of an estate and thus his or her "representative" cannot also be the administrator. Citing *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), employer contends that because the term "representative" is used in Section 33(g) rather than "legal representative," the administrative law judge erred in failing to interpret the term "representative" consistent with its usage elsewhere in the statute. Finally, employer asserts that if the term "representative" in Section 33(g) is not interpreted to include an attorney, the purpose of 33(g), *i.e.*, the protection of employer, will be frustrated, since if interpreted otherwise, "an attorney

may do that which a claimant may not."

We reject employer's argument that Mr. Wartnick was claimant's "representative" for purposes of Section 33(g). The administrative law judge's construction is consistent with the plain language of the statute, which, as stated in *Cowart*, is the starting point of statutory construction. In *Cowart*, the Court found that its interpretation of the term "person entitled to compensation" in Section 33(g)(1) was reinforced by the fact that the term as it appeared elsewhere in the statute could not bear the meaning placed on it by claimant. *Cowart*, U.S. , 112 S.Ct. at 2596, 26 BRBS at 52 (CRT). Moreover, where, as here, the statute as written is clear, the Court held that effect must be given to the plain language. *See Cowart*, U.S. , 112 S.Ct. at 2594, 26 BRBS at 51 (CRT).

Section 33(c) explicitly refers to the "assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as `representative')" when an employee dies without statutory dependents. 33 U.S.C. §933(c). The term "representative" next appears in subsection (g)(1). Therefore, the logical interpretation of the plain language is that "representative" in subsections following subsection (c) means "legal representative of the deceased." That the term "representative" may be used in other contexts elsewhere in the statute is irrelevant in light of this clear directive. Moreover, as was noted by the administrative law judge, interpreting the term "representative" in this manner allows for a reasonable reading of the portion of Section 33(g)(1) which refers to entering into a third- party settlement for an amount less than the compensation to which the "person (or the person's representative)" would be entitled. While a legal representative of the decedent may receive compensation, his attorney cannot. Finally, the administrative law judge's interpretation accords with a basic tenet of statutory construction: the specific takes precedence over the general. *See, e.g., Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT) (2d Cir. 1993); *McPherson v. National Steel and Shipbuilding Co.*, 24 BRBS 224 (1991), *aff'd on recon. en banc*, 26 BRBS 71 (1992); *see generally Markair, Inc. v. Civil Aeronautics Board*, 744 F.2d 1383 (9th Cir. 1984). In addition, the administrative law judge's interpretation of the term "representative" as being limited to legal representatives of a decedent who would be entitled to recover compensation under the Act is consistent with *Mobay* and *Kem*, and his decision to credit these cases over the cases relied upon by the employer was rational. *See generally Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

While employer contends that *Graves*, 692 F.2d at 71, mandates a contrary interpretation, we disagree. In *Graves*, a quadriplegic brought a claim under the Federal Tort Claims Act, which was signed by his attorney because plaintiff allegedly could not write himself due to injuries he sustained in a diving accident. In rejecting the government's argument that the case should be dismissed because the documents were signed by the attorney without evidence of his authority to do so, the court interpreted a portion of a regulation which read:

> A claim presented by an *agent or legal representative* shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. §14.3(e)(emphasis added). Although employer argues that *Graves* demonstrates that in the Ninth Circuit an attorney is a legal representative, this result does not follow. The attorney in *Graves* may have, in fact, been acting as the agent of the physically incapacitated claimant, an interpretation bolstered by the court's later discussion of agency law. 692 F.2d at 74. Accordingly, the administrative law judge's finding that claimant's civil attorney was not her "representative" as that term is used in Section 33(g)(1) of the Act is affirmed.

Agency

In light of our determination that the administrative law judge properly found that Mr. Wartnick was not claimant's "legal representative," we must next address employer's argument that claimant's claim is barred under Section 33(g) on the basis that claimant was bound by Mr. Wartnick's actions on agency principles. Initially, the administrative law judge found that under applicable California law, the attorney may bind the client in three circumstances: where the attorney has actual authority to enter the settlement, the attorney has apparent authority, or an unauthorized settlement is later ratified by the client. Employer does not challenge the administrative law judge's findings that Mr. Wartnick lacked either actual or apparent authority to enter into the third-party agreement. Instead, employer reiterates the argument it made below that the settlement was ratified and thus claimant was vicariously bound by Mr. Wartnick's actions in entering into the unauthorized settlement because she did not take immediate action to repudiate his actions, such as firing him.

Generally, the attorney-client relationship, insofar as it concerns authority of the attorney to bind his client by agreement or stipulation, is governed by agency principles. *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 212 Cal. Rptr. 151, 696 P.2d 645 (1985). As the administrative law judge found, under California law, "the client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied); or his apparent or ostensible authority; or by unauthorized acts ratified by the client." *Id.*; *Yanchor v. Kagan*, 22 Cal. App. 3d 544, 549, (1971). An attorney is not authorized merely by virtue of his retention in litigation, to "impair the client's substantial rights on the course of action itself." *Blanton*, 38 Cal. 3d at 404, 212

Cal. Rptr. at 156, 696 P. 2d at 650, *quoting Linsk v. Linsk*, 70 Cal. 2d 272, 276 (1969). The law is well settled that an attorney must be specifically authorized to settle and compromise a claim; he has no ostensible authority merely on the basis of his employment to bind his client to a compromise settlement of pending litigation. *Id., citing Whittier Union High School Dist. v. Superior Court*, 66 Cal. App. 3d 504, 508 (1977); *Linsk*, 70 Cal. 2d at 278. It is also a well-settled rule of agency that a principal will be held to have ratified the agent's actions where he voluntarily accepts the benefits of the unauthorized transaction. *Alvarado Community Hospital v. Superior Court of San Diego City*, 173 Cal. App. 3d 476, 481, 219 Cal. Rptr. 52, 54 (1985), *citing* RESTATEMENT (SECOND) OF AGENCY §98 (1958). The receipt, by a purported principal who knows the facts, of things to which he would not be entitled unless the transaction were ratified, indicates his consent to become a party to the transaction as it was made. *Id.*, 173 Cal. App. 3d at 482, 219 Cal. Rptr. at 55. *See, e.g., Fidelity and Casualty Company v. Abraham*, 70 Cal. App. 2d 776, 161 P.2d 689 (1945).

Employer's ratification argument is rejected. On the facts presented in the present case, the administrative law judge rationally found that claimant did not ratify the agreement in question because she had not been fully informed about the unauthorized acts of her counsel and did not obtain any benefit from his actions. *Horner v. Ferron*, 362 F.2d 224, 231 n.10 (9th Cir. 1966). Employer argues on appeal, as it did below, that claimant's March 8, 1993, declaration in which she indicated that she had not authorized Mr. Wartnick to settle her civil action is sufficient to establish that claimant knew of the settlement by that date. Employer contends that inasmuch as she testified that she did not discuss this subject again with her attorney until May 25, 1993, two-and-a-half months later, she ratified the agreement by her inaction. We disagree.

In rejecting this argument, the administrative law judge reasonably determined that while claimant's deposition and written declaration indicate that she had not authorized Mr. Wartnick to settle her civil case and thus had some knowledge of the attempted settlement, these documents fail to establish that claimant was aware of the key details of the agreement. Specifically, they do not establish that she was aware that Mr. Wartnick had dismissed her action against Waldron Duffy with prejudice or that he received $4,500 in settlement funds. Likewise, although Mr. Wartnick testified that an unidentified person in his office allegedly informed claimant of "an offer" of $4,500 from Waldron Duffy, the administrative law judge reasonably found that this testimony was not sufficient to establish that claimant was contacted, given that Mr. Wartnick could not specify who made the call or when it was made and that the only offer claimant could recall was for $20,000 in connection with her Longshore claim. Dep. of Cl. at 16-17. The administrative law judge also rationally reasoned that even if claimant had been fully informed of Mr. Wartnick's unauthorized actions, it is unlikely that she would have understood their legal implication, noting that even the attorneys involved denied that there was a settlement and that claimant would have relied on their assertions. Finally, the administrative law judge properly found that the law does not require a client to fire her attorney to avoid ratification of unauthorized acts and that claimant's refusal to sign a release, her repudiation of the agreement and her refusal to accept the money were actions inconsistent with ratification. Because the administrative law judge's finding that claimant did not ratify the purported settlement is rational, supported by the record, and in accordance with law, it is affirmed. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert.*

denied, 459 U.S. 1104 (1983); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 61-62 (1992). Accordingly, as Mr. Wartnick was not claimant's legal representative, claimant did not enter the agreement herself, and claimant was not otherwise bound by Mr. Wartnick's actions on agency principles, the administrative law judge's finding that Section 33(g) is inapplicable on the facts presented is also affirmed.

Settlement

Finally, employer argues that regardless of the intent of the parties, Mr. Wartnick's actions resulted in the execution of a settlement and dismissal of the civil action. In support, employer cites a communication by Roderic Jones, counsel for Waldron Duffy, to his clients that "we have settled," and his request that settlement drafts be prepared which would be provided to Mr. Wartnick in exchange for either releases or dismissals, in support of its assertion. Employer also points out that claimant's civil attorney dismissed the civil action against Waldron Duffy with prejudice and cashed the settlement checks and retained the proceeds for eight-and-a-half months, indicia of an executed agreement under California law.[2] Employer further avers that the California Superior Court for Alameda County lacked subject matter jurisdiction to vacate the dismissal of the lawsuit because under California law, such an action must be taken within six months of the dismissal. Finally, employer contends that claimant's reliance on *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992), and *Rosario v. M. I. Stevedores*, 17 BRBS 50 (1985), in support of its argument that no settlement occurred, is misplaced.

Claimant responds that the fact that her civil counsel received a lump sum settlement check for all civil offers made by Waldron Duffy and then mistakenly allowed a dismissal with prejudice to be filed does not indicate that a settlement occurred, inasmuch as these actions were transient; the monies were ultimately returned and the dismissal of the claim was ultimately vacated by the Superior Court. Citing *Chavez* and *Rosario*, claimant asserts that employer errs in equating a dismissal which was subsequently vacated with an executed settlement and that such circumstantial evidence of a settlement does not mandate a finding of a third-party settlement, where, as here, there is overwhelming evidence to the contrary.

In the present case, the administrative law judge properly determined that it was unnecessary for him to reach this issue in light of his conclusions that Mr. Wartnick was not claimant's legal representative for Section 33(g) purposes and that she was not otherwise bound by his unauthorized efforts to settle the civil claim. Because we are affirming the administrative law judge's findings in this regard, we also need not reach this issue; even if a settlement did occur, it would not be binding on the claimant. Nonetheless we note that in *Chavez*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, refused to find a third-party settlement

[2]The evidence indicates that two checks totaling $180,750 were sent to Mr. Wartnick's law firm from two carriers for Waldron Duffy to cover the purported settlement for the 60 plaintiffs represented by the law firm. Emp. Ex. H at 99, 104.

occurred exclusively on the basis of documentary evidence, including formal court papers suggestive of the existence of a settlement where, as here, there was countervailing evidence indicating otherwise. In *Chavez*, claimant brought a claim for longshore compensation for an asbestos-related injury as well as a civil suit against various asbestos manufacturers, suppliers, and distributors. Two of the defendants in the third-party action were Keene Corporation and Armstrong World Industries, Inc. Chavez's claims were consolidated with numerous civil actions against the same defendants brought by other plaintiffs. An order, with Chavez named as the lead plaintiff, was filed in a California Superior Court purportedly approving a "good faith settlement" between Keene and the asbestos plaintiffs, including Chavez. In refusing to find a settlement by claimant in *Chavez*, the court acknowledged that the court order "approving" Keene's settlement with Chavez was "circumstantial evidence from which the inference could be drawn" that Chavez had settled his case with Keene. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). The Ninth Circuit acknowledged as well that a letter written by Armstrong's lawyer and "agreed and acknowledged" by Chavez's lawyer, which recited that Chavez's case against Armstrong had been settled, could also be circumstantial evidence of the existence of a settlement between Chavez and Keene. The *Chavez* court nonetheless concluded that the existence of such evidence did not require a finding of a settlement for purposes of Section 33(g) where, as in the present case, claimant, claimant's attorney, and the third-party defendant's attorney testified that no settlement had occurred, that no release had been signed, and that no funds had been received by the claimant. *Chavez*, 961 F.2d at 1413, 25 BRBS at 140 (CRT). A similar result was reached by the Board in *Rosario,* 17 BRBS at 50.

In this case, there is documentary evidence of an order vacating the dismissal of the suit, as well as testimony from claimant, Mr. Wartnick, and Mr. Jones, counsel for Waldron Duffy, to the effect that no settlement had occurred. It would thus appear that pursuant to *Chavez* and *Rosario*, there was no settlement on the facts presented, as a matter of law. While employer alleges that the dismissal was not properly vacated because the action was not taken within the six-month period required by California law, this administrative proceeding is not the proper forum to raise this argument. Orders of a state court are not generally subject to collateral attack before the Board. *See generally Hudson v. Puerto Rico Marine, Inc.*, 27 BRBS 183, 186-187 (1993). Finally, although employer suggests that it will somehow be prejudiced if the claimant is not bound to the settlement, we disagree. Section 33(g) was intended to protect the employer from the injured employee's acceptance of too little for his cause of action. *See Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968), *reh'g denied*, 391 U.S. 929 (1968). Where claimant has yet to settle her third-party claim, employer can suffer no prejudice for Section 33(g) purposes.

Accordingly, the administrative law judge's Order Denying Motion for Rescission of Stipulations and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge