BRB No. 95-0783

CAROLYN LEE O'BRIEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EVANS FINANCIAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
PROPERTY & CASUALTY INSURANCE COMPANY	)	
	)	
and	)	
	)	
MARYLAND INSURANCE COMPANY (for the defunct IDEAL INSURANCE COMPANY)	)	
	)	
Employer/Carriers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Jeffrey W. Ochsman and James J. Gallinero (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fee of Administrative Law Judge David W. Di Nardi 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*. (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant injured her back on May 15, 1980, when she slipped and fell in the course of her employment as a manager with employer. Claimant filed a claim for benefits under the Act, and employer sought relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). On January 10, 1987, the district director issued a Compensation Order awarding claimant permanent total disability benefits and granting employer Section 8(f) relief, with the Special Fund responsible for payments as of January 9, 1986. The Compensation Order further provided that "employer shall continue to provide medical services to the claimant in accordance with the provisions of Section 7(a) of the Act." Order at ¶ 10. Employer paid claimant $92,950 in discharge of its liability for the first 104 weeks of disability compensation.

Claimant filed a third-party action in the District of Columbia Superior Court against the owner of the building where she suffered her injury. *See* 33 U.S.C. §933. Claimant and the third party agreed to settle this action, resulting in a gross settlement amount of $275,000, pursuant to which claimant would receive net proceeds of $99,227.65.[1] ALJX-11: 23-27. To facilitate claimant's settlement with the third-party tortfeasor, employer reduced its lien by $12,500 to $80,450. ALJX-11: 32; n.1, *supra*. Prior to the approval of the settlement, in a letter dated January 13, 1987, from claimant's counsel Mitchell R. Peiser to Jack Curley of the Office of Workers' Compensation Programs (OWCP), Mr. Peiser stated that claimant was to receive "$55,000 [of the net settlement amount] free and clear" with "no setoff." ALJX-11: 26-27, 35-36. The remaining $44,227.65 of the net proceeds was to be “treated as sums subject to setoff with credit to the Special Fund taken prospectively for the next approximately 3 ½ years. This prospective setoff includes the

[1]The net proceeds resulted from a reduction of the $275,000 gross amount by: $91,500 for attorney's fees; $951 for deposition costs; $670 for filing services and witness fees; $2,200 for professional witness fees; and $80,450 to be paid into an escrow to satisfy an employer/insurer lien which was created by employer's payment of permanent total disability benefits pursuant to the Compensation Order for the first 104 weeks of claimant's permanent total disability.

approximately $13,000.00 paid by the Special Fund to the claimant to date." *Id*. Mr. Peiser also wrote to employer's counsel on January 30, 1987, concerning the third-party settlement, and reported that he was forwarding to counsel a copy of the above-referenced letter to OWCP which outlined the full details of the settlement, including the notation regarding claimant's retention of the $55,000. ALJX-11: 25-27. Counsel for the insurer, Maryland Insurance Guaranty (for the defunct Ideal Mutual Insurance Company), approved the settlement by signing Form LS-33 on February 12, 1987. ALJX-11: 23. This Form LS-33 recited that claimant would receive a gross settlement in the amount of $275,000 and a net amount of $99,227.65, but did not otherwise reflect the distribution of the proceeds. A letter to employer's counsel from claimant's attorney, which reflected the agreed reduction in the amount to be repaid to employer through the proceeds held in escrow, was countersigned by employer's counsel. ALJX-11: 32. The third-party settlement was approved by the Acting Director, OWCP, on March 2, 1987. Thereafter, OWCP sent a letter to claimant's counsel stating that the Special Fund was suspending claimant's compensation benefits until the $44,227.65 was amortized.

On August 24, 1987, as a result of this third-party settlement, the district director issued a Compensation Order - Modification of Award which modified the previous Compensation Order on application of the parties in accordance with the provisions of Section 33, 33 U.S.C. §933. This Order incorporated by reference the earlier award of benefits. With regard to the third-party settlement, the Order reflected the distribution of the gross proceeds in payment of attorney's fees, costs and employer's reduced lien. The Order then stated "that the claimant realized a net recovery of $44,227.65 which shall be applied against the liability of the Special Fund," and concluded by granting the Special Fund a "credit against future benefits in the amount of $44,227.65." ALJX-11: 11-12. Although the second Compensation Order in effect embodied the accord between claimant and OWCP because the Special Fund was ruled to be entitled to a credit of only $44,227.63, the Order did not reference that agreement, but stated claimant's "net recovery" as $44,227.63. Although mathematically, it is clear that subtracting the specified deductions from the gross amount yields a higher number, the Order does not specify the disposition of any remaining proceeds. None of the parties, including employer which was served with the Compensation Order, objected to the modified Order or requested a hearing, and the Order therefore became final. *See* 20 C.F.R. §§702.315, 702.349.

Claimant thereafter accrued medical bills in the amount of $1,160.50, *see* CXs-1-4, and submitted them to the district director for payment. These bills were in turn forwarded to employer/carrier by an OWCP claims examiner. ALJX-11: 38-49. After these bills were not accepted by employer, the claims examiner, on May 22, 1992, wrote to counsel for employer, noting that claimant's net recovery of $44,227.65 was applied to the Special Fund's liability and was now "absorbed." The claims examiner pointed out that "claimant has satisfied the insurer's lien" and reiterated that "insurer is liable for any and all future medical expenses ... ." ALJX-11: 20.

Employer refused to pay the medical bills, and this matter was referred to an administrative law judge for a formal hearing. The administrative law judge found that employer is liable for the medical bills, finding that employer has no cognizable interest in

the remaining settlement proceeds where it has discharged its liability for disability compensation benefits and recouped this amount through a lien on the settlement proceeds. The administrative law judge determined that the second Compensation Order was not appealed, had become final, and was given *res judicata* effect. Employer was thus deemed to have effectively waived its challenge to that order. The administrative law judge also ruled that in any event employer would not be entitled to a credit pursuant to Section 33(f), 33 U.S.C. §933(f), against its obligation to provide medical benefits because the liability for the payment of medical benefits pursuant to Section 7 is not subject to offset rights at all. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $975, to be paid by employer. Employer has appealed both orders.

On appeal, employer contends that the accord between claimant and the Director which gave claimant $55,000 from the net amount of the settlement proceeds "free and clear" violates the "spirit" of Section 33. 33 U.S.C. §933. Employer contended before the administrative law judge, and repeats its argument before the Board, that the Director, by agreeing with claimant to permit claimant to retain $55,000 of the net settlement proceeds "free and clear" without obtaining employer's written approval, prejudiced employer's rights, which it asserts precludes claimant's rights to any further medical benefits. With regard to its appeal of the attorney's fee award, employer contends only that the fee award is not enforceable until the case on the merits becomes final. Neither claimant nor the Director has responded to employer's appeals.

At the outset, we hold that the administrative law judge's ruling that an employer is never entitled to offset the net proceeds of a third-party settlement against present and future medical expenses is in error. Employer is entitled to credit pursuant to Section 33(f), 33 U.S.C. §933(f)(1982), the net settlement proceeds against its liability for all past and future Section 7 medical benefits that would be payable to the claimant. *Inscoe v. Acton Corp.*, 19 BRBS 97, 98 (1986), *aff'd mem.*, 830 F.2d 1188 (D.C. Cir. 1987); *see also Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254, 269 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part); *Maples v. Texports Stevedore Co.*, 23 BRBS 302 (1990), *aff'd sub nom. Texports Stevedore Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT) (5th Cir. 1991). Section 33(f) provides offset for "the amount" determined to be payable.[2] The Board has

[2]Section 33(f) states:

> If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of *the amount* which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

33 U.S.C. §933(f)(1982)(emphasis added).

held that this term includes both medical benefits and disability compensation in employer's offset. *Harris*, 30 BRBS at 13.

Similarly, we do not find persuasive the administrative law judge's reliance on Section 7(h) to find that employer is not entitled to offset its liability for medical benefits against settlement proceeds. Section 7(h) provides:

> The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or that suit has been brought against such third party. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in section 933(b) of this title.

33 U.S.C. §907(h)(1982). The administrative law judge relied on the first sentence of this section to find that employer has no offset rights in the proceeds of claimant's settlement with the third party inasmuch as employer has a right to bring an action against the third party to recover benefits it paid to claimant that are the liability of the third party.

We do not find this reasoning convincing. Section 33(b) assigns to the employer claimant's right to sue the third party under certain circumstances. If employer sues the third party, employer is permitted to retain from the proceeds, pursuant to the terms of Section 33(e), amounts it actually paid to the claimant pursuant to Section 7 and the present value of future medical benefits. 33 U.S.C. §933(e)(1)(B), (D) (1982). If, however, claimant sues the third party on his own behalf, the provisions of Section 33(f) govern the distribution of the proceeds, and employer is entitled to offset its liability for medical benefits pursuant to the case law. *See, e.g., Harris,* 30 BRBS at 13.

Although the administrative law judge's analysis is in error in these respects, we nevertheless affirm the Decision and Order holding employer liable for claimant's medical benefits. By virtue of the correspondence pre-dating the approval of the third-party settlement, employer was aware of the agreement between claimant and the Special Fund limiting the Fund's offset to $44,227.65, and providing that the remaining net proceeds were to be retained by claimant "free and clear." Employer nonetheless subsequently approved the third-party settlement, completing Form LS-33 as is necessary in order for claimant to avoid forfeiting her rights to further benefits under Section 33(g).

Since employer gave its written approval to the third-party settlement, its specific argument that claimant has forfeited her right to medical benefits by entering into an unapproved agreement must be rejected. Section 33(g) requires employer's written approval of a third-party settlement, and employer gave its approval to the settlement in this case. There is no additional statutory approval requirement. Employer's argument that further approval was required not only lacks support in the statute, but it also overlooks several key facts in this case which lead us to conclude that employer waived its right to an

offset against medical benefits in this case.

The first compensation Order clearly held employer liable for future medical benefits; Section 8(f) limited employer's liability only for continuing permanent total disability benefits. Employer participated in negotiations with regard to the third-party settlement proceeds, compromising its lien to facilitate settlement, but made no provision for offset of its liability for future medical benefits. After being notified of the specific agreement between claimant and the Special Fund, employer approved the third-party settlement. Moreover, the district director then issued a second Compensation Order, clearly and explicitly stating the "net recovery" as $44,227.65, which amount was to be credited solely against the Special Fund's liability. Although in approving the settlement, employer had stated the net recovery as $99,227.65, employer took no action when it was served with the Order stating a different amount. Employer had the opportunity to object to the Order and assert its right to an offset against its liability for medical benefits; a district director is authorized under the regulations to enter compensation orders only in uncontested cases. *See* 20 C.F.R. §702.315. Employer thus had several avenues available to challenge the Order, including seeking reconsideration, or requesting a hearing. While it appears that there were no outstanding medical expenses at that time, employer was on notice that it remained liable for medical expenses under the terms of the first award, which was incorporated by reference into the second Order. As neither employer nor any other party challenged the second Order, it became final. Employer's failure to timely object to the Order stating the net amount and providing for it to offset only the liability of the Special Fund precludes its belated challenge to the disposition of the net proceeds of the settlement. Because this compensation order became final, we conclude that employer has waived its right to assert its entitlement to an offset against medical benefits. We therefore affirm the administrative law judge's Decision and Order holding employer liable for claimant's medical benefits.

In view of our disposition of this appeal, we likewise affirm the Supplemental Decision and Order awarding claimant's counsel an attorney's fee payably by employer inasmuch as employer does not contest the amount of the fee. Employer is correct, however, that the fee award is not payable and enforceable until all appeals are exhausted. *See Wells v. Int'l Great Lakes Shipping Co.,* 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982).

Accordingly, the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fee are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

I respectfully dissent. I would reverse the Decision and Order, and hold that employer is entitled to offset its liability for claimant's medical benefits against the remaining settlement proceeds of $55,000. As pointed out by the majority in this case, the administrative law judge's rationale for holding that employer is not entitled to an offset against its liability for medical benefits pursuant to Section 33(f) is incorrect as a matter of law. Moreover, the district director's second Compensation Order does not explicitly mention that claimant would receive from the settlement $55,000 "free and clear," and it simply does not address the issue now presented, *viz*. whether employer may offset future medical bills from the proceeds received by claimant. This issue did not arise until the medical bills were incurred and forwarded to employer, who promptly requested a formal hearing. Under these circumstances, I would hesitate to find employer precluded from contesting the award of medical benefits on the basis of a procedural default. *See generally Wellmore Coal Corp. v. Stiltner*, 81 F.3d 490, 20 BLR 2-211 (4th Cir. 1996).

JAMES F. BROWN
Administrative Appeals Judge