BRB No. 95-2177

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| MAE BARNES (Widow of EUGENE BARNES) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| GENERAL SHIP SERVICE | ) | DATE ISSUED: |
| and | ) | |
| LIBERTY MUTUAL INSURANCE COMPANY | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Order Granting Employer's Motion for Summary Judgment of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

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

Herman Ng (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Judgment (87-LHC-321) of Administrative Law Judge Ellin M. O'Shea 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 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).

[1]By Order dated July 11, 1996, the Board granted claimant's request to maintain this case on the Board's docket until November 14, 1996, pursuant to Public Law No. 104-134.

Eugene Barnes (decedent) filed a claim for disability benefits under the Act on May 10, 1984, after incurring lung cancer secondary to asbestos exposure during his employment with employer. Prior to his death, decedent and his wife Mae Barnes (claimant) filed a third-party civil action against various asbestos manufacturers and suppliers. In 1984, decedent and claimant settled their action against 14 third-party defendants. Subsequently, decedent died of lung cancer on February 11, 1985, and claimant filed a claim for death benefits under the Act on March 6, 1985. Claimant also filed a third-party wrongful death action against various asbestos manufacturers and suppliers.

In a Decision and Order issued April 8, 1988, decedent was awarded permanent total disability benefits and claimant was awarded death benefits. The administrative law judge rejected employer's argument that claimant and decedent were precluded from any recovery under the Act because they had entered into third-party settlements without obtaining the written consent of employer as required by Section 33(g) of the Act, 33 U.S.C. §933(g). The administrative law judge ruled, in accordance with existing case law, that the Section 33(g) bar did not apply because the 1984 third-party settlements were executed prior to the time that claimant and decedent received compensation under the Act. On appeal, the Board affirmed the administrative law judge's decision. *Barnes v. General Ship Service*, BRB Nos. 88-1453/A (March 30, 1990). Both claimant and employer subsequently appealed to the United States Court of Appeals for the Ninth Circuit.[2] On July 10, 1991, the Ninth Circuit remanded the case for further fact-finding regarding apportionment of the 1984 third-party settlements pursuant to 33 U.S.C. §933(f). *Barnes v. Director, OWCP*, No. 90-70227 (9th Cir. July 10, 1991).

During 1990 and 1991, claimant received offers to settle her third-party wrongful death action from eight defendants: Johns-Manville (Manville Trust), W.R. Grace, UNR, Uniroyal, Flintkote, Western MacArthur, Plant Insulation, and Kaiser.[3] On July 16, 1990, claimant's attorney sought consent for a settlement offer received from Flintkote stating that claimant would accept the settlement offer provided that the longshore carrier consented. Subsequently, claimant signed releases in which she released and discharged each of the eight defendants from her wrongful death claims and agreed to execute requests for dismissal with prejudice of her civil action after payment of settlement proceeds by the defendants to claimant's attorney as trustee for claimant.[4] Most of the

[2]We note that employer's appeal to the United States Court of Appeals for the Ninth Circuit of its designation as the responsible employer, *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991), is not at issue in the present appeal.

[3]Claimant's attorney sought and obtained consent on April 2, 1990, from the longshore carrier to a settlement reached with an additional defendant Center for Claims Resolution (CCR); the CCR settlement, thus, is not at issue in the instant appeal.

[4]Claimant signed the Plant Insulation release on July 8, 1991, the W.R. Grace, Uniroyal and Flintkote releases on July 9, 1991, the Western MacArthur release on July 15, 1991, the Manville Trust release on July 17, 1991, the Kaiser release on November 14, 1991, and the UNR release on

releases contain express provisions that the terms of the release are contractual, and not a mere recital, and constitute the entire agreement between the settling parties. The gross amounts of the settlements range from $700 to $105,000, and total $151,340.

By letter dated July 16, 1991, claimant's counsel sought carrier's consent to her settlements with Manville Trust, W.R. Grace, Uniroyal, Flintkote, Western MacArthur, and Plant Insulation, stating that she would like to consummate these settlements on behalf of claimant and distribute the monies, but would not do so without the consent of the longshore carrier and that if consent was not received, claimant would be forced to abandon her civil action. By letters dated July 18, 1991, claimant's counsel mailed the signed releases to counsel for defendants W.R. Grace, Uniroyal, Flintkote, Western MacArthur, and Plant Insulation.[5] The cover letters enclosing the signed releases state: 1) that the agreements are contingent upon the required consent under the Longshore Act; 2) that if, at any time, plaintiff is required to rescind the agreement because of her longshore claim, plaintiff will return the settlement monies to the defendant; and 3) that the defendant has no right to rescind the agreement which is final and binding as to the defendant as of the date initially entered into. The record contains Alameda County Superior Court documents entering the dismissal with prejudice of claimant's civil action against defendants Uniroyal on September 5, 1991, W.R. Grace on September 13, 1991, and Flintkote on December 24, 1991. Claimant's counsel reiterated her request for consent by the longshore carrier to the settlements on numerous occasions between September 25, 1991 and February 21, 1995, noting in these letters that she had received no response to her repeated requests for consent.

Finally, the record also contains letters written in March and April 1995 by the attorneys for each of the third-party defendants, confirming their understanding that the "tentative" settlements with claimant were contingent upon approval of the longshore carrier, that settlement monies paid to claimant's attorneys were to have been deposited in a trust account, and that if consent is not obtained, the monies with interest would be returned to the defendants and claimant would abandon her third-party action. Declarations of claimant and her attorneys contained in the record similarly attest that settlement offers were accepted contingent upon claimant's obtaining the carrier's consent, that claimant's attorneys are holding settlement monies in trust for claimant, that claimant herself has received no settlement monies, and that if the longshore carrier refuses consent, the settlement monies, with interest, will be returned to the defendants, and claimant's civil case would be dismissed.

In her Order Granting Employer's Motion for Summary Judgment, the administrative law judge found that the Section 33(g) bar applies to the 1991 post-death third-party settlements, barring claimant from recovering any further benefits under the Act.[6] In ruling that claimant entered into

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March 10, 1994.

[5]Identical cover letters, enclosing signed releases, were sent to counsel for defendants Kaiser on November 15, 1991, Manville Trust on June 17, 1994, and UNR on March 31, 1995.

[6]We note that employer does not contest the administrative law judge's finding, with respect to the

fully executed settlements with third-party defendants W.R. Grace, Uniroyal and Flintkote, the administrative law judge relied on uncontested evidence that claimant personally signed settlement releases, that claimant's attorney, as her agent, received and is holding settlement monies in trust for claimant, and that dismissals with prejudice were entered with respect to the aforementioned three settling defendants. The administrative law judge rejected claimant's characterization of the settlements as executory, ruling that the cover letters, which post-date claimant's signing of the releases and set forth the carrier consent contingency, do not, by themselves, constitute an enforceable contract, but, rather, constitute an attempted modification of the original settlement contracts which fails for lack of consideration. The administrative law judge further found that claimant's counsel had express authority to enter into the agreement and to accept settlement monies on claimant's behalf, and, thus, counsel's acceptance of the monies binds claimant under agency principles.

On appeal, claimant contends that, in order to preserve her entitlement to benefits under the Act, claimant entered into executory, tentative third-party settlements, conditioning final agreement on consent from the longshore carrier, and that employer failed to satisfy its burden of showing the settlements were fully executed. Specifically, claimant contends that the statutory language of Section 33(g) contemplates that claimant may enter into an executory contract and subsequently obtain employer's consent prior to full performance, or execution, of the settlement, and that the settlement agreements must be deemed to be executory until the condition has been fulfilled, in this case, obtaining the carrier's consent. Claimant further avers that counsel's receipt of settlement proceeds does not establish execution of the third-party settlement. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

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1984 pre-death third-party settlements, that inasmuch as the determination in the original Decision and Order that the Section 33(g) bar did not apply to those settlements was not appealed, the original decision is final as to the 1984 settlements. Moreover, the administrative law judge found that any benefits to which claimant was entitled prior to the 1991 settlements is not affected by her ruling.

Section 33(g) provides a bar to 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 employer's prior written consent.[7] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992). We first address two preliminary contentions made by claimant with respect to the issue of whether the settlements were fully executed. Claimant avers initially that the burden of proof to show fully executed third-party settlements falls on the employer; claimant asserts that the reasoning of the United States Court of Appeals for the Ninth Circuit in *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991), underlying its ruling that the employer bears the burden of proof regarding apportionment of third-party settlements pursuant to Section 33(f), 33 U.S.C. §933(f), applies equally to the burden of proof issue under Section 33(g). Claimant's position that the employer bears the burden of proving that the claimant executed a settlement agreement without employer's written approval is correct, as it is in the nature of an affirmative defense. In *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, F.3d , No. 94-70927 (9th Cir. Oct. 24, 1996), *aff'g Stadtmiller v. Mallot & Peterson*, 28 BRBS 304 (1994), the United States Court of Appeals for the Ninth Circuit placed the burden on employer of proving that an attorney was in fact acting as the claimant's agent for purposes of entering into a third-party settlement. Moreover, as claimant correctly notes, the burden is on employer to establish apportionment of any third-party settlement for purposes of its credit under Section 33(f). *Force*, 938 F.2d at 985, 25 BRBS at 19 (CRT); *see also I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *modified on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 113 S.Ct. 1579 (1993). Thus, in this case, employer bears the burden of proving that claimant entered into fully executed settlements without its prior written approval in order to bar claimant's receipt of further benefits.

Claimant additionally asserts that Section 33(g) contemplates that an agreement between a claimant and a third-party defendant will be reached before such agreement is submitted for the approval of the employer. Citing statutory language that written approval must be obtained "before the settlement is executed," claimant avers that the statute provides the claimant with a window of

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[7]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).

opportunity to obtain the carrier's consent after a settlement has been entered into and before the settlement is executed.[8] We agree that the language cited by claimant indicates a clear statutory recognition of the distinction between an executory and an executed, or completed, settlement. We note that, in practical terms, until there is an agreement between the claimant and the third party, there is nothing for the employer to approve. *See generally Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992). Furthermore, it is clear that the third-party settlements can be conditioned on some action by employer. *See Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995) (third-party settlement conditioned on employer's release of its lien). Moreover, we reject the construction of Section 33(g) urged by employer, according to which an agreement signed by the claimant necessarily would be considered an executed settlement as a matter of law. Inquiry must be made, on the facts of the individual case, into whether the settlement was executed, prior to its submission to the employer for its approval; the statutory bar applies if written approval is not obtained before the settlement is executed.

Our agreement with claimant on her two preliminary points, however, does not compel a decision in her favor. Rather, on the facts presented by the instant case, we hold that employer satisfied its burden of proof that claimant failed to obtain employer's written approval before executing third-party settlements. The administrative law judge in the case at bar properly relied upon uncontested evidence that claimant personally signed the settlement releases, that settlement proceeds were paid to claimant's attorney as trustee for claimant, and that claimant's civil actions were dismissed with prejudice against defendants W.R. Grace, Uniroyal and Flintkote to find that the settlement agreements between claimant and W.R. Grace, Uniroyal and Flintkote were fully executed as a matter of law.

In this regard, we note that previous cases in which there was held to be no third-party settlement for purposes of Section 33(g) may be distinguished from the present case on several bases. In *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, F.3d , No. 94-70927 (9th Cir. Oct. 24, 1996), *aff'g Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), the United States Court of Appeals for the Ninth Circuit upheld the Board's affirmance of the administrative law judge's finding that because the claimant was not bound by the unauthorized efforts of her counsel to settle her case, the Section 33(g) bar did not apply. In *Stadtmiller*, it was uncontested that the claimant's attorney lacked actual or apparent authority under California law governing agency to enter into the third-party agreement. In upholding the administrative law judge's ruling that the

[8]Section 33(g)(1), in relevant part, provides that:

> if the person entitled to compensation ... *enters into a settlement with a third person* ... for an amount less than the compensation to which the person ... would be entitled under this chapter, the employer shall be liable for compensation ... only if written approval of the settlement is obtained from the employer and the employer's carrier, *before the settlement is executed*, ....

33 U.S.C. §933(g)(1)(1988) (emphasis supplied).

claimant did not ratify the unauthorized settlement, the Board and the court affirmed the administrative law judge's finding that the claimant's refusal to sign a release, her repudiation of the agreement and her refusal to accept settlement proceeds were actions inconsistent with ratification.[9] Additionally, the Board noted that there was documentary evidence that the court order dismissing the lawsuit was vacated. *Id.*, 28 BRBS at 306, 313.

In *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT)(9th Cir. 1992), the Ninth Circuit held that substantial evidence supported the administrative law judge's and Board's determination that no third-party settlement existed; in support of its ruling, the court cited the absence of any evidence of an actual settlement agreement executed by the parties, the fact that the claimant had not received any settlement monies, the claimant's counsel's testimony that he had not agreed to any settlements on the claimant's behalf and had returned any monies received to the third-party defendants, and testimony by counsel for the third-party defendants that no settlement agreement had been reached and that they were not aware of any releases signed by the claimant. *Id.*, 961 F.2d at 1413, 25 BRBS at 139 (CRT). In rejecting the employer's argument that the administrative law judge's admission of extrinsic evidence to demonstrate that no settlement had been executed violated the parol evidence rule, the court held that although a contract is evidence that an agreement exists, extrinsic evidence may be introduced to prove the nonexistence of an agreement; parol evidence need not be excluded until it is known that a contract has been made. *Id.*, 961 F.2d at 1414, 25 BRBS at 140-141 (CRT).

Lastly, in *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995), the Board affirmed the administrative law judge's determination that because no settlement of the claimant's third-party suit was executed, there was no settlement for Section 33(g) purposes. The Board affirmed the administrative law judge's findings: 1) that the proposed settlement was contingent upon the employer's release of its lien; 2) that, as the lien was not released, the contingency did not occur; 3) that the claimant received no settlement monies; and 4) that the claimant had signed no releases. *Id.* at 108.

The instant case is distinguishable from these cases in several material aspects. First, unlike the *Chavez, Formoso* and *Stadtmiller* cases in which the claimants did not sign settlement releases, claimant herein personally signed the releases. Additionally, claimant's counsel in the instant case is holding the settlement proceeds in trust for claimant as distinguished from *Chavez* in which the claimant's attorney returned settlement monies to the third-party defendant and *Formoso* in which the third-party defendant did not pay any settlement funds. As distinguished from *Stadtmiller*, where it was undisputed that the claimant's attorney lacked authority to settle the civil action and, thus, counsel's actions with respect to the "settlement" could not be imputed to the claimant, the releases signed by claimant in the case at bar expressly conferred on claimant's counsel the authority to settle the action and receive monies on behalf of claimant.

[9]The court also affirmed the Board's holding that the term "representative" in Section 33 does not mean the attorney of the claimant.

While claimant characterizes the settlements as "executory," or contingent on obtaining employer's approval, the particular facts of this case do not support such a characterization. The settlement releases themselves contain no provision requiring that employer's approval be obtained;[10] in accordance with the written terms of the releases, settlement proceeds were paid to claimant's attorney as trustee and the civil actions were dismissed with prejudice against three of the third-party defendants.[11] As there is no condition on the faces of the releases which has not been satisfied, the agreements signed by claimant have been fully executed.

Contrary to claimant's contention, the cover letters setting forth the employer consent contingency, which post-dated claimant's signing of the releases, cannot be considered to create a condition precedent. Claimant avers that the employer approval condition outlined in the cover letters as well as other documents which post-date the releases allows claimant to return the settlement proceeds to the defendants and rescind the settlements should she be unable to obtain employer's approval of the settlements. Rescission of an agreement, however, must return both parties to the settlement to the *status quo ante*, and, here, the court's dismissal with prejudice of the third-party actions forecloses a restoration of the parties' original positions.[12] Claimant relies on the fact that the settlement proceeds paid to claimant have been held in trust and the fact claimant agreed to return the proceeds to the defendants in the absence of employer's approval of the settlements; these facts, however, are of no consequence where the dismissal of the lawsuits precludes the return of claimant's rights to the *status quo ante*.[13] We therefore affirm the administrative law judge's determination that claimant's settlement agreements with W.R. Grace, Uniroyal and Flintkote were fully executed without employer's prior written approval, and that, therefore, the provisions of Section 33(g)(1) bar claimant from recovery of further benefits under the Act.

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[10]We note that this case would not be before the Board in this posture had the settlement release stated, on its face, that it was conditioned on employer's approval of the settlement and that the agreement would be void if employer's approval was not obtained within a specified period of time.

[11]Claimant relies upon *Mills v. Marine Repair Service*, 22 BRBS 335 (1989), in which dismissal of a third-party suit was held not to bar a claim under Section 33(g), to argue that claimant's authorization to her counsel to dismiss the civil action upon counsel's receipt of monies does not trigger the Section 33(g) bar. In *Mills*, however, the employer asserted the Section 33(g) bar solely on the claimant's abandonment of a third-party suit; the Board's holding was based on the fact that there was no third-party settlement. *Mills* is thus distinguished from the instant case in which claimant dismissed her third-party suits as part of a settlement agreement.

[12]We note that, unlike the *Stadtmiller* case in which there was documentary evidence that the court order dismissing the third-party lawsuit was vacated, there is no evidence in the case at bar of any attempt to have the dismissals vacated nor does claimant assert any right to reinstatement of the three suits that were dismissed.

[13]In light of our holding that claimant's counsel's receipt of funds and the dismissal of the three lawsuits effectuated completion of the settlements, we need not address all of the administrative law judge's findings with respect to the parol evidence rule and the existence of consideration for claimant's attempt to modify the original settlement agreement.

Accordingly, the Order Granting Employer's Motion for Summary Judgment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge