BRB No. 97-1576

MARY SUE HUTCHISON (Widow of RAY HUTCHISON)	)	
Claimant-Petitioner	)	DATE ISSUED:_____
v.	)	
PETROLEUM HELICOPTERS, INCORPORATED	)	
and	)	
AMERICAN HOME ASSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion For Summary Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph L. Waitz (Waitz & Downer), Houma, Louisiana, for claimant.

Kathleen K. Charvet (McClinchey Stafford, P.L.L.C.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion For Summary Decision (96-LHC-1090) 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 administrative law judge findings of fact and conclusions of law which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v.*

Smith, Hinchman & Grylls Associates, Inc., 350 U.S. 359 (1965).

The facts in this case are largely undisputed. On March 23, 1978, claimant's husband was killed in a helicopter crash while working for employer. Employer instituted voluntary payments of death benefits under the Act. Subsequently, claimant, individually and on behalf of her three minor children, filed a third-party wrongful death suit against the manufacturer of the helicopter, Bell Helicopter Textron (Bell), in the United States District Court, Eastern District of Louisiana, Nos. 79-1067, 79-1075. Employer's carrier, American Home Assurance Company (American Home), also instituted suit in the same court against Bell to recover the benefits it paid to claimant under the Act, No. 79-3634, and intervened in claimant's lawsuit against Bell. The lawsuits against Bell were subsequently consolidated along with several suits for attorney's fees.

Thereafter, following discussions between claimant's counsel, Mr. Waitz, American Home's counsel, Mr. Dalferes, and, Bell's counsel, Mr. Christovitz, an agreement was reached on January 15, 1991, to settle the third-party action for $460,000, with $310,000 going to the claimant and $50,000 each to each of the minor children. As a condition precedent to the settlement, claimant was to obtain orders from the court having jurisdiction of the consolidated third-party actions permitting the release of the involved parties with regard to any and all claims, rights, or causes of action of whatever nature or kind arising out of the injuries to, and the death of, decedent which claimant and her children may have under the Jones Act, 46 U.S.C. §688, the Louisiana Wrongful Death Statute, L.S.A. §2315, the general maritime law, or any other act or statute or common law providing for recovery. In addition, the agreement provided that with regard to the complaint and intervention filed by counsel in the consolidated cases claiming attorney's fees and to the separate suit and intervention filed by American Home, upon obtaining executed stipulations of prejudicial dismissal as to said claims, suits, and interventions and executed release documents acknowledging the complete satisfaction and discharge of all their claims, the releasees would be held harmless and would be fully and completely indemnified out of the settlement proceeds. Thereafter, on January 16, 1981, American Home filed a Form LS-208 with the Department of Labor in which it stated that it was terminating its payment of death benefits because the third-party action had been settled with "100% recovery from at-faulty (sic) party." EX-4.

A series of letters followed. In a letter dated January 19, 1981, from Mr. Dalferes, counsel for American Home, to claimant's counsel, Mr. Dalferes confirmed that a total of $40,027.89 in compensation had been previously paid to claimant and that American Home had consented to his endorsing the settlement draft on their behalf. Thereafter, in a letter dated January 21,1981, claimant's counsel informed

Mr. Dalferes that he would personally guarantee that the settlement funds in the above matter would be deposited in his trust account, that upon notification by the bank that the funds have been honored, he would issue a $40,027.89 check payable to America Home, and upon this guarantee requested endorsement of the settlement funds subject to claimant's right to further compensation, should she at some time in the future become eligible. In a subsequent letter dated January 26, 1981, claimant's counsel confirmed the prior statements made to counsel for American Home, and indicated that releases had been sent to carrier's counsel some time ago. In addition, the record contains an undated Stipulation of Dismissal with prejudice signed by Mr. Dalferes on behalf of American Home which reflected that its action in No. 79-2634 had been settled, as well as an undated release he also signed regarding all of the consolidated third-party actions. By letter dated February 13, 1981, claimant's counsel remitted the check for $40,027.89, to American Home and its attorney, Mr. Dalferes.

On July 14, 1989, claimant requested reinstatement of her Longshore benefits. The case was eventually referred to the Office of Administrative Law Judges for a hearing on the issue of whether claimant's right to additional compensation was barred pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g).[1] Prior to the scheduled hearing, employer filed a motion for summary judgement in which it argued that claimant's attempt to obtain reinstatement of benefits on July 14, 1989, was not timely under Section 13 of the Act, 33 U.S.C. §913, and that as claimant did not dispute that she entered into a third-party settlement without obtaining employer/carrier's prior written consent, her right to additional compensation under the Act was barred by Section 33(g)(1) under the United States Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). Claimant opposed employer's motion, arguing that *Cowart* was distinguishable and that inasmuch as employer through its carrier filed suit, participated in, and was fully compensated by the third party settlement, its

[1]Section 33(g)(1) requires that a "person entitled to compensation" obtain his employer's written approval prior to entering into a third-party settlement for less than the amount to which he is entitled under the Act. Pursuant to Section 33(g)(2), the employee forfeits his right to future compensation if, *inter alia*, no written approval is obtained as required by Section 33(g)(1).

involvement in the third-party litigation precluded application of Section 33(g)(1). Employer responded to claimant, reiterating its prior arguments.

Noting that in *Cowart* the employer fully participated in the third-party litigation and funded the third-party settlement, yet the claimant still forfeited his right to further benefits, and that both the United States Supreme Court and the Fifth Circuit in *Cowart* found no exceptions to the unqualified prior written approval language of Section 33(g) even where the employer/carrier participated in the settlement discussions, the administrative law judge granted summary judgment in employer's favor. The administrative law judge found that although it was clear that the third-party settlement reimbursed employer/carrier for all compensation payments, it was equally clear that the requirements of Section 33(g) had not been met. Accordingly, he concluded that claimant's right to benefits ceased when she executed the third-party settlement agreement without obtaining prior written approval from employer/carrier. In light of his determination that claimant's right to compensation was barred by Section 33(g)(1), the administrative law judge declined to consider employer's alternate argument regarding the timeliness of the July 14, 1989, claim seeking reinstatement of compensation under Section 13. Claimant's motion for reconsideration was denied summarily in an Order dated July 2, 1997.

Claimant appeals, arguing that contrary to the determination made by the administrative law judge, the *Cowart* Court did not address the question of whether or not Section 33(g) applied when employer participated in the settlement. Moreover, claimant contends that on the facts presented, employer/carrier waived the need for Section 33(g) based upon their involvement in the third-party settlement, their acceptance of the settlement proceeds which reimbursed them completely, and their acquiescence despite being put on notice that claimant's right to resume compensation was being reserved. Employer responds, urging affirmance of the administrative law judge's determination that claimant's right to additional compensation is barred under Section 33(g)(1). In the alternative, employer reiterates the argument it made below that claimant's July 14, 1989, claim for reinstatement of benefits is untimely under Section 13.[2]

[2]Employer additionally asserts that inasmuch as claimant had previously taken the position in a prior action that her attorney's failure to obtain employer/carrier's

We agree with claimant that the administrative law judge's denial of benefits cannot be affirmed as it does not follow the Supreme Court's decision in *Cowart*. It is true that in its decision in *Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93(CRT) (5th Cir. 1991) (*en banc*), *aff'd,* 505 U.S. 469, 26 BRBS 49(CRT) (1992), the United States Courts of Appeals for the Fifth Circuit stated that the language of Section 33(g)(1) contains "no exception" to its approval requirement. *See Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991). In affirming the Fifth Circuit's holding that the claim was barred under Section 33(g) in *Cowart*, the Supreme Court, however, explicitly stated that the statute provides two exceptions to the written approval requirement: where the claimant settles a third-party suit for an amount greater than his compensation entitlement and where claimant obtains a judgment against a third party. Thus, the Court, contrary to the administrative law judge's interpretation, did not adopt the "no exceptions" language of the Fifth Circuit.

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approval of the settlement resulted in legal malpractice, she should be barred from now assuming a contrary position under the doctrine of equitable estoppel. We decline to address this argument which employer is raising for the first time on appeal. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

More importantly, the administrative law judge misinterpreted *Cowart* as foreclosing consideration of employer/carrier's participation in the third-party settlement as an issue under Section 33(g). Contrary to the administrative law judge's determination, the *Cowart* Court did not hold that employer's participation in the third-party litigation was irrelevant under Section 33(g). Rather, the Court explicitly reserved the question of the effect of employer's participation in the third-party litigation in that case because it had not been included in the question on which *certiorari* was granted. *Id*., 505 U.S. at 483, 26 BRBS at 53 (CRT). In fact, the Fifth Circuit also did not rule on this precise issue, as it was not raised before that court. Therefore, as employer's participation in third-party proceedings, particularly where, as here, employer institutes suit, remains a crucial issue, we vacate the administrative law judge's determination that claimant's right to additional compensation is barred under Section 33(g)(1) and remand the case for reconsideration. On remand, the administrative law judge must consider the evidence of record relevant to employer/carrier's participation in the third-party litigation and determine whether it constructively approved the settlement or Section 33(g)(1) otherwise applies.[3] *See I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *aff'g and rev'g* 24 BRBS 11 (1990)(Brown, J., dissenting on other grounds), *cert. denied*, 507 U.S. 984 (1993); *Gremellion v. Gulf Coast Co*, 31 BRBS 163 (1997)(Brown, J., concurring)*; Deville v. Oilfield Industries*, 26 BRBS 123 (1992). *But see Perez v. International Terminal Operating* Co., 31 BRBS 114 (1997) (Smith, J., concurring)*; Pool v. General American Oil Co.*, 30 BRBS 183 (1996)(Smith and Brown, JJ., separately concurring and dissenting).

On remand, if the administrative law judge concludes that employer's participation in the third-party litigation precludes application of Section 33(g), he must determine whether claimant's attempt to obtain reinstatement of benefits in July 14, 1989, is timely under Section 13(a). Employer raised this argument in the

[3]The present case is similar to *Sellman* is that employer here also instituted suit. In *Sellman,* the court stated that where employer directly participates in filing suit and negotiating a settlement, its actions render Section 33(g) inapplicable, as the section refers to cases where the "person entitled to compensation" reaches a settlement and not one where employer also participates in the settlement.

alternative below, but the administrative law judge declined to reach this issue in light of his determination that

claimant's right to compensation was barred by Section 33(g)(1).[4] Section 13(a) of the Act, 33 U.S.C. §913(a), provides that in the case of a traumatic injury, the right to compensation for disability or death benefits shall be barred unless the claim is filed within one year from the time claimant became aware or in the exercise of reasonable diligence should have been aware of the relationship between the injury and his employment. Section 20(b), 33 U.S.C. §920(b), provides a presumption that the claim has been timely filed. *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *aff'd mem*., 729 F.2d 1441 (2d Cir. 1983). As part of its burden to rebut Section 20(b), employer must preliminarily establish that it complied with the requirements of Section 30(a), which provides that employer must submit a report within ten days of the date of any injury which causes the loss of one or more shifts of work. 33 U.S.C. §930(a) (1994). Section 30(f) provides that where an employer has notice of an employee's injury and fails to file a report as required by Section 30(a), the Section 13(a) time limitation period does not begin to run against the claim until the report is filed. 33 U.S.C. §930(f); *see also Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65, 69 (1990).

In the present case, as the actual claim form is not in the record, the administrative law judge may wish to reopen the record for its submission on remand. The Board, however, has also previously recognized that any letter or notice to the district director from which it may be reasonably inferred that a claim for compensation is being made is sufficient to constitute a claim under the Act and that a claim filed within one year of the last voluntary payment of compensation is timely under Section 13(a). *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). *Cf. Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 178 (1996)(injury report and hospital discharge report are not claims as they were not filed with district director). We note that the record contains correspondence relevant to this issue. Accordingly, on remand the administrative law judge must determine whether a claim was timely filed within one year of decedent's death or within one year of January 16, 1981, when carrier terminated its voluntary payments of death benefits. If a claim was timely filed and was neither withdrawn or

[4]As employer reiterates this argument in its response brief which could, if correct, support the administrative law judge's denial of benefits on an alternate theory, employer was not required to file a cross-appeal. *See Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987).

adjudicated, it remains open and pending. *Intercounty Construction Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975).

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge