U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0112

DARRELL EDWARDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE REPAIR SERVICES, INCORPORATED	)	DATE ISSUED: Sept. 30, 2015
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Respondent's Motion for Summary Decision and the Order Denying Claimant's Motion to Reconsider Grant of Summary Decision of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John S. Austin (Austin Law Firm, PLLC), Raleigh, North Carolina, for claimant.

J. Hubert Wood, III (Wood Law Group, LLC), Charleston, South Carolina, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Respondent's Motion for Summary Decision and the Order Denying Claimant's Motion to Reconsider Grant of Summary Decision (2014-LHC-00839) of Administrative Law Judge Kenneth A. Krantz 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's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim under the Act in 2012, alleging he sustained injuries on June 10, 2010, when his vehicle was struck from behind by a truck at or near an entrance gate to employer's facility in South Carolina. Employer has not paid any benefits and has disputed the claim on multiple grounds.[1] Claimant also filed a tort suit in federal court against the owners of the truck that hit him. The parties to the tort action settled the claim for an undisclosed amount, and the court dismissed the tort action on April 29, 2013. With respect to claimant's claim under the Act, employer filed a motion for summary decision with the administrative law judge in September 2014, asserting that claimant did not obtain its prior written approval of the third-party settlement in accordance with Section 33(g)(1) or notify it of the settlement in accordance with Section 33(g)(2). 33 U.S.C. §933(g)(1), (2). Claimant filed a response brief, asserting that employer has assumed contradictory defensive positions and, effectively, argued that claimant is not a "person entitled to compensation" (PETC), making Section 33(g) inapplicable. As such, claimant contended that employer is judicially estopped from arguing the Section 33(g) defense when it has already asserted other procedural defenses which prevent claimant from being a PETC. Claimant also argued that a genuine issue of material fact exists as to the applicability of Section 33(g) because employer failed to show that claimant settled with a third party for less than his compensation entitlement under the Act.

Relying on the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), the administrative law judge found that employer's defenses to the claim are not inconsistent with its assertion that claimant is a PETC. Although the administrative law judge noted he does not know the amount of the third-party settlement, and, thus, whether Section 33(g)(1) or (g)(2) specifically applies, the administrative law judge found it is undisputed that claimant did not notify employer, or get its prior written approval, of his tort settlement. Therefore, he essentially found that either section would act to preclude claimant's entitlement to benefits. Accordingly, the administrative law judge granted employer's motion for summary decision and dismissed claimant's claim. Claimant filed a motion for reconsideration, and the administrative law judge stated that he had granted summary decision on the grounds that claimant failed to comply with Section 33(g) and on his rejection of claimant's judicial

[1] Employer controverted the claim on the grounds that it was untimely filed and the injury did not occur on a covered situs or within the course and scope of claimant's employment. Employer also raised the Section 33(g), 33 U.S.C. §933(g), defense that is the subject of this appeal.

estoppel argument. As claimant did not raise a genuine issue of material fact with regard to Section 33(g), the administrative law judge denied the motion for reconsideration.

Claimant appeals the administrative law judge's orders, asserting error because: 1) the time for complying with Section 33(g) should be tolled; 2) claimant is not a PETC; 3) employer had actual or constructive knowledge of the third-party settlement; and 4) the administrative law judge's lack of knowledge as to the amount of the third-party settlement precludes application of Section 33(g). Employer responds, urging affirmance of the summary decision in its favor.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72 (2015). In this case, the administrative law judge found there are no genuine issues of material fact with regard to Section 33(g) and that employer is entitled to summary decision as a matter of law.

Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if he determines that the third party may be liable for damages for his work-related injuries. In order to protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C. §933(f), a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in his favor, or he must obtain his employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g);[2]

[2] Section 33(g), 33 U.S.C. §933(g), 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

Mapp v. Transocean Offshore USA, Inc., 38 BRBS 43 (2004). The Supreme Court has held that Section 33(g)(2) requires a PETC to provide notice of the termination of the third-party proceedings to his employer in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). Thus, the prior written approval requirement of Section 33(g)(1) is inapplicable in those two instances. Pursuant to Section 33(g)(1), prior written approval is necessary only when the PETC enters into a settlement with a third party for less than the compensation to which the claimant is entitled under the Act. *Id.*; *see Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281.

Claimant first contends the administrative law judge erred in granting summary decision because he is not a PETC and Section 33(g) does not apply to him. He asserts he is not a PETC because employer's various defenses are based on the fact that he is "not entitled" to compensation. We reject this contention. In *Cowart*, the Supreme Court stated that the normal meaning of "entitlement" includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person's satisfying the prerequisites attached to the right. *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52(CRT). The claimant in *Cowart* was a PETC because the terms of the Act gave him a right to compensation for the work-related injury he suffered. *Id.* Employer here conceded that claimant was its employee and that an injury occurred on June 10, 2010. Emp. Br. at 2; Emp. Pre-Hearing Statement. While the defenses employer asserts may otherwise bar claimant's entitlement to compensation, such cannot preclude claimant from being a "PETC."

Claimant urges the Board to estop employer from asserting that claimant is a PETC because it consistently denied his claim for benefits. Claimant contends that by denying liability while also arguing that claimant is a "person *entitled* to compensation,"

> be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

employer has expressed contrary positions and should be judicially estopped from doing so. The administrative law judge properly found that the doctrine of judicial estoppel does not apply in this case, as employer's defenses to the claim are not inconsistent, regardless of whether they have merit.[3] Employer is entitled to raise any defenses to a claim against it, and it may argue those defenses in the alternative. As claimant has not demonstrated error in the administrative law judge's conclusions, we reject claimant's arguments that he is not a PETC and that employer should be judicially estopped from asserting that he is a PETC. *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52(CRT); *Manders v. Alabama Dry Dock & Shipbuilding Corp*., 23 BRBS 19 (1989).

Claimant next avers employer had actual or constructive knowledge of the third-party settlement and was aware of it within months of its execution; its knowledge led it to petition for a court order that the confidential settlement be revealed. Claimant alleges employer has not been prejudiced by claimant's failure to give notice at the time of the third-party settlement. Employer responds that its "mere awareness" of the settlement is insufficient to satisfy claimant's burden of notification under Section 33(g)(2). It also asserts that claimant admitted in his September 2014 affidavit to having failed to notify employer of the settlement, supporting the administrative law judge's finding that it was undisputed that employer did not receive notification of the third-party settlement.

The Board has held that the plain language of subsection (g)(2) places on the claimant an affirmative duty to notify his employer of the third-party settlement, and the employer's mere knowledge of the settlement or the absence of prejudice to the employer will not suffice to prevent the bar to compensation from being invoked. *Fisher v. Todd*

[3] Judicial estoppel is a common-law, equitable, doctrine invoked at a court's discretion and designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a second proceeding. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002); *Sparks v. Service Employees Int'l, Inc.*, 44 BRBS 77, *aff'g* 44 BRBS 11 (2010); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Two factors are prominent: 1) "it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding" and 2) "such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes*, 291 F.3d at 1285 (quoting *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001)). Significantly, there was no other proceeding in this case wherein employer could have taken an inconsistent position under oath. Rather, the inconsistencies claimant alleges are the different defenses employer has raised against claimant's claim, and the administrative law judge properly found those were not inconsistent as all of the defenses could be meritorious. Order at 4.

Shipyards Corp., 21 BRBS 323 (1988). Although the administrative law judge appears to have accepted claimant's affidavit admission as support for his finding that claimant did not give notice to employer under Section 33(g)(2), Order at 3, it is apparent that neither the parties nor the administrative law judge properly addressed the time frame in which a claimant must notify an employer of a third-party settlement.[4] In claimant's affidavit, he testified that employer consistently denied his claim for benefits, and he "reasonably relied" on those denials, stating:

> [d]ue to the repeated denials, I did not think the Employer or the Carrier had an active interest in my settlement with the third party and never notified me, either before or after the denial of my claim, that I should advise them of a settlement. Based on the above, I did not notify my employer or carrier of my potential settlement on or about April 29, 2013.

Cl. Affidavit at para. 15-16. In his opposition to employer's motion for summary decision, claimant conceded he did not give employer notice of the settlement until "months after [the] settlement." Cl. Resp. to M/SD at 7.

The courts have determined that notice under Section 33(g)(2) must be given before an employer has made any payments of compensation and before the agency announces any award of benefits. *Bundens*, 46 F.3d 292, 29 BRBS 52(CRT); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990). Failure to provide notice of a third-party settlement in this time-frame results in the loss of compensation and medical benefits under the Act. 33 U.S.C. §933(g)(2); *Jackson v. Land & Offshore Services, Inc.*, 855 F.2d 244, 21 BRBS 163(CRT) (5th Cir. 1988). Claimant did not notify employer of the third-party settlement at the time of the settlement, and no party disputes this. However, there is also no dispute that claimant notified employer of the third-party settlement at some point thereafter ("months later"). To date, employer has paid no benefits and the administrative law judge has issued no award. Thus, although claimant did not notify employer of the third-party settlement at the time of the settlement, his notification predated any payment by employer and any action by the administrative law judge. Therefore, claimant has complied with the Section 33(g)(2) notice provision.[5] *Mobley*, 920 F.2d 558, 24 BRBS 49(CRT).

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[4] Section 33(g)(1) provides that the written approval must be obtained *prior to the execution* of the settlement. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Bockman v. Patton-Tully Transp. Co.*, 41 BRBS 34 (2007). It is undisputed that claimant did not obtain prior written approval of the third-party settlement in this case.

[5] Claimant's tolling argument was not raised before the administrative law judge. *See, e.g., Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008); *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000). In any event, there is no Section 33(g) tolling

As claimant complied with Section 33(g)(2), but not Section 33(g)(1), n.4, *supra*, the issue is which subsection applies to his case. *See Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). To resolve the issue, the administrative law judge must make a comparison between a claimant's gross third-party settlement and his compensation entitlement under the Act. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998);[6] *Pool v. General American Oil Co.*, 30 BRBS 183 (1996) (Brown, J., dissenting); *Harris v. Todd Pacific Shipyards Corp*., 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part); *see also Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result only). Section 33(g)(1) applies only when the third-party settlement is less than the claimant's compensation entitlement under the Act. The Board explained in *Gladney*:

> If an employee obtains third-party settlement proceeds in excess of his entitlement under the Act, the Section 33(g)(1) forfeiture provision does not apply; however, the employer must be notified of such a settlement. Failure to make the comparison and determine which subsection of Section 33(g) applies effectively reads the notice requirement of Section 33(g)(2) out of the Act.

Gladney, 30 BRBS at 28. As there is no evidence regarding the amount of the third-party settlement, claimant correctly contends there remains a genuine issue of material fact which prevents the granting of summary decision for employer.[7] *Irby v. Blackwater*

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provision in the Act. The Section 30(f) tolling provision, to which claimant makes an analogy, specifically provides that the Section 13(a) period for filing a claim does not begin to run if the employer does not file the Section 30(a) form when required to do so. 33 U.S.C. §§913(a), 930(a), (f); 20 C.F.R. §702.205. It does not address the timeliness of notifications a claimant must make under Section 33(g).

[6] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the comparison is to be made between the amount of the claimant's compensation entitlement, excluding medical benefits, and the gross amount of the aggregate third-party settlements. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). Further, it is the total amount to which a claimant would be entitled over his lifetime under the Act that must be compared with the claimant's aggregate third-party settlements. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994).

[7] Claimant states he is willing to reveal the settlement amount but the third-party defendant trucking company is not, and he must abide by his confidentiality agreement. Cl. Br. at 9; Cl. Resp. M/SD at 6-7.

Security Consulting, 44 BRBS 17 (2010). Because he did not obtain employer's prior written approval, if claimant's third-party settlement is for less than the amount to which he would be entitled under the Act, he forfeits his disability and medical benefits under the Act. *Esposito*, 36 BRBS 10. However, because he notified employer of the third-party settlement before employer paid benefits or an award issued, if his settlement was for an amount greater than or equal to his entitlement under the Act, Section 33(g) does not preclude claimant from receiving benefits under the Act.[8] *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). The administrative law judge did not make a finding as to whether claimant's settlement was for an amount greater than or less than his entitlement under the Act. *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). This is a genuine issue of material fact. Therefore, it was improper for the administrative law judge to grant employer's motion for summary decision. *Tisdale v. American Logistics Services*, 44 BRBS 29 (2010); *Irby*, 44 BRBS 17. We vacate the administrative law judge's orders granting employer's motion for summary decision and remand this case to the administrative law judge for further proceedings.

On remand, the parties may establish the remaining facts necessary to resolve the Section 33(g) issue,[9] or the administrative law judge may resolve the case on other grounds without reaching the Section 33(g) issue. If employer's other defenses fail, the Section 33(g) issue would need to be decided.

[8] Pursuant to Section 33(f), an employer is entitled to credit the employee's net third-party recovery against its liability for compensation and medical benefits under the Act. If the third-party settlement is greater than the benefits owed or previously paid by the employer, the employer is entitled to credit the employee's third-party recovery against not only its past obligations under the Act, but also any future obligations for which it may be responsible. *See Peters v. North River Ins. Co.*, 764 F.2d 306, 17 BRBS 114(CRT) (5th Cir. 1985); *Webb v. Santa Fe Drilling Co.*, 2 BRBS 367 (1975). Credits under Section 33(f) must be made on a dollar-for-dollar basis without taking into account present value or interest. *Gilliland v. E. J. Bartells Co., Inc.*, 34 BRBS 21 (2000), *aff'd*, 270 F.3d 1259, 35 BRBS 103(CRT) (9th Cir. 2001).

[9] Moreover, as the proponent of the Section 33(g) defense, employer bears the burden of establishing that claimant entered into a third-party settlement for less than his compensation entitlement. *Flanagan v. McAllister Bros., Inc.*, 33 BRBS 209 (1999). In light of the confidentiality of the third-party settlement, the administrative law judge may determine if *in camera* proceedings can resolve the impasse over the confidentiality of the third-party settlement. 29 C.F.R. §§18.51, 18.56, 18.85 (2015).

Accordingly, the administrative law judge's Order Granting Respondent's Motion for Summary Decision and Order Denying Claimant's Motion to Reconsider Grant of Summary Decision Orders are vacated, and the case is remanded for further proceedings.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge