U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0426

MARVIN SIVER (o/b/o ESTATE OF RUTH SIVER, Widow of DAVID SIVER)	)	
Claimant-Petitioner	)	
v.	)	
KAISER ALUMINUM & CHEMICAL CORPORATION	)	
and	)	
ALLIANZ RESOLUTION MANAGEMENT o/b/o FIREMAN'S FUND INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	DATE ISSUED: 11/07/2022
KAISER STEEL RESOURCES, INCORPORATED	)	
and	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY	)	
and	)	
Employer/Carrier-Respondents	)	

CALIFORNIA INSURANCE GUARANTEE ASSOCIATION o/b/o INDUSTRIAL INDEMNITY	)	
Carrier-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Summary Decision and Dismissing Claim of Richard M. Clark, Administrative Law Judge, United States Department of Labor, and the Order Dismissing California Guarantee Association of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and John R. Wallace (Brayton Purcell, L.L.P.), Novato, California, for Claimant.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for Kaiser Steel Resources and the Hartford Accident & Indemnity Company.

Michael D. Williams and Carlo R. Varela (Brown Sims), Houston, Texas, for Kaiser Aluminum & Chemical Corporation.

Laura G. Bruyneel (Bruyneel Law Firm, LLP), San Francisco, California, for Allianz Resolution Management – Fireman's Fund Insurance Company.

John T. Marin (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for California Insurance Guarantee Association.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Richard M. Clark's Order Granting Summary Decision and ALJ William Dorsey's Order Dismissing California Guarantee Association (2013-LHC-00385) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the ALJs' findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Background

David Siver (Decedent) was allegedly exposed to asbestos in the course of his work as a marine electrician with Employer during the 1940s.[2] He passed away on October 17, 2007.[3] On September 29, 2008, his heirs, consisting of his widow, Ruth Siver, and sons, Marvin and Alton Siver, filed a survival and wrongful death lawsuit in San Francisco Superior Court against various third-party manufacturers, distributors, and purchasers of asbestos products. The Sivers were represented in this action by the law firm of Brayton Purcell LLP (BP).

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[1] Claimant, Marvin Siver, is the adult son of Decedent, David Siver, and his subsequently deceased widow, Ruth Siver. Following Ruth's death, Marvin participated in this case on behalf of his mother's estate. We will use "Claimant" and "Marvin" interchangeably in this decision.

[2] Decedent's Social Security records indicate he worked for Kaiser Aluminum & Chemical Corporation (insured by Fireman's Fund Insurance Company (Fireman's Fund)), in 1941 and 1943, and for Kaiser Steel Resources, Incorporated (insured by Hartford Accident & Indemnity Company (Hartford)), in 1946. These entities, now known as Kaiser Ventures, LLC, shall hereafter be collectively referred to as Employer in this case.

[3] Decedent's cause of death was listed as progressive respiratory insufficiency, ischemic colitis, asbestos related pleural plaques and pulmonary fibrosis (asbestosis), and sigmoid and left hemicolectomy. EX B. He executed a will on November 4, 2004, designating his property as community property and leaving all personal property to his wife, Ruth. BPX E. The remainder of the estate was left to the 1989 Siver Family Trust, with Ruth designated as executor. *Id.*

On May 31, 2009, Ruth, through BP, signed two disclaimers which purported to renounce her interest in the third-party actions and in Decedent's estate in favor of her pursuit of a claim for death benefits under the Longshore Act. EX J. The first disclaimed her interest in property she is entitled to as a beneficiary of Decedent's estate consisting of "[a]ll current and future net proceeds from lawsuits and claims filed by Dave Siver and/or Dave Siver's estate in connection with Dave Siver's exposure to asbestos that would belong to Dave Siver's estate and that were negotiated after Dave Siver's death." *Id.* The second recited various considerations provided by BP and purported to "disclaim all of [Ruth's] interests in any ongoing or future third-party civil lawsuits based on injuries and death caused by [her] spouse's asbestos exposure." *Id.* It also indicated that pursuing third-party civil lawsuits and a claim under the Longshore Act "would cause legal complications," and requested that BP pursue, on behalf of Ruth, a claim arising under the Longshore Act. *Id.* There is no evidence either disclaimer was ever filed with any court or provided to any other party before Marvin presented it as part of the record in this case.

On October 16, 2009, Ruth, still represented by BP, filed a claim for death benefits under the Act against Employer and its putative carriers, Fireman's Fund, Hartford, and Industrial Indemnity, all of whom provided coverage to Employer at various points during Decedent's employment the 1940s.

Between 2010 and 2011, Marvin executed on behalf of himself, as well as Decedent's heirs and Decedent's estate, seven third-party settlement agreements in the survivor/wrongful death lawsuits relating to Decedent's workplace asbestos exposure for a total of $32,089.22.[4] Pertinent to this appeal are two of those settlements: (1) Consolidated Insulation, Incorporated (CII), which Marvin signed on December 28, 2010, for $20,000 (20/80 percent proceeds apportionment between the survivor action and wrongful death action) (CII Settlement); and (2) CBS Corporation (CBS), which Marvin signed as "successor-in-interest" on November 1, 2011, for $5,000 (again 20/80 percent proceeds apportionment between survivor and wrongful death actions) (CBS Settlement).

Ruth, who died on May 24, 2015,[5] did not sign any of these settlements and there is no evidence Marvin notified any putative longshore employer and/or carrier or the

[4] The proceeds of those seven settlements were disbursed as follows: BP received $15,921.33 in fees and costs; Marvin and Alton Siver received respectively $8,083.95 and $8,083.94. BPX G.

[5] On December 17, 2007, Ruth signed her last will and testament leaving her property to the 1989 Siver Family Trust as restated in 2004, with Marvin named as executor.

Director, Office of Workers' Compensation Programs (Director), of the third-party settlements.[6]

As for the death benefits claim, in 2016, the California Insurance Guarantee Association (CIGA) filed a notice of controversion on behalf of one of Employer's potential responsible carriers, Industrial Indemnity,[7] and thereafter sought dismissal from the case based upon California Insurance Code §1063.1.[8] On November 15, 2016, ALJ William Dorsey granted CIGA's motion, withdrew his order consolidating twelve cases,[9] and returned the cases to their individual dockets. Following an unsuccessful consolidated appeal of Judge Dorsey's Order to the Board,[10] the cases were returned to the Office of

[6] Marvin does not contend he made any effort to contact any parties involved with Ruth's claim for death benefits under the Act.

[7] In addition to Fireman's Fund and Hartford, Industrial Indemnity may have insured Employer while it employed Decedent in the 1940s. Fireman's Fund and Hartford have denied liability on various theories, leaving open the possibility that Industrial Indemnity could be the last responsible carrier. Industrial Indemnity, however, is insolvent and defunct, conditions which raised CIGA as a potential responsible party in this case. As yet, no findings have been rendered regarding which of these three potentially liable insurers is the last responsible carrier.

[8] CIGA asserted the California legislature amended state law, effective January 1, 1988, to exclude Longshore claims from its coverage. CIGA maintained the change in law precluded Employer's insolvent carriers from being "member" insurers under Section 1063.1 of the California Insurance Code because they were required to pay into the Act's Special Fund.

[9] Judge Dorsey previously had consolidated this case with eleven similarly situated cases. Each of the cases involved a claim for death benefits for alleged work-related asbestos exposure filed by a widow or the widow's estate in which the employee died subsequent to 1987, and his employer and its insurer were no longer in existence. CIGA was substituted for the various employers and carriers, and it moved to be dismissed from the claims.

[10] The Board dismissed the claimants' consolidated appeals of Judge Dorsey's Order initially as premature under 20 C.F.R. §802.206(f). Upon reconsideration, the Board dismissed the appeals as interlocutory. *McCue, et al. v. California Ins. Guarantee Assoc.*, BRB Nos. 17-0120 – 17-0129 (Jan. 6, 2017), *recon. denied on other grounds* (Sept. 7, 2017).

Administrative Law Judges for resolution on the merits. This case was assigned to ALJ Clark (ALJ). On May 15, 2019, he issued an order substituting Marvin, on behalf of Ruth's estate, as Claimant. He scheduled a hearing for November 7, 2019, in San Francisco, California.[11]

Meanwhile, on September 27, 2019, Employer filed a Motion for Summary Decision. 29 C.F.R. §18.72. Employer maintained 33 U.S.C. §933(g) prohibited recovery under the Act because Ruth entered into the CII and CBS third-party settlements for an amount less than Employer's liability for compensation under the Act without obtaining the employer/carrier's permission. Claimant urged the ALJ to deny Employer's motion for summary decision because a genuine issue of material fact existed regarding whether Ruth "entered into" the settlement agreements within the meaning of Section 33 of the Act.

The ALJ found Employer's motion for summary decision and Claimant's opposition thereto "created ethical concerns regarding" BP's conduct in this case, which compelled him to investigate further before proceeding to adjudicate the motion. On October 22, 2019, he issued an Order to Show Cause (OSC) vacating the hearing, staying the case, and directing the parties to submit additional relevant evidence and brief the ethical questions. He also stated Claimant's counsel, BP, "must show cause as to why there is not a conflict of interest in its representation of different individuals in connection with the death of David Siver." OSC at 12. The parties complied with the ALJ's directive, and on October 2, 2020, he issued another order dismissing the prior show cause order and finding BP "violated its ethical duties, but disqualification is not necessary." ALJ Order Regarding Order to Show Cause RE: Conflict dated October 2, 2020 at 2. He therefore directed the parties to file any supplemental materials relating to Employer's motion for summary decision within fourteen days.

Finding no genuine issues of material fact, the ALJ addressed the legal issue of whether Ruth "entered into" the third-party settlement agreements within the meaning of Section 33(g). Based on the undisputed facts in this case and upon review of the relevant case law, including the United States Court of Appeals for Ninth Circuit's "unpublished and not precedential" decision in *Hale v. BAE Systems San Francisco Ship Repair, Inc., et al.*, 801 F. App'x 600 (9th Cir. 2020), he concluded Section 33(g) barred Ruth and, derivatively, Marvin (via her estate) from recovering benefits under the Act. Order Granting Summary Decision at 11, 12. In reaching this conclusion, the ALJ found: (1) it is undisputed that Ruth was a "person entitled to compensation" (PETC) within the meaning of the Act and subject to the provisions of Section 33(g), *id.* at 12; (2) although

[11] The ALJ previously had issued an Order dated March 4, 2019, granting CIGA's motion to be removed from the case caption based on Judge Dorsey's 2016 Order.

Ruth did not personally sign the settlement agreements or receive any of the settlement proceeds, her claims were included within the meaning of the third-party settlements such that she was bound by them as a "Releasor" under the clear meaning of the settlement language, *id.* at 20; (3) Ruth also explicitly granted Marvin the authority to act as her agent and did not revoke or modify that power through her execution of the May 31, 2009, disclaimers, *id.* at 17; (4) Ruth, therefore, "entered into" the third-party settlements *id.* at 20; (5) Employer, its carriers, and/or the Director were never notified and/or never approved the third-party agreements, *id.*; and (6) the aggregate amount of the settlement agreements is less than Ruth's potential entitlement to benefits under the Act, *id.* Accordingly, the ALJ granted Employer's motion for summary decision based on the affirmative defense of Section 33(g) of the Act and dismissed the claim.

On appeal, Claimant challenges the ALJ's application of Section 33(g) to bar the estate's claim to death benefits. Marvin also challenges Judge Dorsey's 2016 Order dismissing CIGA from the case. Employer responds, urging affirmance of the ALJ's Order. CIGA responds, stating it should remain dismissed from this case because Claimant has not established Decedent worked for Employer during a period when Industrial Indemnity provided insurance coverage. The Director agrees with Employer's position and urges the Board to affirm the ALJ's decision dismissing the claim. Alternatively, the Director maintains if the Board reverses or vacates the ALJ's grant of summary decision, it should also vacate Judge Dorsey's order dismissing CIGA and remand the case for further consideration on the merits, which would include CIGA's potential liability.

The Parties' Contentions

Claimant contends the ALJ's dismissal of the claim for death benefits under Section 33(g)(1) of the Act is contrary to law and unsupported by the record. He asserts the ALJ erred as a matter of law by primarily focusing on whether Ruth was "bound by" the third-party settlements, rather than on whether she actually "entered into" those settlements. He maintains the ALJ's reliance on two documents to find he acted on behalf of and by the authority of his mother, who is the undisputed PETC in the death benefits claim arising under the Act, is misplaced. Marvin asserts the first document, a declaration stating he was authorized to act on behalf of Decedent's successor-in-interest, is irrelevant for the death benefits claim, and the mere existence of the second document, the power of attorney Ruth granted to Marvin shortly after Decedent's death, is insufficient to establish Marvin exercised it in executing the third-party settlements.

Claimant states the ALJ failed to recognize the significant distinction between the survival action and the wrongful death cause of action pursued through the third-party lawsuit. He contends the ALJ's statement, and resulting conclusion, that Claimant acted on behalf of the decedent's successor-in interest, his mother, in both the survival and

wrongful death actions is erroneous because a successor-in-interest, as a matter of law, has no role in a wrongful death action. He maintains a death benefits PETC, like Ruth, who is also Decedent's "successor in interest" can, solely in the latter capacity, pursue and settle a third-party survival claim without an employer's or its carrier's approval and without any credit or offset against the Longshore death benefits claim. Accordingly, Claimant states that if he, as the ALJ reasoned, executed the third-party settlements as one authorized to act on behalf of his mother as Decedent's successor-in-interest, such authority was limited exclusively to the third-party survival action and not the wrongful death action. Claimant concludes, as such, the unapproved settlement of the survival action cannot invoke Section 33(g) with respect to Ruth's right to death benefits arising under the Act.

Claimant further argues there is no support for finding he exercised his power of attorney to execute the third-party settlements on his mother's behalf. He maintains he never purported to be exercising the authority to sign for Ruth with respect to the wrongful death action as there was no notation or any representation that he was acting in any such capacity, and he never revealed that he had a general power of attorney to act for Ruth. Claimant states the ALJ's finding is even more troubling in that his exercising a power of attorney in executing the third-party settlements would directly conflict with his mother's express disclaimer of any interest in the third-party action, resulting in an inappropriate and irrational breach of trust. He therefore contends the ALJ's conclusion that he exercised the power of attorney is not based on the record but instead on the ALJ's own unsubstantiated belief that Ruth's disclaimer of any participation in the wrongful-death action and intent not to enter into any third-party settlements was an unethical scheme by which BP "sought to create a workaround" of Section 33(g).

Employer, joined by the Director,[12] maintains Claimant's contentions are unsupported by the evidence and are contrary to law. It maintains the plain language of the contracts and terms of the third-party settlements establish the parties' mutual intent at the time the releases were signed to include Ruth as a party to the settlements. Employer maintains Marvin's assertion that the evidence does not show he revealed to anyone that he had a general power of attorney to act for Ruth is irrelevant because Marvin and his attorneys already knew he could and did only act as Ruth's "successor-in-interest" solely by virtue of an exercise of his power of attorney. It maintains Claimant's reference to a

[12] The Director states, in his brief, "[f]or the reasons set forth in the response submitted by Employers and Carriers, the Board should affirm the ALJ's decision and order granting summary decision and dismissing the claim under Section 33(g)." Dir. Br. at 2.

"breach of trust" is flawed as it is apparently predicated on his declaration reciting the confidential advice of his attorney, which was rejected by the ALJ as "self-serving, inconsistent with the contemporaneous evidence, and not credible." Emp. Br. at 13.

Section 33(g) Law

Pursuant to Section 33(a), 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if she determines the third party may be liable for damages related to the work-related injuries. 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 her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g);[13] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992).

Pursuant to Section 33(g)(1), an employer/carrier's prior written approval of the settlement is necessary when the person entitled to compensation (PETC) enters into a settlement with a third party for less than the amount to which she is entitled under the Act. 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT); *see Bundens v. J.E.*

[13] Section 33(g) is titled "Compromise obtained by person entitled to compensation" and 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 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.

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. Failure to obtain prior written approval of a "less than" settlement results in the forfeiture of benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). As Section 33(g) is an affirmative defense, the employer bears the burden of proving the claimant entered into a fully executed "less than" settlement with a third party without obtaining prior written approval from it and its carrier. *Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017); *Newton-Sealey v. Armor Group Services (Jersey), Ltd.*, 49 BRBS 17 (2015); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

Section 33(g) is intended to ensure an employer's rights are protected in a third-party settlement and to prevent the claimant from unilaterally bargaining away funds to which the employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). The purpose of the approval and notice requirements of Section 33(g) is to enable an employer to protect its right to set off, under Section 33(f), the amount of a third-party settlement against any future obligations it might have and allow it to protect its right to reimbursement from the proceeds of the settlement in the amount of any payment it has already made. *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988).

California Law

Interpreting a contract is a judicial function, and the court is to give effect to the parties' mutual intentions as of when the contract was executed. Generally, intent is a legal question determined by the terms of the contract. *Golden v. California Emergency Physicians Medical Group*, 782 F.3d 1083, 1089 (9th Cir. 2015) (settlement is matter of state law; California looks at objective intent embodied in language of contract). If there is ambiguity and the meaning of the contract is susceptible to the disputing parties' differing positions, a judge may accept extrinsic evidence to assist with the interpretation. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. State of California*, 618 F.3d 1066 (9th Cir. 2010).

Under California law, when, as alleged in this case, an individual dies as a result of negligence, recklessness, or an intentional wrongful act, two types of lawsuits may be brought against the wrongdoer(s). The first is a wrongful death lawsuit to compensate the survivors for their losses, *see* CCP §377.60, and the second is a survival cause of action to compensate the estate for losses suffered by the decedent, prior to death, *see* CCP §377.30. Section 377.60, specifically referred to in both settlement releases in this case, addresses

who has standing to file a wrongful death action. CCP §377.60. It identifies as eligible plaintiffs the surviving spouse and the children of the deceased.[14] It does not define the term "heir" and, indeed, does not even mention the word. *Id.* The California Probate Code, however, identifies an "heir" as "any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession under this code." Cal. Prob. Code §44. The California Probate Code also identifies a "beneficiary" as a "person to whom a donative transfer of property is made or that person's successor in interest." If the beneficiary takes via "the intestate estate of a decedent," she is an "heir." Cal. Prob. Code §24.

The Probate Code also addresses how a beneficiary may renounce some or all interests she could take as a beneficiary. Cal. Prob. Code §§262, 264-265, 267, 275 ("A beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in this part."). To be effective in probate, the disclaimer must be filed "within a reasonable time after the person able to disclaim acquires knowledge of the interest." Cal. Prob. Code §279. The disclaimer for probate court "means any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary." Cal. Prob. Code §265. While the disclaimers in this case sufficiently articulated Ruth's decision to "decline[], refuse[], renounce[], or disclaim[] any interest that would otherwise be taken by [her as] a beneficiary," there is no dispute: they were never filed with the court.

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[14] Section 377.60(a)(1) states:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
>
> > (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

CCP §377.60(a). Therefore, California law allows the decedent's personal representative to bring a wrongful death cause of action on behalf of the decedent's surviving spouse. A claim for wrongful death is a statutory claim. *Ruttenberg v. Ruttenberg*, 53 Cal. App. 4th 801, 807 (2d Dist. 1997). "While each heir designated in Section 377.60 has a personal and separate wrongful death cause of action, the actions are deemed joint, single and indivisible and must be joined together in one suit." *Corder v. Corder*, 41 Cal. 4th 644, 652 (2007). Accordingly, absent heirs are necessary parties, and all known heirs must be joined into the single suit. *Ruttenberg*, 53 Cal. App. 4th at 808.

Under Section 377.30, "[a] cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest" and is enforceable by the "decedent's personal representative or, if none, by the decedent's successor in interest." In contrast to a cause of action for wrongful death, a survival cause of action "is not a new cause of action that vests in the heirs on the death of the decedent;" rather, it is "a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event." *See Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1264 (2006). Section 377.11 of the CCP states, "[f]or the purposes of this chapter, decedent's successor in interest means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action."

In terms of a power of attorney, Chapter 3 of the California Probate Code, pertaining to the modification and revocation of powers of attorney, states a principal may modify or revoke a power of attorney "in accordance with the terms of the power of attorney" through notice. Modification requires "an instrument executed in the same manner as a power of attorney" which "sets out the modification," Cal. Prob. Code §4150(a)(2), whereas revocation merely requires "a writing." Cal. Prob. Code §4151(a)(2). More specifically, authority of an attorney-in-fact under a power of attorney may be revoked "[w]here the principal informs the attorney-in-fact orally or in writing that the attorney-in-fact's authority is revoked or when and under what circumstances it is revoked." Cal. Prob. Code §4153(a)(2). Generally speaking, "[a] third person shall accord an attorney-in-fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act." Cal. Prob. Code §4300. Additionally, "[a] third person may rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney-in-fact." Cal. Pro. Code §4301.

Discussion

In ruling on a party's motion for summary decision, the ALJ must determine, 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 a matter of law. *Wilson v. Boeing Co.*, 52 BRBS 7 (2018); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); 29 C.F.R. §18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts" to show "there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574,

587 (1986). The ALJ must draw all inferences in favor of the non-moving party. *O'Hara*, 294 F.3d at 61; *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). If the ALJ could resolve the issue in favor of the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issues presented, summary decision must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Wilson*, 52 BRBS 7.

The ALJ found the following undisputed facts:

(1) Ruth granted Marvin Power of Attorney on December 17, 2007 (RX F);

(2) This durable power of attorney was neither mentioned, modified, nor revoked by the alleged disclaimers she signed in May 2009 (RX F);

(3) Decedent's will identified Ruth as his sole beneficiary, making her the successor-in-interest of his estate (RX E);

(4) Ruth was explicitly listed as a plaintiff in the third-party actions (RX L);

(5) Nothing in the language of the third-party settlements contradicts the plain reading that Marvin was acting on behalf of the successor-in-interest, as well as on behalf of Decedent's heirs (BAE EX 10.28);

(6) The May 2009 disclaimers were never filed with any court or provided in a timely fashion to any relevant party (RX J);

(7) BP, despite having full prior knowledge of those disclaimers, did not have Ruth explicitly excluded from the settlements (RXs J, F and H); and

(8) The settlements included Ruth in the class of plaintiffs who settled their claims and released CII and CBS from any and all liability relating to Decedent's exposure to asbestos – thereby foreclosing Employer's ability to protect its right to a Section 33(f) setoff of the amount of these third-party settlements against any future obligations it might have and to allow it to protect its right to reimbursement from the proceeds of the settlement in the amount of any payment it has already made. (RXs F and H).

Based on these undisputed facts, the ALJ found the third-party settlements "contain broad language" discharging the third parties from "any potential and future claims of the heirs of Dave Siver" connected to his exposure to asbestos. *Id.* at 13 (citing RXs F, H). He next found the settlements documented the "releasors" as Marvin Siver, listed as personal representative, Dave Siver, identified as the decedent, his children, listed as

Marvin and Alton Siver, and "Decedent's heirs (not otherwise set forth above) as defined by [CCP] Section 377.60." *Id.* at 13-14 (citing RXs F, H).

Recognizing that in California, wrongful death is a "joint, single and indivisible" suit adjudicating the rights of all potential beneficiaries, the ALJ found the unambiguous settlement language "undoubtedly" establishes Ruth is an included heir because she was a surviving spouse as delineated in Section 377.60. He therefore concluded "the objective intent" of the settlement agreements "as evidenced by the language" is that Ruth, as one of decedent's heirs and one of the individuals listed in Section 377.60, is a "Releasor," and therefore bound by the settlements. He stated this conclusion was further supported by the fact that Ruth "was still listed as a plaintiff in the action at the time the settlements were executed, by the consideration of the settlement as a whole, and the concurrent representation of all family members by the same attorneys." *Id.* at 16.

The ALJ next found, pursuant to California law, the 2009 disclaimers did not alter Marvin's authority to enter into a binding contract on Ruth's behalf because the disclaimers: were not executed in the same manner as the power of attorney and did not modify the durable power of attorney; did not reference Marvin's durable power of attorney in any way; and were not filed with any court, shared with any third party, or notarized. Moreover, the ALJ found there was no provision in the power of attorney document that provided it could be revoked or modified through the execution of the disclaimers. He therefore found Marvin not only had the authority to enter into contracts on Ruth's behalf, but the documents in question also established he asserted he was acting on her behalf in the third-party actions. In this regard, the ALJ found Marvin signed a declaration stating he was authorized to act on behalf of Decedent's successor-in-interest as defined in Section 377.11 of the CCP with respect to the wrongful death action. Pursuant to Decedent's last will and testament, his sole beneficiary and successor-in-interest was Ruth. Additionally, he found Claimant signed the settlements on behalf of the releasors, which included both Alton and Ruth.[15] Order at 17-18. Consequently, because the PETC within the meaning of the Act, Ruth, entered into the CII and CBS third-party settlements for an amount less than her potential entitlement under the Act without obtaining Employer's prior written consent, he concluded Claimant's claim is barred by Section 33(g) of the Act. Accordingly,

[15] He further found, contrary to Claimant's position, the fact that Ruth did not receive funds from the settlements is not dispositive because a party can decide to settle claims for nothing or gift the proceeds to family members but still have entered into the settlements. Furthermore, the settlements in this case paid Claimant's attorneys, BP, as "trustees for the heirs of Dave Siver," which the ALJ found necessarily included Ruth. RXs F, H, L.

he granted Employer's motion for summary decision. For the reasons that follow, we affirm the ALJ's decision.

The Board and the Ninth Circuit have previously addressed the applicability of the Section 33(g) bar under circumstances similar to this case. In *Hale v. BAE Sys. San Francisco Ship Repair*, 52 BRBS 57 (2018), *rev'd*, 801 F. App'x 600 (9th Cir. 2020), and *Verducci v. BAE Sys. San Francisco Ship Repair*, BRB No. 17-0551 (Oct. 30, 2018) (unpub.), *rev'd*, 801 F. App'x 600 (9th Cir. 2020), the decedents filed personal injury lawsuits against several third-party defendants. They died while their third-party lawsuits remained pending, however, prompting the state courts to appoint each decedents' adult child as successor-in-interest to their respective third-party claims. The decedents' widows signed similar disclaimers to those at issue here purportedly renouncing their rights in the third-party actions and the estate in favor of their pursuit of benefits under the Longshore Act without ever filing or providing the disclaimers to any other party; thereafter, the widows filed separate Longshore claims.

In both of those cases, on behalf of the decedents' estates and heirs, the adult children of the decedents likewise signed similar settlement agreements to those here with third parties. The ALJs found the widow/claimants had "entered into" and were bound by the settlements by virtue of the terms of the settlements and the nature of California's wrongful death action and therefore concluded their claims were barred by Section 33(g). The Board affirmed the ALJs' application of Section 33(g) to bar the widow/claimants' entitlement to benefits.

On April 17, 2020, the Ninth Circuit, by a panel majority in an unpublished decision, reversed the Board's decisions in *Hale* and *Verducci*, *Hale v. BAE Sys. San Francisco Ship Repair*, 800 F. App'x 600 (9th Cir. 2020), by creating a distinction between "entering into" a settlement for the purposes of Section 33(g) and "being bound by" a settlement under California contract law. According to the majority, regardless of whether the widows were bound by the plain language of the settlements and the law of contracts, there was not enough evidence to show that, either on their own or through an authorized agent, they had personally "entered into" the settlements under the language of the Longshore Act. The majority noted "the settlements in question were not signed by the widows" but instead "were between third parties and the decedents' daughters, who were successors-in-interest to certain legal claims their fathers filed while still alive." *Id.*, slip op. at 2. Given that lack of a signature and "a dearth of record evidence to suggest that the daughters acted as agents on the widows' behalves," the panel reversed the Board, finding neither the "person entitled to compensation," "her agent," nor her "legal representative" as defined by Section 33(g)

"entered into" any third-party settlements.[16] *Id.* It thus remanded the cases for further proceedings. *Id.*[17]

The dissenting judge would have upheld the Board's decision, explicitly rejecting the majority's view that "entering into" a settlement differs from "being bound by" it for the purposes of Section 33(g) and California contract law. *Hale*, slip op. at 3 (Gould, J. dissenting); *see also see* California Code of Civil Procedure (CCP) §377.60. Noting that the terms are synonymous and functionally equivalent, he would have held the clear language of the third-party settlements and the actions of the parties expressed an unambiguous "objective intention that the Petitioners be bound by and parties to the settlements" for the purposes of Section 33(g). *Id.* He further noted "the settlements would not have evidenced such an intention" had the claimants simply filed the disclaimers or had BP merely excluded the claimants from the settlements. *Id.* It did not.

The ALJ's decision complies with both the majority and dissenting opinions in *Hale*. *First*, the lack of evidence of an agency relationship that the *Hale* majority relied on to distinguish "entering into" and "being bound by" a settlement is not present here. The *Hale* majority's concern that the daughters signed the settlements as successors-in-interest on behalf of the estate and not expressly for the widow's benefit is not an issue. *Hale*, slip op. at 2; RXs E, F, L. The third-party claims were filed by Decedent's estate, and not by Decedent (as in *Hale*), at a time when Ruth was Decedent's sole successor-in-interest, when Marvin had her explicit power of attorney to file and settle lawsuits on her behalf, and when Ruth was the sole PETC under Section 33 of the Act. RXs E, F, L.

More fundamentally, however, rather than containing "a dearth of evidence" of an agency relationship, the record here contains indisputable confirmation of it: Marvin, by virtue of Ruth's notarized power of attorney, inarguably was Ruth's agent at all relevant times by operation of law. The notarized durable power of attorney Ruth signed expressly

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[16] The majority further held "[t]he statutory phrase 'the person's representative' [in Section 33(g)] refers to the 'legal representative of the deceased,'" and therefore did not apply "where the Act's benefits accrue to a living, breathing 'person entitled to compensation.'" *Hale*, slip op. at 2

[17] Other than implying there must be an unspecified amount of additional evidence to support an agency relationship that establishes a claimant has entered into a settlement for the purposes of Section 33(g) beyond the evidence required to establish the same claimant is bound by the settlement under contract law, the majority did not explain the difference between "entering into" and being legally "bound by" a settlement for the purposes of 33(g).

listed Marvin as Ruth's specific agent and broadly granted him the authority, among other things, to pursue or settle any lawsuit on her behalf. RX F; *see also Power of Attorney* Black's law Dictionary (11th ed. 2019) (defining "power of attorney" as "[a]n instrument authorizing another to act as one's agent or attorney"). Ruth gave Marvin that power of attorney in 2007 -- prior to the filing of the third-party lawsuits. As the ALJ found, she never revoked or modified that power prior to her death. RX F; Cal. Prob. Code §4153(a)(2).

Moreover, the plain language of the third-party claims and the settlements identified Ruth as a plaintiff and heir. Marvin indicated he had authority to sign on behalf of all the settling heirs, who were all represented by BP, and the durable power of attorney further expressly granted him that power on Ruth's behalf. By virtue of the language of the releases, and the express terms of the power of attorney -- an element missing in *Hale* -- Ruth both "entered into" the settlements under the majority's discussion of an agency relationship and was "bound by" them under the law of contracts. RXs F, H, L; *see Hale*, slip op. at 2; *see generally Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1210 (9th Cir.1999) ("Contract terms are to be given their ordinary meaning.").

In addition, Judge Gould's dissenting opinion in *Hale* overwhelmingly supports the ALJ's decision. In disagreeing with the majority's distinction between "entering into" and being "bound by" settlements for the purposes of Section 33(g), he succinctly reasoned "Black's Law Dictionary defines 'enter' as 'to become a party to,' as in 'they entered into an agreement.'" *Hale*, slip op. at 2 (Gould, J., dissenting) (citing *Enter*, BLACK'S LAW DICTIONARY (11th ed. 2019)). Given the synonymous meaning, Judge Gould further explained courts must simply apply existing contract law to establish whether a binding agreement exists by "looking to the plain language of the settlements." *Id.* In so doing he found:

> the plain language of the settlements binds [the claimants] to its terms as 'heirs' to the decedents. Accordingly, I read the settlements as expressing an objective intention that [the claimants] be bound by and parties to the settlements. If [they] had filed disclaimers, or if the attorneys who orchestrated the settlements – the same attorneys who represented [the claimants] – had specifically excluded [them] from the settlements, then the settlements would not have evidenced such an intention.

Hale, slip op. at 2 (Gould, J., dissenting). Based on straightforward meaning, Judge Gould would have applied the Section 33(g) bar for the claimants' failure to obtain prior written consent of the third-party settlements. *Id.*

The settlement language compels the same result here. The wording is nearly identical, as is the same law firm's refusal to specifically exclude Ruth from the agreements, file the disclaimers with any court, or provide them to any other party. In the case before us, Ruth gave Marvin her power of attorney. RX F. Thereafter, Marvin, both under the plain terms of the settlements and with Ruth's express power of attorney, signed settlement agreements on behalf of Decedent's estate and Decedent's heirs (of which Ruth is undoubtedly one) -- without explicitly excluding Ruth, revealing the disclaimers, or attaching them to the settlements. RXs F, H, L.

Based on the plain language of the settlements, the failure to file or publicize the disclaimers, and California contract and probate law, the ALJ correctly found Ruth is included in the class of plaintiffs who "entered into" settlements of claims with CII and CBS for less than the amount to which she would have been entitled under the Act, without obtaining prior written approval from Employer and its carrier.[18] There is no dispute the aggregate of the settlements represents an amount less than that which Ruth would have been entitled to under the Act, and there was no effort to notify or obtain Employer's prior written approval. For these reasons, we affirm the ALJ's conclusion that Section 33(g) bars the death benefits claim arising under the Act.[19] 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). Moreover, we affirm the ALJ's order granting Employer's motion for summary decision, as Claimant has not demonstrated error in the ALJ's conclusions that there were no genuine issues of fact for trial and that Employer is entitled to a decision in its favor as a matter of law.

[18] Notably, while the ALJ decision is affirmable under both the majority and dissenting opinions in *Hale*, in our view only Judge Gould's opinion fulfills the purpose of Section 33(g). For the statutory framework of Section 33 to function, employers must be notified and given an opportunity to protect their interests in third party settlements. *See generally Serv. Eng'g Co. v. Emery*, 100 F.3d 659, 30 BRBS 96(CRT) (9th Cir. 1996). Creating a distinction between entering into and being bound by a settlement permits claimants to unilaterally bargain away funds to which the employer might be entitled under 33 U.S.C. §933(b)-(f) by becoming parties to enforceable contracts that by their terms extinguish employers' rights to an offset. In addition to unnecessarily blurring what should be straight-forward matters of contract law, the distinction potentially writes Section 33(g) out of the statute.

[19] Because Section 33(g) bars this claim, identification of the responsible carrier in this case is not necessary. We therefore need not address Judge Dorsey's 2016 Order Dismissing California [Insurance] Guarantee Association.

Accordingly, we affirm the ALJ's Order Granting Summary Decision and Dismissing Claim.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge