BRB Nos. 97-1117
and 97-1117A

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| JASON D. REDMOND | ) | |
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| Claimant-Petitioner | ) | DATE ISSUED:_____ |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| SEA RAY BOATS | ) | |
| | ) | |
| and | ) | |
| | ) | |
| CRAWFORD AND COMPANY | ) | |
| | ) | |
| Employer/Carrier- | ) | |
| Respondents | ) | |
| Cross-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Garfinkel, P.A.), Titusville, Florida, for claimant.

Michael F. Wilkes (Marasco & Wilkes), Rockledge, Florida, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (96-LHC-1323) of Administrative Law Judge Edith Barnett 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 administrative law judge's findings of

[1]By Order dated August 19, 1997, the Board denied employer's motion to consolidate this appeal with the appeals in *Powers v. Sea Ray Boats*, BRB No. 97-705, and *Castleton v. Sea Ray Boats*, BRB No. 97-1042, which were consolidated before the Board. The Board also denied employer's motion for oral argument. However, the Board granted claimant's motion to hold this case in abeyance pending the Board's decision in *Powers*, and a decision in that case was issued on January 26, 1998.

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 worked at employer's facility constructing fiberglass motorized recreational vessels. He was sent to the facility through a temporary employment agency called Norrell Temporary Services. While there, he was injured when he and a co-worker were carrying a swim platform for assembly onto the 650 CMY, employer's longest vessel. Claimant stepped on an air hose, tripped, and injured his low back and right shoulder. Tr. at 152-153. Claimant filed a state workers' compensation claim against Norrell and a claim for benefits under the Act against Sea Ray. Thereafter, claimant and Norrell settled the state claim, without prior approval from Sea Ray. Emp. Exs. 15-17; Tr. at 153.

The administrative law judge found, *inter alia*, that the 650 CMY is 72 feet 7 inches; therefore, she found that claimant is not excluded from coverage under Section 2(3)(F) of the Act, 33 U.S.C. §902(3)(F) (1994). Additionally, she found that Sea Ray is claimant's borrowing employer and is liable for benefits; however, she concluded that the Section 33(g), 33 U.S.C. §933(g), bar is applicable, as claimant settled a third-party claim with Norrell and did not obtain prior approval from Sea Ray. Decision and Order at 11-13, 15-16. Claimant appeals the decision to apply Section 33(g) to this case, and employer responds, urging affirmance. BRB No. 97-1117. Employer cross-appeals the decision, challenging the finding that the 650 CMY is over 65 feet in length, and that claimant is not excluded from coverage, and claimant responds, urging affirmance. BRB No. 97-1117A.

We first address the issue raised in employer's cross-appeal. Employer contends the administrative law judge erred in determining that the 650 CMY, employer's longest vessel, measures over 65 feet in length. Employer argues that the swim platform, an aft attachment to the hull, and the bow pulpit, a fore attachment to the hull, were improperly included in the measurement of the vessel. Therefore, it asserts that the recreational vessel measures less than 65 feet in length, and Section 2(3)(F) excludes claimant from coverage under the Act. Claimant responds, arguing that the definition of length under the implementing regulation to the Act, 20 C.F.R. §701.301(a)(12)(iii)(F), requires the measurement to be made from end to end, including all attachments and fixtures. The Board recently addressed this issue, as it pertains to this same employer and vessel, in *Powers v. Sea Ray Boats*, ___ BRBS ___, BRB No. 97-705 (Jan. 26, 1998).[2] For the reasons set forth in *Powers*, we reject employer's contention that claimant is excluded from coverage. In *Powers*, the Board held that the length of a recreational vessel is measured from the foremost part of the vessel to the aftmost part, including fixtures attached by the builder, *Powers*, slip op. at 11, and the Board affirmed the administrative law judges' findings that the 650 CMY measures 72 feet 7 inches with the attachments. *Id.* Therefore, as the vessel at issue exceeds 65 feet in length, the administrative law judge's decision that claimant is not excluded from the Act's coverage is affirmed.

[2]The instant case was consolidated for hearing and decision by the administrative law judge with *Castleton*, which was consolidated on appeal with *Powers*. *See* n.1, *supra*.

Claimant contends the administrative law judge erred in applying Section 33(g) to this case. He argues that such application is inappropriate as neither a third party nor a civil suit was involved. Employer argues that nothing in Section 33 prohibits the bar from being applied to an employer paying state workers' compensation benefits. Section 33(a), 33 U.S.C. §933(a), provides that if an injured employee "determines that some person other than the employer. . . is liable in damages" for the same disability or death, he need not elect between his compensation remedy and a third-party civil suit. Section 33 provides a method designed to foreclose the injured employee from receiving a double recovery by obtaining both benefits under the Act and civil damages from a successful negligence suit against a third party. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). Thus, Section 33(g) applies to bar claimant's entitlement to compensation under the Act if he enters into a settlement with a third party under Section 33(a) for an amount less than his compensation entitlement without obtaining employer's prior written consent or for an amount greater than or equal to his entitlement without prior notice. 33 U.S.C. §933(g) (1994); *Cowart*, 505 U.S. at 409, 26 BRBS at 49 (CRT).

As claimant correctly contends, the administrative law judge erred in applying Section 33(g) to bar claimant's entitlement to benefits as there is no third-party defendant or civil suit for damages involved in this case. The claim for state workers' compensation benefits was filed against claimant's nominal employer, Norrell, and one of the issues before the administrative law judge herein was whether Norrell, as the nominal employer or Sea Ray, as the borrowing employer, is liable for claimant's benefits. The state compensation claim does not fall within the provisions of Section 33 as it was not brought against a third party in a civil suit for tort damages. Accordingly, Section 33(g) cannot apply to bar claimant's claim for benefits.

However, Section 3(e) of the Act, 33 U.S.C. §903(e), specifically provides an employer liable for benefits under the Act with a credit against benefits the claimant receives under another workers' compensation law for the same injury. *See, e.g., D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24 (CRT)(1st Cir. (1997); *Shafer v. General Dynamics Corp.*, 23 BRBS 212 (1990); *see also Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). The parties in this case agree that employer is entitled to this credit. Decision and Order at 15; Tr. at 5. Consequently, we reverse the administrative law judge's application of the Section 33(g) bar, and we remand the case for the administrative law judge to resolve the remaining issues between the parties and to determine the extent of employer's liability in light of its entitlement to a credit pursuant to Section 3(e). *Shafer*, 23 BRBS at 213-214.

Accordingly, that portion of the administrative law judge's Decision and Order applying the Section 33(g) bar and denying benefits is reversed, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge