BRB Nos. 97-1117
and 97-1117A

JASON D. REDMOND	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: June 15, 1998
Cross-Respondent	)	
	)	
v.	)	
	)	
SEA RAY BOATS	)	
	)	
and	)	
	)	
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER
Cross-Petitioners	)	on RECONSIDERATION

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

PER CURIAM:

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Redmond v. Sea Ray Boats*, 32 BRBS 1 (1998). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has responded, urging affirmance. Because employer's argument has merit, we hereby grant the motion for reconsideration.

To reiterate the facts of this case briefly, 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. He was injured when he and a co-worker were carrying a swim platform for assembly onto a vessel. 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.

In its decision dated February 6, 1998, the Board affirmed the administrative law judge's determination that the 650 CMY, employer's longest vessel, is 72 feet 7 inches and, therefore, claimant is not excluded from coverage under Section 2(3)(F), 33 U.S.C. §902(3)(F) (1994). However, it reversed her finding that the Section 33(g), 33 U.S.C. §933(g), bar is applicable, holding that the state workers' compensation claim against Norrell was not a third-party claim requiring employer's prior approval. *Redmond*, 32 BRBS at 2. In its motion for reconsideration, employer argues that the Board failed to address one of its arguments under Section 2(3)(F), specifically, whether claimant worked on the 650 CMY. Additionally, it contends the Board's Section 33(g) analysis is incomplete and that Norrell qualifies as a third-party, thereby invoking the Section 33(g) bar. Claimant responds, urging the Board to affirm its previous decision.

Initially, we agree with employer that its remaining Section 2(3)(F) argument should have been considered. Employer argues that claimant was not employed to build, repair or dismantle any recreational vessels 65 feet or longer. Specifically, it argues that claimant was assigned to its Merritt Island plant which produces only vessels fewer than 40 feet in length, and therefore, that claimant should be excluded from coverage under Section 2(3)(F). Claimant responds, arguing that, although he was primarily assigned to the Merritt Island plant, the plants are all adjacent to each other, with shuttle access among them, and that he sometimes worked at the Sykes Creek plant on the longer vessels.

Section 2(3)(F) of the Act states:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--. . .
>
> > (F) *individuals employed to build, repair, or dismantle* any recreational vessel under sixty-five feet in length; . . .

> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(F) (1994) (emphasis added). A person is "engaged in maritime employment" under Section 2(3) if he spends "at least some of [his] time" working for his employer engaged in non-excluded maritime work. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997).

The record evidence reveals that claimant was assigned to employer's Merritt Island plant between June 1993 and the date of his injury in August 1993, and that the 650 CMY is produced only at employer's Sykes Creek plant. Emp. Ex. 18; Tr. at 151, 159-160, 194. Claimant testified, however, that although he worked primarily at Merritt Island, he also worked several times at Sykes Creek on the longer vessels. Tr. at 139, 141, 159. A human resources supervisor, Ms. Crist, testified that, sometimes, employees would be sent to plants, other than their assigned plant, to work on vessels. Tr. at 194.

Employer raised the issue of claimant's employment duties before the administrative law judge, Tr. at 6, but she did not address the issue. Instead, she resolved the claim solely on whether the length of the vessel exceeded 65 feet. Decision and Order at 11. Because the Board is not permitted to engage in *de novo* review of the evidence, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), we must vacate the conclusion that claimant is covered by the Act and remand this case to the administrative law judge for consideration of employer's remaining Section 2(3)(F) argument. *See generally Garmon v. Aluminum Co. of America-Mobile Works*, 29 BRBS 15 (1995), *aff'g on recon.* 28 BRBS 46 (1994); *Sans v. Todd Shipyards Corp.,*19 BRBS 24 (1986). If the administrative law judge determines on remand that claimant worked on a vessel greater than 65 feet in length, then claimant is not excluded under Section 2(3)(F). *Redmond*, 32 BRBS at 2; *Powers v. Sea Ray Boats*, 31 BRBS 206 (1998).

Next, employer urges the Board to reconsider its conclusion that Section 33(g) is inapplicable in this case. Specifically, employer asserts that the Board did not adequately address whether Norrell, the temporary employment agency, is a third party. In the Board's February 1998 decision, it reversed the administrative law judge's determination that Section 33(g) barred claimant's benefits under the Act, holding that Norrell, a nominal employer, is not a third party. We reject employer's argument and reaffirm the conclusion that Section 33(g) is not applicable to this case. The Section 33(g) bar applies only when the claimant has obtained a

settlement in a third-party civil suit for damages related to the compensable injury and the claimant has failed to meet the appropriate notice or approval requirements. 33 U.S.C. §933(g) (1994); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). While claimant in this case obtained a settlement of his claim, it was a claim for state workers' compensation benefits and not a civil suit for damages. Moreover, Norrell, as the temporary agency through which claimant was employed, is claimant's nominal employer, and Sea Ray is claimant's borrowing employer. Both are claimant's employers who cannot be held liable in tort. *See, e.g., Honey v. United Parcel Service*, 879 F.Supp. 615 (S.D. Miss. 1995) (employee denied damages sought from temporary agency after having received workers' compensation benefits from same agency; employer held not liable in tort under concepts of dual employment and borrowed servant doctrine under Mississippi law); *McMaster v. Amoco Foam Products Co.*, 735 F.Supp. 941 (D.S.D. 1990) (when an employee of temporary agency is assigned to another employer, both employers are entitled to workers' compensation exclusivity under South Dakota law). Thus, Norrell is not a third-party defendant under Section 33, and we reaffirm our conclusion that benefits are not barred by Section 33(g).

Accordingly, the motion for reconsideration is granted. The Board's initial decision in this case is vacated with respect to its affirmance of the administrative law judge's finding that claimant is not excluded from the Act's coverage, and the case is remanded for reconsideration consistent with this opinion. 20 C.F.R. §802.409. In all other respects, the Board's decision is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
JAMES F. BROWN

Administrative Appeals Judge