BRB Nos. 07-0492
and 07-0492A

C.S.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INGRAM BARGE COMPANY	)	
as successor to	)	
	)	
ORSOUTH TRANSPORT COMPANY	)	DATE ISSUED: 02/28/2008
	)	
and	)	
	)	
CAPITAL MARINE SUPPLY, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	DECISION and ORDER
Carrier-Respondent		

Appeals of the Decision and Order and Order on Motion for Reconsideration of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Jeremiah H. Sprague and Timothy J. Falcon (Falcon Law Firm), Marrero, Louisiana, for claimant.

Andre J. Mouledoux, Derek M. Mercer, and Jacques P. Degruy (Mouledoux, Bland, Legrand & Brackett LLP), New Orleans, Louisiana, for employer.

Peter S. Koeppel and Maurice E. Bostick (Best Koeppel, APLC), New Orleans, Louisiana, for carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and Order on Motion for Reconsideration (2004-LHC-2057) of Administrative Law Judge Patrick M. Rosenow 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 sustained head injuries as a result of three distinct work accidents over the course of his work as a shore-side vessel mechanic for employer. Specifically, on February 6, 2001, claimant was struck on the head with a chain sling attached to a crane barge owned and operated by AEP Elmwood (AEP). On March 2, 2001, claimant was struck on the head by a hatch cover while aboard the M/V GOOD NEIGHBOR, owned and operated by Orsouth Transport Company (employer), and on September 16, 2002, claimant was struck on his head by a sewer valve while aboard the M/V MISSISSIPPI STAR, owned and operated by Capital Marine Supply, Incorporated (Capital Marine). Employer was self-insured at the time of the February 6, 2001, and March 2, 2001, accidents, but covered by Signal Mutual Indemnity Association (Signal) at the time of the September 16, 2002, accident.

Claimant alleged that he has a psychologically disabling condition as a result of these accidents which prevents him from returning to work. He thus filed a claim seeking permanent total disability and medical benefits under the Act. Claimant also filed a lawsuit in federal district court for damages against Capital Marine, Ingram Towing, and Orsouth Transport pursuant to the Jones Act, and against AEP and its crane barge pursuant to Section 5(b) of the Act, 33 U.S.C. §905(b). On April 18, 2005, the district court granted summary judgment for defendants Capital Marine, Ingram Towing and Orsouth Transport,[1] on the basis that claimant was not a seaman, thereby leaving the

[1] At the time claimant filed his lawsuit, Ingram Towing was the successor in interest by merger with Capital Marine and Orsouth Transport. Thus, these three companies are now the same entity and, collectively, represent employer in this case.

Section 5(b) action arising out of the incident against AEP and its crane barge as the sole cause of action pending in district court. *Saienni v. Capital Marine Supply, Inc.*, No. Civ. A. 03-2509, 2005 WL 940558 (E.D.La. April 18, 2005).

On May 16, 2005, notwithstanding the prior dismissal of claimant's claim, claimant and employer executed a settlement agreement in which employer agreed to pay benefits under the Longshore Act, representing $86,044.12 in past disability compensation, and $21,346.75 in past medical expenses.[2] Employer's Exhibits (EXs) 5, 7, 8. Claimant executed a formal release of his third-party claims for all three injuries against the defendants, including those previously dismissed, *i.e.*, Ingram Towing, Capital Marine, and Orsouth (which collectively comprise employer), as well as AEP and its crane barge and the vessels M/V GOOD NEIGHBOR and M/V MISSISSIPPI STAR. EX 8. The parties also agreed to proceed with the Longshore claim, with employer providing claimant medical benefits and continued disability benefits at a rate of $842.50 per week, until such time as a decision was issued on claimant's disability claim. EX 5. Relevant to the instant appeal, claimant obtained employer's approval of the settlement agreement but did not obtain Signal's approval.

Before the administrative law judge, Signal contended that claimant's claim for benefits is barred pursuant to Section 33(g), 33 U.S.C. §933(g), because claimant did not obtain its prior written approval of the settlement agreement. Signal also contended that claimant did not sustain a disabling injury as a result of the incident on September 16, 2002. The administrative law judge found that claimant executed a settlement which released at least two third parties who had not been dismissed by the district court, AEP, as to the February 6, 2001, accident, and the M/V MISSISSIPPI STAR, which he found qualified as a "third party," with regard to the September 16, 2002, injury. The administrative law judge found that claimant obtained written approval of the settlement, which the administrative law judge determined was for an amount less than claimant's compensation entitlement under the Act, from employer but not from Signal, which commenced as its carrier on June 28, 2002, and therefore was only at risk with regard to the September 16, 2002, injury. Given these findings, the administrative law judge concluded that Section 33(g) bars claimant's recovery for benefits related to the September 16, 2002, incident. As for claimant's February 6, 2001, and March 1, 2002, work accidents, the administrative law judge found that claimant was not entitled to any disability benefits because claimant subsequently returned to his usual employment following each incident. Moreover, the administrative law judge found, based on the

[2] As its consideration for claimant's releasing his tort claims, the amounts employer agreed to pay were benefits under the Longshore Act. EXs 5, 7, 8.

record as a whole, that claimant's current condition, as it relates to his ability to work, is not a direct result, or natural progression of his two 2001 work accidents, nor was his current condition substantially worsened by those incidents. The administrative law judge further found that his application of the Section 33(g) bar renders moot any discussion as to whether claimant's current disabling condition is due to the September 16, 2002, accident. He nonetheless found claimant entitled to medical benefits for ongoing treatment related to the February 6, 2001, and March 2, 2001, work accidents. Claimant's motions for reconsideration were denied by the administrative law judge's Order on Motion for Reconsideration dated February 12, 2007.

On appeal, claimant challenges the administrative law judge's finding that Section 33(g) bars his claim for benefits related to the September 16, 2002, work accident. Employer and Signal separately respond, each seeking affirmance of the administrative law judge's denial of disability benefits. On cross-appeal, employer challenges the administrative law judge's finding that it is liable for medical benefits, as well as the administrative law judge's refusal of its request, on reconsideration, to admit additional evidence.[3] Claimant responds, urging affirmance of the award of medical benefits.

Claimant contends the administrative law judge erred in finding his claim barred by Section 33(g), first averring that he did not settle a third-party claim for the third injury. Section 33(a) of the Act states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a). In order for Section 33 as a whole to apply, the entity against whom the lawsuit is filed must be potentially liable to both claimant and employer for the

[3] Employer also submits to the Board a motion to supplement the record. Employer's motion is denied as the Board's review of an administrative law judge's decision is limited to consideration of evidence in the formal case record. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). Thus, the Board may not consider new evidence submitted on appeal. *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988).

compensable work-related injury.[4] *See, e.g.,* 33 U.S.C. §933(b); *Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Thus, in order for Section 33(g) to apply, the disability for which claimant seeks benefits under the Act must be the same as that for which he settled his third-party suit. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom., Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); *see also Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 Fed. Appx. 249 (4th Cir. 2007). In this case, as the administrative law judge did not fully address the issues raised or make necessary findings relevant to the threshold issue regarding the applicability of Section 33, the case must be remanded for further consideration.

This case involves three distinct traumatic injuries. Employer was self-insured at the time of the February 6, 2001, and March 2, 2001, accidents, and covered by Signal at the time of the September 16, 2002, accident. The applicability of Section 33(a), and thus Section 33(g), requires an initial determination regarding the cause of claimant's disability and identification of the responsible carrier. If claimant's current disability stems from either of the first two incidents, then the Section 33(g) bar is inapplicable as employer gave its prior written approval of the settlement.[5] If, however, claimant's disability is due to the third incident, as Signal did not give its prior written approval of the third-party settlement, Section 33(g) is potentially applicable. The administrative law judge here considered the applicability of Section 33(g) prior to addressing the causation/responsible employer issue, and consequently did not fully address this potentially dispositive issue.

The determination of the responsible carrier in the case of multiple traumatic injuries turns on whether the claimant's condition is the result of the natural progression or the aggravation of a prior injury. In this case, if the claimant's disability resulted from the natural progression of the initial or second injury or aggravation by the second injury,

[4] Specifically, Section 33(g) cannot apply to a settlement of a lawsuit that does not fall within the scope of Section 33(a) of the Act, because the purpose of Section 33(g) is to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *See, e.g., Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986).

[5] Thus, while AEP is a third party named in the settlement, as the administrative law judge found, claimant's only injury on its vessel was the first injury. As employer approved this settlement for this injury, the Section 33(g) bar cannot apply to this injury, and the release of AEP does not affect Signal's liability, if any, for the later injury. *See infra.*

then the carrier at the time of that injury, the self-insured employer, is responsible for compensating the claimant for his entire disability. If, however, the third injury aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the carrier at the time of the third injury, herein Signal, is liable for all medical expenses and compensation related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Buchanan v. Int'l Transp. Serv.*, 33 BRBS 32 (1999), *aff'd mem.*, No. 99-70631, 2001 WL 201498 (9th Cir. Feb. 26, 2001) (unpub.); *see also Delaware River Stevedores v. Director*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). "The key under this formulation is determining which injury ultimately resulted in the claimant's disability." *Kelaita*, 799 F.2d at 1311.

In this case, the administrative law judge did not fully address the evidence relevant to this issue. The administrative law judge articulated the proper standard, *see* Decision and Order at 7-8, and found that claimant "is not entitled to disability compensation as it relates solely to his 06 Feb 01 accident," Decision and Order at 91, or "as a result of the 2 Mar 01 accident or a combination of the 2 Mar 01 and 6 Feb 01 accidents." Decision and Order at 93. Moreover, the administrative law judge found that "claimant's current condition as it relates to his ability to work is not a direct result or natural progression of the 2001 accidents and is not substantially worsened because of those accidents."[6] Decision and Order at 94. However, the administrative law judge explicitly refused to address whether the September 16, 2002, injury is the cause of claimant's disability, stating that "Section 33 renders moot any further analysis as to whether his current disabling condition is a consequence of his 16 Sep 02 accident." Decision and Order at 94. Thus, while the administrative law judge addressed whether claimant was disabled after his first two injuries, he did not render any specific finding with regard to which entity is potentially responsible for compensating the claimant for an "entire disability" he ultimately sustained. Therefore, we must remand this case for specific findings regarding whether claimant is disabled, which injury is the cause of the disability, and which carrier therefore is potentially liable for benefits. The administrative law judge must discuss these issues in terms of the specific medical evidence, and then make findings regarding Section 33(g) based on his conclusions.[7]

[6] However, we note that the administrative law judge's findings regarding causation, as it pertains to claimant's entitlement to medical benefits, are inconsistent with this inference, in that he determined that the record supported a finding that claimant's ongoing care became "necessary no later than after the second accident." Order on Reconsideration at 4. *See* discussion *infra.*

[7] We recognize that the administrative law judge extensively summarized the medical opinions rendered by physicians. *See* Decision and Order at 36-48, 49-62, 74-

Section 33(g) bars claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining the prior written consent of employer and its carrier. 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Esposito v. Sea-Land Service*, 36 BRBS 10 (2002). Section 33(g)(1) specifically requires written approval of both employer and its carrier:

> 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.

33 U.S.C. §933(g)(1) (emphasis added); *Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004). If Section 33(g)(1) applies, both compensation and medical benefits are barred pursuant to Section 33(g)(2). *Esposito*, 36 BRBS 10.

In this case, employer, by virtue of its active participation in the negotiation of the settlement and the fact that it is an actual signatory to that agreement, provided approval of the agreement in compliance with Section 33(g)(1). *See Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163, 166 (1997) (Brown, J., concurring); *Deville v. Oilfield Industries*, 26 BRBS 123, 131-132 (1992). Consequently, if, on remand, the administrative law judge determines that claimant's disability resulted from the natural progression of the initial injury sustained on February 6, 2001, or from the second injury sustained on March 2, 2001, then employer, as a self-insured entity, would remain liable for such compensation as Section 33(g) is inapplicable. *Id*.

---

77. He did not, however, specify the medical evidence he credited. Moreover, while the administrative law judge relied on the fact that claimant returned to work after the first two accidents, that fact alone is not dispositive; in every responsible employer/carrier dispute, claimant returns to work, and the question of which accident ultimately caused his disability is generally resolved by the medical evidence.

Assuming, *arguendo,* that claimant's disability is due to the third incident, claimant argues that the administrative law judge erred in finding that he settled a third-party claim relating to that incident. Specifically, claimant asserts that the administrative law judge's finding that claimant settled a Section 5(b) cause of action against the M/V MISSISSIPPI STAR is not supported by the facts in this case. Employer, in its response brief, concedes that claimant's "uncontroverted status as an employee providing vessel repair services within the meaning of Section 5(b)," precluded him from having any right and/or cause of action against employer for vessel negligence under Section 5(b) relative to the September 16, 2002, accident. Signal counters that the issue of whether claimant had a valid Section 5(b) claim against MV/MISSISSIPPI STAR is irrelevant as to the applicability of Section 33(g), as that provision contains no language limiting its application to situations only where claimant has "a strong or valid claim to settle." Signal's Brief at 4.

Under the Act, dual capacity employers are immune from direct suits by employees injured during the course of shipbuilding, repair work, and breaking services, but, in all other instances, injured employees may sue their dual capacity employers for vessel negligence and receive damages outside scope of the statutory compensation scheme. 33 U.S.C. §905(b); *see also In re ADM/Growmark River System, Inc.*, 234 F.3d 881 (5th Cir. 2000). Section 5(b), in pertinent part, states:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

It is thus clear that a ship repairman cannot bring an action against employer, as the vessel owner, pursuant to Section 5(b). *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *see also Easley v. Southern Shipbuilding Corp.*, 936 F.2d 839 (5th Cir. 1991), *vacated and remanded*, 503 U.S. 93 (1991), *aff'd on remand*, 965 F.2d 1 (5th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

In this case, the administrative law judge found that "since a vessel, even if owned by the employer, qualifies as a third party under the Act, the M/V MISSISSIPPI STAR was a third party under the Act." Decision and Order at 86. The administrative law judge, however, did not address either the specific facts in this case or the language of Section 33(a) or Section 5(b). The specific language of Section 33(a) states that if, due to

disability for which compensation is payable under this Act, "the *person entitled to compensation determines* that some person other than employer is liable in damages," he may seek to recover damages as well as compensation. 33 U.S.C. §933(a). (emphasis added). Thus, the statute envisions a situation where claimant files suit against a third party. In this case, however, the lawsuit claimant filed in district court did not allege a Section 5(b) cause of action against the M/V MISSISSIPPI STAR. Rather, as noted by the administrative law judge, claimant's lawsuit was limited to a Jones Act claim against the collective employer, and a Section 5(b) claim against AEP and its crane barge.[8] EX 6. Moreover, the administrative law judge did not address the significance of claimant's work for employer as a ship repairman, including the finding by the district court that claimant was a ship repairman and not a seaman. *Saienni*, 2005 WL 940558 at *11.

Thus, with regard to the third accident on September 16, 2002, the administrative law judge must re-evaluate in terms of Sections 33(a) and 5(b) whether the evidence establishes that any third-party is potentially liable to both claimant and employer/Signal for that accident. If so, the administrative law judge must then consider the applicability of the Section 33(g) bar. However, if the administrative law judge finds that there is no third party potentially liable to claimant and employer/Signal for the September 16, 2002, accident, then Section 33 is inapplicable with regard to that accident.

Claimant also contends that the administrative law judge erred in finding that claimant settled his third-party claim for an amount less than his total potential entitlement under the Act, averring that the administrative law judge should have considered whether claimant settled for an amount less than the carrier's liability under the Act given that he found that employer approved the third-party settlement but that the carrier did not. Claimant thus maintains that since the record is devoid of any evidence

[8] The Board, in an unpublished decision, addressed an issue similar to Signal's argument that the validity of a third-party claim has no relevance under Section 33(g). In *Marmillion v. A.M.E. Temporary Services*, BRB No. 05-0543 (Mar. 23, 2006) (unpub.), the Board stated that regardless of the merits a particular suit, where claimant settles a suit arising from the same injury as under the Act, the administrative law judge is not required to look behind this result and determine whether the third party was in fact liable to claimant and employer. The Board concluded that "it is sufficient for purposes of Section 33(a) that the claimant filed a suit naming the third party as a defendant for the same disabling injury at issue in the compensation claim and obtained a settlement from that defendant." *Id.*, Slip op. at 4. This element is absent in the present case. In contrast to *Marmillion*, where claimant filed third-party suits against all of the potentially liable parties, the M/V MISSISSIPPI STAR, as found by the administrative law judge, "was neither dismissed nor named in the district court action." Decision and Order at 86.

regarding carrier's coverage limit, carrier did not meet its burden for application of the Section 33(g) bar in this case.

Section 33(g)(1) applies only if the settlement amount is less than the claimant's compensation entitlement. Thus, a determination must be made as to the amount of compensation to which claimant is entitled under the Act in comparison to the amount of the third-party settlements. 33 U.S.C. §933(g)(1). In comparing the amount of disability compensation, not including medical benefits, to which the claimant would be entitled under the Act to the amount of the third-party recovery in a case involving a continuing award, the claimant's total lifetime entitlement to disability compensation must be considered. *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996), *aff'g and modifying on recon. en banc* 28 BRBS 254 (1994) (Brown and McGranery, JJ., concurring and dissenting); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994); *see generally Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). In arriving at an amount determinative of claimant's lifetime entitlement, the administrative law judge, as finder-of-fact, may use any reasonable method to calculate the amount of compensation to which the claimant would be entitled over his lifetime. *Linton*, 28 BRBS at 287-289.

The administrative law judge found that as of the date of his decision, the amount of the settlement and claimant's entitlement to compensation under the Act equaled each other, as the third-party settlement was only for longshore benefits. The administrative law judge found that any future disability or medical benefits to which claimant would be entitled under the Act would increase his entitlement above that for which he settled his third-party claims. Decision and Order at 87. The administrative law judge erred in including medical benefits in calculating the amount of claimant's compensation under the Act. *Harris*, 30 BRBS 5. Moreover, we remand for the administrative law judge to address claimant's assertions, which were raised but not addressed below,[9] regarding the

[9] Contrary to Signal's assertion, claimant specifically raised the issue of Signal's limited liability in his petition for reconsideration before the administrative law judge. The administrative law judge's order on reconsideration acknowledged claimant's argument that he "did not settle his third party claim for less than the amount of Carrier's liability." Order on Reconsideration at 3. Nevertheless, he did not address the specific merits of that argument, as he denied claimant's motion for reconsideration on the general basis that "claimant's position is simply that he would have made different factual findings and legal conclusions." Order on Reconsideration at 4.

relevance, if any, of carrier's alleged limited liability on compensation paid pursuant to the Act.[10] 33 U.S.C. §933(g).

Lastly, we turn to employer's contentions on cross-appeal regarding the administrative law judge's award of medical benefits. Employer argues that the administrative law judge erred in finding that claimant's need for ongoing medical treatment arises out of the first two injuries sustained on February 6, 2001, and March 2, 2001, rather than the injuries resulting from claimant's September 16, 2002, accident. Addressing claimant's entitlement to medical benefits, the administrative law judge found that although claimant's accidents of February 6, 2001, and March 2, 2001, did not result in any disability, they did require medical care. He additionally found that there was no significant change in the medical care recommended for claimant between his first, second and third head trauma injuries, as claimant's complaints remained the same throughout this time. Decision and Order at 94. Additionally, the administrative law judge found that claimant's anger management therapist referred claimant to a neurologist and neuro-psychologist on September 13, 2002. In light of these findings, the administrative law judge concluded that claimant's September 16, 2002, injury "did not break the causal connection between the necessary medical treatment related" to the two prior injuries and his current condition. Decision and Order at 94. He thus concluded that claimant's present treatment with an anger management therapist, psychiatrist, psychotherapist, and neuro-psychologist, is reasonable, appropriate, and necessary as they relate to his injuries of February 6, 2001, and March 2, 2001.

On reconsideration, the administrative law judge clarified his finding, stating that "the record did not support a finding by a preponderance of the evidence that either of the first two injuries alone would have made the medical care at issue necessary" but that "it did support a finding that the care was necessary no later than after the second accident." Order on Reconsideration at 4. To the extent that the administrative law judge's decision finds employer, as a self-insured entity, liable for medical treatment which claimant incurred prior to the time of the September 16, 2002, injury, it is affirmed.[11] The administrative law judge's finding regarding employer's liability for medical benefits subsequent to that date, however, must be vacated, as it must be resolved consistent with the responsible carrier findings.

[10] On remand, the administrative law judge may reopen the record to afford the parties an opportunity to submit additional evidence on this issue. *See generally* 20 C.F.R. §§702.338, 702.339; *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

[11] We note that medical benefits incurred prior to September 16, 2002, were paid as a result of the third-party settlement agreement. EXs 5, 7, 8.

As previously articulated in this decision, liability for claimant's disability and medical benefits from the time of his third accident on September 16, 2002, rests on a determination as to whether the claimant's condition is the result of the natural progression, or the aggravation, of a prior injury. Specifically, if, on remand, the administrative law judge determines, as he found in addressing the medical benefits issue in this case, that claimant's present condition is due to a combination of the first two injuries alone, or the natural progression of the original injury which he sustained on February 6, 2001, then employer, as a self-insured entity at the time of those incidents, is liable for claimant's ongoing need for medical treatment. If, however, the administrative law judge determines that claimant's September 16, 2002, injury aggravated, accelerated or combined with either or both of the first two injuries resulting in claimant's need for medical care, then Signal, as employer's responsible carrier at the time of that third incident, is liable for claimant's continuing medical treatment.[12] *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

[12] We note that as non-compliance with Section 33(g)(1) of the Act results in the forfeiture of both disability compensation and medical benefits in accordance with Section 33(g)(2), claimant's entitlement to continued medical benefits in this case will be barred if the administrative law judge determines, on remand, that Section 33(g)(1) applies with regard to the September 16, 2002, accident and resulting injury. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 38 BRBS 6 (2004); *Esposito*, 36 BRBS 10.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge