BRB No. 96-314

JERRY M. POOL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL AMERICAN OIL COMPANY	)	DATE ISSUED:_____
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughan (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Daniel B. Shilliday (Vinson & Elkins, L.L.P.), Houston, Texas, for employer/carrier.

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

DOLDER, Administrative Appeals Judge:

Claimant appeals the Decision and Order Denying Compensation (93-LHC-2556) of Administrative Law Judge Quentin P. McColgin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured when he fell from a crane on July 14, 1977. He was diagnosed with a shoulder sprain and, pursuant to the Act, received temporary total disability and medical benefits from July 15 through July 18, 1977, January 27 through April 4, 1978, and August 16, 1979, through January 24, 1980. Cl. Ex. 4; Tr. at 11-12. On July 13, 1978, claimant filed a third-party suit in the United States District Court for the Western District of Louisiana against Link-Belt Corporation,

FMC Corporation (FMC), and RECO Crane Company (RECO) (No. 78-0869).[1] On July 13-21, 1981, claimant's case came before a jury, and the jury, by special verdict, found in favor of claimant and awarded him $215,000 in damages, less $15,068.60.[2] Cl. Ex. 6.

On August 28, 1981, Judge Hunter issued a "JUDGMENT" which documented the jury's verdict, stating:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment

in favor of the plaintiff, Jerry M. Pool, and against the defendants, [RECO and its carrier, United States Fidelity and Guaranty Corporation (USF & G)], jointly, severally and in solido, in the full sum of [$215,000 less $15,068.60 (plus interest)].

Cl. Ex. 6. The order also specifically set forth:

Litigants are entitled to a clear statement of what is intended with reference to the finality of this judgment. We expressly refuse to grant a 54B certificate because claims for monetary relief against FMC Corporation remain to be tried.

This judgment remains subject to revision in accordance with the express provisions of Rule 54B of the Federal Rules of Civil Procedure.

Id. The court also noted that if claimant's case against FMC is dismissed, it would enter an appropriate final judgment against RECO. *Id.* at n.1.

On October 14, 1981, Judge Hunter filed an "ORDER OF DISMISSAL" indicating that the parties had settled the claims. He dismissed the case without prejudice with an option to reopen if the settlement was not consummated within 90 days. Cl. Ex. 7. On November 12, 1981, claimant and counsel for Travelers appeared before a notary to execute a "RELEASE" which provides:

NOW, THEREFORE, appearers realizing the risk of continued litigation, accept the offer, and in consideration of the payment to appearer, Jerry M. Pool, of the sum of $200,000 paid in the proportion of $160,000 for and on behalf of [RECO] and $40,000 for and on behalf of FMC Corporation, receipt of this amount acknowledged, do hereby release and discharge [RECO and FMC] from all claims, causes of action and liability in connection with the Judgment rendered on the jury's verdict.

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[1]Claimant also filed actions in Cameron Parish, Louisiana (No. 6939, *Pool v. Kemper Ins. Group, et al.*) and in Texas state court (No. 78-8014, *Pool v. Link-Belt Corp., et al.*).

[2]The jury also found in favor of intervenor Travelers Insurance Company, which sought recovery of the monies it paid to claimant in disability and medical benefits under the Act. Consequently, claimant was required to pay carrier $15,068.60 out of his award. Cl. Ex. 6.

* * *

> Appearers agree that this release includes all claims asserted in the suit; that this document constitutes a compromise of disputed claims, and that the payment is not to be construed as an admission of liability . . . .

Emp. Ex. 11.[3]

On December 1, 1981, the parties filed a "RELEASE AND SATISFACTION OF JUDGMENT" with the court. This release acknowledged receipt by claimant of $160,000 from USF&G, accepting "that amount in compromise and satisfaction of the Judgment entered on the jury's verdict," and discharged RECO and USF&G from further liability. Cl. Ex. 13. Again, Travelers' counsel did not sign the agreement. However, he did sign a "SATISFACTION OF JUDGMENT" executed the same day which acknowledged receipt of $15,242.44 paid by claimant in satisfaction of the judgment on behalf of intervenor Travelers. *Id.* at p.3. Thereafter, claimant and Travelers moved the court to dismiss the claims against the defendants, and the court did so with prejudice, as "there has been a complete satisfaction of the Judgment rendered herein August 28, 1981[.]" Cl. Ex. 14.

The only issue presented to the administrative law judge was whether Section 33(g) of the Act, 33 U.S.C. §933(g) (1988), applies to this case.[4] *See* Decision and Order at 3. Initially, the administrative law judge found that the 1984 amendments to Section 33(g) control the disposition of the case. *Id.* at 5. He also determined that the "JUDGMENT" issued by Judge Hunter was not final and that any "release" or "satisfaction" received by claimant after the October 14, 1981 dismissal was a "settlement" for purposes of Section 33(g) application. *Id.* at 7-8. Further, he held that Travelers' participation as an intervenor did not remove the case from the realm of Section 33(g), as the United States Court of Appeals for the Fifth Circuit recognizes no exceptions to the formal approval requirements of Section 33(g). Finally, the administrative law judge denied claimant's claim for disability benefits under the Act, relying on the Fifth Circuit's statement in *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), that the combined effect of Section 33(f), 33 U.S.C. §933(f), and Section 33(g) extinguishes employer's liability without having to ascertain whether a settlement is for an amount more or less than the entitlement under the Act. Decision and Order at 8-9. He found, however, that claimant's claim for medical benefits is not barred by Section 33(g)(2), 33 U.S.C. §933(g)(2) (1988), as employer received proper notice of the settlement. Nevertheless, he noted that claimant is entitled only to those medical expenses which exceed his $82,593.49 net settlement recovery. *Id.* at 10. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

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[3]This document was signed by claimant but not by Travelers' counsel, and it does not appear to have been filed with the court.

[4]The parties and the administrative law judge agreed to bifurcate the case and resolve this Section 33(g) issue before addressing any other disputed issues.

Claimant first contends the administrative law judge erred in applying the 1984 amended version of Section 33(g) to this claim. Claimant is incorrect. Although the injury occurred in 1977, and the jury verdict was rendered in 1981, this case did not come before an administrative law judge until 1993. The effective date of the 1984 Amendments was September 28, 1984. The Board has stated that the standard for retroactivity of legislation depends on whether the statute in question has "prescribed the statute's reach." *Monette v. Chevron USA, Inc.*, 29 BRBS 112, 115 (1995), *aff'g on recon. en banc*, 25 BRBS 267 (1992) (citing *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S.Ct. 1483, 1501 (1994)). The Board held that Section 33(g) as amended must be applied to a case pending on or filed after the effective date of the amendments, as Congress specifically provided for the changes to be applicable to such claims. *Monette*, 29 BRBS at 115; *see also* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §28(a), 98 Stat. 1639, 1655 (1984). As claimant's claim under the Act was pending either on September 28, 1984, or thereafter, the 1984 Amendments to Section 33(g) control the outcome of this case. *Id.*; *Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994); *see also Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276, 23 BRBS 143 (CRT) *aff'd en banc sub nom. Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) (court applied 1984 amendments in *Barger* even though third-party settlement occurred prior to 1982). Consequently, we reject claimant's argument, and we affirm the administrative law judge's determination on this matter.

Next, claimant avers that the administrative law judge erred in holding that the satisfaction of judgment is a "settlement," thereby invoking the Section 33(g)(1), 33 U.S.C. §933(g)(1) (1988), bar. Specifically, claimant contends the value of his case was set by a jury; therefore, as he obtained a judgment, his situation falls within the provisions of subsection (g)(2) and not (g)(1), and he need not have sought employer's prior written approval to accept less than the jury's award, as any deficit is to his own detriment and not employer's. To support his arguments, claimant relies on decisions rendered by the Supreme Court of the United States in *Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968), and by the United States Court of Appeals for the Fourth Circuit in *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960). Employer responds, arguing that Judge Hunter's "JUDGMENT" was not final; therefore, claimant's acceptance of less than the jury's award without employer's approval constitutes a compromise which invokes the Section 33(g) bar.

Under Section 33(g)(1), an employee must obtain his employer's written approval prior to entering into a third-party settlement for less than the amount to which he is entitled under the Act. He need only notify his employer under Section 33(g)(2) if he obtains a judgment against the third parties or if he settles the third-party claim for an amount greater than that to which he is entitled under the Act. 33 U.S.C. §933(g)(1), (2); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). We agree with employer that the administrative law judge properly found claimant's post-verdict activities resulted in a settlement within the meaning of Section 33(g), rather than a judgment, and we conclude that claimant's reliance on *Banks* and *Bell* is misplaced.

In *Banks*, 390 U.S. at 459, the widow and minor children of a longshoreman obtained a $30,000 jury verdict in their third-party claim. The judge informed the parties he would grant the

defendant's motion for a new trial unless the plaintiffs accepted a remittitur of $11,000. Without consulting the employer, the plaintiffs accepted the remittitur, and the court entered judgment for $19,000. *Banks*, 390 U.S. at 460-461. When the plaintiffs sought benefits under the Act, the employer disputed their entitlement based on their failure to get written approval prior to accepting an amount less than the judgment. The Supreme Court noted that a remittitur is not the equivalent of a mutual agreement among the parties but is "a judicial determination of recoverable damages[.]" *Id.*, 390 U.S. at 467. The Court declared that the protection supplied by Section 33(g) of the Act to an employer is not required when a fact-finder independently evaluates the situation in a third-party claim and awards damages; therefore, it reversed the denial of benefits.

In *Bell*, 284 F.2d at 777, the Fourth Circuit addressed the legal effect of the acceptance, as full payment, of less than the amount of a judgment for damages recovered by the beneficiaries of a longshoreman whose death was caused by a third-party tortfeasor. In the third-party claim, the decedent's parents were awarded $6,500, and before the appeal was heard, the plaintiffs accepted $5,000 as satisfaction of the judgment without obtaining written approval from the employer. *Bell*, 284 F.2d at 778. Although the plaintiffs agreed to credit the employer the amount of the judgment and not just the $5,000 in their claim for deficiency compensation, the deputy commissioner denied benefits. The Fourth Circuit reversed the denial of benefits, stating "there has been a judicial determination of the damages, [and] there is no possibility whatever of prejudice to the employer from the judgment creditor's subsequent consent to a diminution in payment." *Bell*, 284 F.2d at 780.

Contrary to claimant's argument, the cases cited are not dispositive of the issue at hand. In this case, claimant obtained a special jury verdict against RECO and USF&G. Judge Hunter documented the jury's verdict in his "JUDGMENT"; however, he specifically refused to grant "54B certification" because the claim against FMC was still pending.[5] *See American Interinsurance Exchange v. Occidental Fire & Casualty Co. of N.C.*, 835 F.2d 157 (7th Cir. 1987) (judgment which fails to terminate case as to all parties and issues is not subject to appeal); *Farmer v. Powers*, 204 F.2d 509 (5th Cir. 1953) (judgment which did not apply to all tortfeasors lacked finality). Contrary to claimant's arguments, Judge Hunter's "JUDGMENT" was not, nor did he consider it, a final judgment. The administrative law judge noted, and the words of the document clearly elucidate, Judge Hunter's intent to enter an interlocutory judgment, subject to revision. Decision and Order at 7 n.3. This significant fact distinguishes claimant's case from the order of remittitur in *Banks* and the final judgment in *Bell*, both of which were non-negotiable. Because claimant's judgment was not final, his post-verdict negotiations with the third-party defendants compromised both his and

[5]Fed. R. Civ. P. 54(b) permits a judge to enter a partial final judgment against one or more, but fewer than all, of the parties in a multiple party claim, providing "there is no just reason for delay" and there is an "express direction for the entry of judgment." The Fifth Circuit, which has appellate jurisdiction over the case at bar, has held that a judge need not mechanically recite the words of the Rule to satisfy the requirements of the Rule -- an unmistakable intent to enter a partial final judgment is sufficient. *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218 (5th Cir. 1990).

employer's rights in the third-party claim.[6]

Rather, the facts before us are similar to the situation in *Broussard v. Houma Land & Offshore*, 30 BRBS 53 (1996). In that case, the Board held that a Rule 68 Offer of Judgment[7] is "tantamount to a formal settlement agreement" and is "a `compromise' for purposes of Section 33(g)(1)." *Broussard*, 30 BRBS at 58. In *Broussard*, the claimant filed a claim under the Act and a third-party suit in a district court in Louisiana. Prior to trial, he accepted the defendants' $20,000 offer of judgment in the tort suit, and the district court rendered judgment in the case. The administrative law judge granted the employer's motion for summary judgment, finding that the claimant failed to obtain the employer's prior written approval of the third-party settlement which was stipulated to be less than the amount to which he was entitled under the Act. *Broussard*, 30 BRBS at 54. On appeal, the claimant argued that the Rule 68 Offer of Judgment was a judgment under Section 33(g)(2) and not a compromise under Section 33(g)(1). The Board rejected this argument, finding that mutual assent was required for the offer and acceptance and that the Rule 68 sanctions are not the equivalent of a penalty which forces the claimant to accept the offer. *Id.* at 57-58. As the claimant did not obtain prior written approval, the Board affirmed the administrative law judge's denial of benefits based on the applicability of the Section 33(g)(1) bar. *Id.* at 58; *see also Morauer & Hartzell, Inc. v. Woodworth*, 439 F.2d 550 (D.C. Cir. 1970), *appeal dismissed*, 404 U.S. 16 (1971) (consent judgment was based on pre-trial negotiations with the aid of the district court judge).

It is the substance of the parties' actions rather than the title of the document ending the litigation that controls the applicability of Section 33(g)(1). Here, the administrative law judge properly found that the jury's verdict in the instant case, while documented by Judge Hunter in a "JUDGMENT," does not signify that a "judgment" within the meaning of Section 33(g)(2) occurred. Because the "judgment" herein was not final, and because claimant thereafter negotiated an agreement with the third parties, we affirm the administrative law judge's determination that the

[6]Claimant concedes employer would be entitled to offset the full amount of the judgment, as was the case in *Bell* and asserts that this fact will fully protect employer's right to receive the full judicially determined amount. As the administrative law judge found, however, in this case the jury verdict was against one defendant, RECO, and the case against FMC remained pending until settled. Claimant argues that FMC was jointly and severally liable with RECO and that the administrative law judge erred in finding that the FMC claim was separate; claimant asserts the verdict thus represented the total value of the case. Employer contends there is no way to prove whether FMC would have been held liable for separate and additional damages or whether it would have been held jointly and severally liable. Therefore, employer argues that it was prejudiced by claimant's failure to obtain prior written approval. The administrative law judge's decision on this argument is supported by the evidence, specifically the "JUDGMENT" entered in court.

[7]Rule 68 of the Fed. R. Civ. P. permits a defendant, until 10 days before trial, to offer to allow a judgment to be taken against it. If the plaintiff rejects the offer, but does not receive a more favorable judgment after trial, the plaintiff must pay the costs incurred after the offer was made.

"satisfaction of judgment" in this case is actually a "compromise" or "settlement" within the meaning of Section 33(g).

Claimant next contends that if a settlement occurred, then carrier's participation in the case as intervenor brought the case outside the realm of Section 33(g)(1). Alternatively, claimant argues that carrier's participation satisfied the requirements of Section 33(g)(1). Employer responds, arguing that the Fifth Circuit recognizes no exceptions to the formal approval requirements of Section 33(g); thus, carrier's participation in the suit as intervenor did not negate claimant's duty to seek approval of the settlement.

Prior to the Supreme Court's decision in *Cowart*, the Fifth Circuit stated in its decision in that case that there are no exceptions to the prior approval requirement of Section 33(g)(1). *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991) (*en banc*), *aff'd on other grounds*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992). In reliance on the Fifth Circuit's statements in *Cowart*, the Board held that participation by an employer or carrier in the third-party settlement negotiations does not nullify the claimant's Section 33(g)(1) responsibility of requesting and obtaining the employer's prior written approval of the settlement. *Monette*, 25 BRBS at 272; *Lewis v. Chevron USA, Inc.*, 25 BRBS 10 (1991). The administrative law judge followed this precedent in deciding this case. The Supreme Court, however, specifically declined to address the issue of the effect of employer participation in the settlement process as it was not included in the question on which *certiorari* was granted, *see Cowart*, 505 U.S. at 483, 26 BRBS at 53 (CRT), and the Board subsequently held, in a case arising in the Fifth Circuit, that an employer's participation in third-party proceedings was sufficient to preclude the applicability of the Section 33(g)(1) bar. *See Deville v. Oilfield Industries*, 26 BRBS 123 (1992), discussed *infra*.

In *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *aff'g and rev'g* 24 BRBS 11 (1990)(Brown, J., dissenting on other grounds), *cert. denied*, 507 U.S. 984 (1993), the employer initiated its own third-party suit and thus was a co-plaintiff with claimant. It participated in the settlement negotiations and recovered directly from the defendants, but refused to give claimant written approval of his settlement with the third party. The Fourth Circuit, affirming the Board on this issue, held that Section 33(g) is not applicable where employer also reaches a settlement with the third-party. If employer participates in the settlement process and assents to its terms, it has assured, by its own actions, the protection of its offset rights. *Id.*, 954 F.2d at 243, 25 BRBS at 106 (CRT). In *Deville*, 26 BRBS at 123, the Board, citing *Sellman*, held that Section 33(g) is inapplicable because the employer intervened in the third-party suit on the side of the claimant, appeared at the hearing, and contributed to the settlement agreement which provided for its offset. Further, the Board held that even if Section 33(g)(1) did apply, the employer gave written approval prior to the execution of the settlement by being an actual signatory to the agreement. *Id.* at 131-132; *see also Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994).

We hold that *Sellman* and *Deville* are distinguishable from the instant case, and that

employer's participation in the third-party claim is insufficient to render Section 33(g)(1) inapplicable or to constitute constructive approval of the settlement. Employer, through its carrier, intervened in the third-party case and participated, to some degree, in the settlement process. Although the record indicates the presence of carrier's counsel at the executions of the two "satisfactions of judgment," he did not sign either document. In fact, counsel for carrier took steps to distance himself from the settlement negotiations, specifically refusing to agree to any settlement, and to establish that his only motivation for being present was to protect carrier's lien against claimant's award. *See* Emp. Exs. 2, 3; *see generally Peters v. North River Insurance Co.*, 764 F.2d 306, 17 BRBS 114 (CRT)(5th Cir. 1985). As carrier did not appear on the side of the claimant, did not sign the actual settlement and in fact specifically declined to do so, we affirm the administrative law judge's finding that employer's participation in the settlement process in this case, via carrier's actions, is insufficient to preclude application of Section 33(g)(1).

Because we conclude that the administrative law judge properly found employer's participation in the settlement process was not sufficient to render Section 33(g) inapplicable, we must address the effect of the application of that section to this case, *i.e.*, whether claimant settled his claim for less than he is entitled to receive under the Act and whether prior written approval was necessary under Section 33(g)(1). The Board addressed this issue in *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring), and *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting). The Board held that before it can be determined whether a claim is barred by Section 33(g)(1), a comparison must be made between the gross amount of a claimant's aggregate third-party settlement recoveries and the amount of compensation, exclusive of medical benefits, to which he would be entitled under the Act. *Gladney*, 30 BRBS at 27; *Harris*, 30 BRBS at 11, 16; *see also Cowart*, 505 U.S. at 469, 26 BRBS at 49 (CRT); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995); *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994). The Board also determined that Section 33(f) does not necessarily extinguish an employer's total liability for benefits in every case, but rather provides the employer with a credit in the amount of the claimant's net third-party recovery against its liability for compensation and medical benefits. *Harris*, 28 BRBS at 269; *see also Bundens*, 46 F.3d at 292, 29 BRBS at 52 (CRT). Thus, the Board determined that *Villanueva*, 868 F.2d at 684, in which the court stated that on the facts of that case it was not necessary to compare claimant's entitlement under the Act with his third-party recovery because claimant's entitlement to benefits was either barred by Section 33(g) or offset under Section 33(f), does not stand for the proposition that such a comparison should never be made.[8] *Gladney*, 30 BRBS at 27-28.

[8]It is noted that *Villanueva* was not discussed in either the Fifth Circuit's panel or *en banc* decisions in *Cowart*. In fact the *en banc* decision references the necessary comparison between the amount of the settlement and the compensation entitlement, as it states "Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller that his LHWCA compensation entitlement." *Cowart*, 927 F.2d at 832, 24 BRBS 96 (CRT).

At the conclusion of his recitation of the facts, the administrative law judge stated: "Claimant netted a payment of $82,593.49, which was in *excess* of his entitlement under the Act at that time." Decision and Order at 5 (emphasis added). Later, in relying on and applying *Villanueva*, the administrative law judge stated: "there is no way to determine what future compensation amounts Claimant might be entitled to under the Act for this claim. . . ." Decision and Order at 8. Consequently, and on the facts of this case, the administrative law judge's reliance on *Villanueva* to avoid the amount comparison required by *Cowart* is improper. *Gladney*, 30 BRBS at 27-28. Additionally, the administrative law judge is incorrect in stating it is impossible to calculate claimant's future benefits. Pursuant to *Linton*, an administrative law judge "may use any reasonable method to calculate" a claimant's lifetime compensation under the Act. *Linton*, 28 BRBS at 287-288; *see also Glenn v. Todd Pacific Shipyards Corp.*, 26 BRBS 186, *aff'd on recon.*, 27 BRBS 112 (1993) (Smith, J., concurring). Because the administrative law judge did not calculate the amount of benefits to which claimant would be entitled or make the necessary comparison with claimant's settlement recovery, we vacate the decision and remand the case for further consideration and for a proper amount comparison. Only after the comparison has been

made can the administrative law judge ascertain whether the Section 33(g) bar should be invoked.[9] *See Gladney*, 30 BRBS at 28.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion. The decision is affirmed with respect to the finding that a settlement rather than a judgment occurred, that the 1984 Amendments apply to this case and that employer's participation does not render the Section 33(g) bar inapplicable.

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' conclusions that the 1984 amendments to the Act apply to this case and that claimant entered into a settlement with the third-party defendants. I also agree with Judge Dolder that, at a minimum, the case must be remanded for a comparison between the gross amount of claimant's settlement and his lifetime compensation entitlement. This result is compelled by the Supreme Court's decision in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), and the Board's *en banc* decision on reconsideration in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring and dissenting), which is controlling precedent for this Board.

[9]I must respectfully disagree with the emphasis placed by Judge Brown on the "controlling nature of *Cowart* and *Villanueva*" to the determination as to present and future medical benefits. It is noted that no party has challenged on appeal the administrative law judge's award of medical benefits and therefore the issue is not properly before the Board. Thus, contrary to my dissenting colleague's statement, this opinion does not take the position that *Cowart* does not bar future medical benefits. Moreover, I disagree with his analysis that a different result is dictated by the fact that the Supreme Court denied *certiorari* in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). It is well established that the denial of *certiorari* "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court" and "such denial carries with it no implication whatever regarding the Court's views on the merits of case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919 (1950)(opinion of Justice Frankfurter respecting the denial of the petition for writ of *certiorari*); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940 (opinion of Justice Stevens respecting the denial of the petition for writ of *certiorari*).

However, I disagree with that part of the opinion regarding carrier's participation in the settlement process. I believe carrier's participation in the settlement process was sufficient to constitute a constructive approval of the settlement, thereby rendering the Section 33(g) bar inapplicable. In a similar case which arose in the Fourth Circuit, the court held that when an employer directly participates in the third-party settlement process and then withholds its approval of the settlement terms, the Section 33(g) bar is inapplicable. *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *cert. denied*, 507 U.S. 984 (1993). The Fourth Circuit reasoned: "the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly ensured, by its own action, the protection of its offset rights." *Sellman*, 954 F.2d at 242, 25 BRBS at 106 (CRT).

Initially, the administrative law judge erred in summarily rejecting claimant's *Sellman* argument based on the "no exceptions" language in the Fifth Circuit's *Cowart* opinion. The Fourth Circuit's opinion in *Sellman* issued thereafter, and a *Sellman* argument was not raised before the Fifth Circuit. Most importantly, the Supreme Court stated, when claimant attempted to raise *Sellman* in the proceedings at that level, that without expressing any opinion on the merits of the argument, the court would not address it as it was not properly raised. *Cowart*, 505 U.S. at 483, 26 BRBS at 53 (CRT).

The Board recognized that this argument remained viable when it followed the Fourth Circuit's decision in *Sellman* in a post-*Cowart* case which arose in the Fifth Circuit. In *Deville v. Oilfield Industries*, 26 BRBS 123 (1992), the Board held that Section 33(g) is inapplicable because the employer intervened in the third-party suit and contributed to the settlement agreement. Further, the Board held that even if Section 33(g)(1) did apply, the employer gave written approval prior to the execution of the settlement by being an actual signatory to the agreement. *Id.* at 131-132. Thus, the approval requirement was satisfied. In either event, the Board held that benefits were not barred by Section 33(g)(1). *Id.* at 132.

In an earlier Fifth Circuit case, an employer intervened in a claimant's third-party suit, participated in the settlement negotiations, and waived part of its lien. Nevertheless, it maintained its blanket policy of withholding written approval of third-party settlement. *Pinell v. Patterson Service*, 22 BRBS 61 (1989), *aff'd on other grounds mem.*, 20 F.3d 465 (5th Cir. 1994). The Board concluded that the employer provided constructive approval of the claimant's third-party settlement agreement by its actions, and it held that Section 33(g) did not bar the claimant's recovery of benefits under the Act, as the employer's interests, *see Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), are protected.[10] *Pinell*, 22 BRBS at 65.

[10]*Collier* identifies two employer interests: 1) a right to directly recover compensation liability from the tortfeasor; and 2) a right to the statutory setoff against compensation liability for any amount received from the tortfeasor. *See Pinell*, 22 BRBS at 65.

Although my colleagues believe employer, through carrier's actions in the third-party claim related to this case, cannot be considered to have given constructive approval of the settlement, I consider employer's participation sufficient to justify the conclusion that it constructively approved the settlement. Counsel for carrier intervened in the third-party suit and was present throughout the negotiations, appearing with claimant before a notary to execute a release. Counsel declined to sign the documents executed by claimant, but did sign a "Satisfaction of Judgment" acknowledging full satisfaction of the judgment rendered in the case. EX 13. Travelers also joined claimant in moving for dismissal of the third- party case with prejudice, and counsel signed this document. EX 14. Employer should not now be permitted to reap the benefits of the Section 33(g) bar, having known fully the terms of the settlement and been represented at the executions thereof and having secured protection of its lien. Therefore, I would hold that Section 33(g) does not bar claimant's benefits in light of employer's constructive approval of the settlement terms. *Sellman*, 954 F.2d at 242-243, 25 BRBS at 106 (CRT); *Deville*, 26 BRBS at 131-132. Consequently, I would vacate the administrative law judge's finding on this issue and remand the case for consideration and application of Section 33(f), 33 U.S.C. §933(f). *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995); *Harris*, 30 BRBS at 5.

As I noted, initially, however, at the very least, the case must be remanded for a comparison between the gross amount of claimant's aggregate third-party settlement recovery and the compensation to which claimant would been entitled under the Act during the course of his life before the claim case can be held barred by Section 33(g), as is required by *Cowart* and the *en banc* decision of the Board in *Harris*, 30 BRBS at 11, 16. *See also Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring).

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ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

For the reasons stated in the main opinion, I concur with my colleagues' conclusions that the 1984 amendments to the Act apply to this case and that the third-party cases brought by claimant against the various third-party defendants were disposed of by settlement, rather than a judgment, for the purposes of Section 33(g)(1). The details of the suits, the results, the entries of "judgments," the execution of the various documents and the final dispositions are set forth in the main opinion. In a nutshell, claimant filed a suit in the United States District Court for the Western District of Louisiana against Link-Belt Corporation, FMC Corporation and RECO Crane Company and their insurance companies. The jury found in favor of claimant and against RECO Crane and its carrier for $215,000, less the sum of $15,068.60 to be paid to Travelers Insurance Company as the workers' compensation intervenor. A special judgment was entered by the court, noting that it was subject to

revision in accordance with the provisions of Rule 54B of the Federal Rules of Civil Procedure. Cl. Ex. 6. As noted above, the judgment was solely against RECO Crane and its carrier. Apparently there was a mistrial as to the other defendants. Er. brief at 2. The court explained in footnote 1 of its "Judgment" that if the case against FMC is dismissed a final order would be entered against RECO. Otherwise the case against FMC would proceed to trial on December 7, 1981, on the issues of liability and quantum.

Subsequently, the court ordered a dismissal of the third-party action, having been advised by counsel for the parties that the action "had been settled." A document called a release was executed indicating that a consideration of $200,000 was paid to claimant, of which $160,000 was from RECO Crane and $40,000 from FMC. It thus appears that the $215,000 verdict against RECO Crane, upon which judgment was entered, was settled for $160,000. It further appears that the pending case against FMC, which was listed to go to trial, was settled for $40,000. It thus is obvious that the actions against RECO Crane and FMC were disposed of by settlements for the purpose of Section 33(g)(1).

I further concur in Judge Dolder's position and holding that the participation of this workers' compensation carrier as an intervenor in the third-party suit did not negate claimant's duty under Section 33(g)(1) to obtain approval of the settlement. I cannot agree with Judge Smith's position that the carrier's participation in the settlement process was sufficient to constitute constructive approval thereby rendering the Section 33(g)(1) bar inapplicable. He relies heavily upon the cases of *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101 (CRT) (4th Cir.), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT) (1992), *aff'g and rev'g* 24 BRBS 11 (1990)(Brown, J., dissenting on other grounds), *cert. denied*, 507 U.S. 984 (1993), and *Deville v. Oilfield Industries*, 26 BRBS 123 (1992). Both cases, however, are distinguishable.

In *Sellman*, both the employee and the employer initiated a third-party suit. Both were named plaintiffs, both participated in all phases of the litigation, participated in the settlement negotiations and entered into settlements that were so interrelated that they could be considered a joint settlement. In fact, the employer's settlement agreement with the third-party stipulated that it was contingent upon the approval of the companion employee's settlement by the Circuit Court of Baltimore. This agreement was signed by employer's attorney, third-party's attorney, employee's attorney and employee's wife and representative. The record contained a statement by employer's workers compensation claims manager that, "we were consenting to the settlement, but we would be entitled to an offset . . . ." 24 BRBS at 22. The Court of Appeals held that employer's conduct in the case rendered Section 33(g) inapplicable.

The *Deville* case is also distinguishable. In that case the Board, citing *Sellman*, held that Section 33(g) is inapplicable because employer intervened in the third-party suit on the side of claimant, appeared at the hearing and contributed to the settlement agreement which provided for its offset. The Board further held that even if Section 33(g)(1) applied, the employer gave written approval prior to the execution. It was an actual signatory to the agreement stating "[Employer] by signing this release specifically approves of this settlement and it is understood that plaintiff does not

waive any future rights to Longshoreman Compensation to which he may be entitled." 26 BRBS at 132.

I concur with Judge Dolder that the *Sellman* and *Deville* cases are distinguishable and that the extent of participation by employer's carrier in this case is insufficient to preclude application of Section 33(g)(1). Carrier's counsel was present at the execution of two "satisfaction of judgments" but did not sign the documents. He specifically refused to agree to any settlement. It is clear that his only interest in being present was to protect the carrier's lien.

We now come to the phase of the case with which I must respectfully dissent. The administrative law judge, in summary, held that the third-party case had been settled and that approval by the employer was not obtained. Although he held that it was impossible to discern whether the third-party settlement was for more or less than the compensation to which claimant was entitled, he relied on *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), which held that the employer would have no liability for further compensation. *Villaneuva* held that if the settlement was greater than the amount of compensation benefits due, Section 33(f) extinguishes employer's further liability, and if it was less, Section 33(g) precludes additional benefits. Although, the administrative law judge relied on *Villaneuva*, he opined that it did not cut off further medical benefits and that employer would have a continuing liability for further medical treatment and costs that would exceed claimant's net third-party recovery. Judge Dolder would remand this case for a determination of whether the net third-party recovery was greater or less that the potential compensation liability. Judge Smith, holding that employer constructively approved the settlement, would reverse the administrative law judge's determination that further compensation is barred. He would remand the case for the application of Section 33(f). I would affirm the administrative law judge's finding that further compensation is barred, and, relying on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT) (1992), and *Villaneuva*, I would reverse his holding that further medical benefits are not barred.

This case is controlled by *Cowart* and *Villaneuva*. The ultimate result of *Cowart* is that if a person is subject to the written-approval requirements of Section 33(g)(1), and settles a third-party suit for less than the compensation to which he would be entitled, he forfeits all longshore *benefits*. *Cowart*, 505 U.S. at 475, 26 BRBS at 51 (CRT). As stated in the first paragraph of the *Cowart* opinion, under certain circumstances "all future benefits including medical benefits are forfeited." *Id.*, 505 U.S. at 471, 26 BRBS at 50 (CRT). Towards the end of the opinion, discussing Section 33(g)(2), the Court noted that written approval is not required in two circumstances: (1) where the employee obtains a judgment and (2) where the employee settles for an amount greater or equal to employer's *total liability*. The logical deduction, therefore, is that in the remaining circumstances, (3) where the settlement is for an amount less than employer's total liability, written approval is required. This brings us back to the significance of *Cowart's* opening statement on this subject. Under the "less than" settlement "all future benefits including medical benefits are forfeited."

The majority's position is that *Cowart* does not bar future medical benefits. However, this was clearly in the holding of the Supreme Court which used such terms as employer's "total

liability," forfeiture of all longshore "benefits" and under certain circumstances, "all future benefits including medical benefits are forfeited." It should be borne in mind that the Section 33(a) suits against third-parties are for "damages." Cases have held that the "damages" include compensation, funeral benefits, punitive damages and pain and suffering.[11] Damages in a third-party personal injury case would also include medical costs, present and future.[12] It thus would appear that the third-party settlements in these cases also encompassed the medical benefits and that if claimants were allowed to proceed against employers for any future medical benefits, this would amount to a double recovery. As was stated in *Force v. Director, OWCP*, 938 F.2d 981, 984, 25 BRBS 13, 18 (CRT) (9th Cir. 1991), "[t]he only relevant question is whether the claimant is impermissibly recovering twice for the same injury, regardless of when such payments occur." Nobody has raised this issue but it really is not necessary in view of the *Cowart* Court's pronouncement on forfeiture of all benefits.

Applying *Cowart* and *Villaneuva* together I would hold that all future compensation and medical benefits are barred. *Villaneuva*, of course is an opinion of the Court of Appeals for the Fifth Circuit, which has jurisdiction over this case. It held that if the settlement was greater than the amount of compensation benefits due, Section 33(f) extinguishes employer's liability, and if it was less, Section 33(g) precludes seeking additional benefits. Based on *Cowart* this would bar future compensation and further medical benefits.

It is noteworthy that we have a similar situation in the Ninth Circuit. There, the court, applying *Cowart*, in its decision in *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT) (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), held that if a tort settlement was less than the statutory entitlement under the Longshore Act, employer is obligated to pay benefits only if it gave prior approval to the settlement under Section 33(g) and if the recovery exceeded the statutory entitlement, further benefits are precluded under Section 33(f). The court stated that the two provisions act as a complete bar to recovery from employer. Of great significance in the handling of this case and its *Cowart-Villaneuva* issue is the fact that the Supreme Court denied *certiorari* in *Cretan*.

Accordingly, I would affirm the summary judgment entered by the administrative law judge holding that claimant is precluded from seeking further compensation but I would reverse his holding that claimant may seek further medical benefits. I would hold that claimant is completely barred from seeking any further benefits under the Longshore Act. I am not inclined to challenge

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[11]*See generally Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991); *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986); 33 U.S.C. §902(12).

[12]The fact that the term "damages" in a third-party suit includes all medical benefits, past and future, is clear from a reading of Sections 33(a), (b) and (e) of the Act. That includes the situation where the third-party action is assigned to employer. Subsection (e) designates the amount of the recovery to be retained by employer, specifying expenses, the cost of benefits under Section 7 (*i.e.*, the medical benefits), compensation paid, present value of future compensation and the present value of all future medical benefits under Section 7 to be estimated by the Director.

the Supreme Court's rulings in *Cowart* and *Cretan*, or the holding of the Court of Appeals for the Fifth Circuit in *Villaneuva.*

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JAMES F. BROWN
Administrative Appeals Judge