



Issue Date: 31 May 2012

CASE NO.: 2011-LDA-00684
OWCP NO.: 02-190934

In the Matter of:

CHAD A. KETCHUM,
Claimant,

v.

AAR BROWN INTERNATIONAL,
Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,
Carrier,

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-interest.

ORDER GRANTING EMPLOYER'S MOTION FOR SUMMARY DECISION

This matter arises under the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* On December 19, 2011, Employer/Carrier filed a Motion for Final Summary Decision in this matter. Employer simultaneously filed Employer/Carrier's Notice of Filing Affidavit, along with an Affidavit of Scott Mullin, Subrogation Adjuster for Carrier. On January 10, 2012, Claimant filed his Response to Employer/Carrier's Motion for Final Summary Decision. Attached to the Response as Exhibit A is Claimant's Motion to Invalidate Lien, which is incorporated by reference into Claimant's Response.¹ Thereafter, on February 7, 2012, Employer filed

¹ As all the substantive arguments underlying Claimant's Response are contained in Claimant's Motion to Invalidate Lien, citations to "Claimant's Response," unless otherwise indicated, will reference Claimant's Motion to Invalidate Lien. As Employer points out, while Claimant's Response to Employer/Carrier's Motion for Final Summary Decision states that the attached copy of Claimant's Motion to Invalidate Lien represents "[a] true and correct copy" of Claimant's Motion To Invalidate Lien filed in the U.S. District Court for the Middle District of Florida, the

Employer/Carrier's Reply to Claimant's Response to Employer/Carrier's Motion for Final Summary Decision² and Response to Employee/Claimant's Request for Stay. The substance of these pleadings is addressed below.

Relevant Background

The parties' submissions reflect the following background facts. On July 20, 2009, Claimant sustained the injuries underlying his current claim in the course and scope of his employment with AAR Brown International Corporation ("Employer" or "Brown") as a Mine Resistant Ambush Protected Vehicle ("MRAP") instructor in Afghanistan. Emp. Mot. at 2. Claimant's injuries arose as a result of his being assaulted by Marvin Williams, an employee of BAE Systems. *Id.* Williams slammed a truck door on Claimant repeatedly, which caused injuries to his left shoulder, right wrist, right knee and right hand middle finger. *Id.* Claimant was also treated for Post-Traumatic Stress Disorder ("PTSD"). *Id.* Claimant never returned to work after the injury. Brown/Zurich accepted Claimant's physical and psychological injuries as compensable and provided medical and compensation benefits to Claimant under the Defense Base Act. *Id.* at 2-3. The medical benefits included a right hand surgery on 10/6/09 and treatment for PTSD. *Id.* Compensation benefits were paid to Claimant at the maximum compensation rate of \$1,200.62 for the date of the injury.

On October 6, 2010, Claimant, through his counsel, Jonathan T. Gilbert ("third-party counsel"), filed a lawsuit against BAE Systems and its employee Williams, alleging negligent hiring/supervision by BAE Systems, civil battery by Williams, false imprisonment by BAE Systems and Williams, and intentional infliction of emotional distress by BAE Systems and Williams. Emp. Mot., Exh. A. On June 8, 2011, BAE Systems filed a third-party complaint against Brown, bringing Brown into the tort case as a third-party defendant.³ Cl. Resp., Exh. A at ¶ 5.

In June 2011, Mr. Gilbert contacted Scott Mullin, Subrogation Adjuster for Carrier, requesting information on whether there was any lien. Cl. Resp. at 2. According to Claimant, "[o]n July 13, 2011, the parties [to the tort suit] reached a settlement in principle for the tort case. The parties explicitly agreed that the workers' compensation case was not to be affected by the settlement." Cl. Resp., Exh. A at ¶ 7. The Release and Settlement Agreement reflects that it pertains to Claimant's tort action against BAE Systems and Williams; it was executed by Claimant, Claimant's third-party attorney, BAE Systems' representative, and Marvin Williams, with the earliest signature dated 7/29/11 and the last signature dated 8/3/11. Emp. Resp., Exh. B. The agreement contains a "Waiver And Release Of All Claims" provision, whereby Claimant agreed to fully and completely release BAE Systems, Brown, and Williams from any and all claims and liability.⁴ The agreement also contains a "Covenant Not To Sue" pertaining to those

motion filed in the district court is substantially different though similar in substance. Emp. Rep., Exh. C. Both versions of the motion contain a signature block for Jonathan T. Gilbert, Esq.

² Evidently in error, this pleading is captioned "Response to Employee/Claimant Brad A. Ketchum's Motion for Summary Final Decision."

³ BAE's sued Brown for indemnity and for negligence. *Ketchum v. BAE Systems Land & Armaments, L.P., et al.*, 2012 WL 206976 (M.D. Fla. 2012)(Emp. Rep., Exh. B).

⁴ The pertinent provision states:

same parties. As consideration for the settlement, BAE Systems agreed to pay Claimant the gross sum of \$155,000.00 “for his claims of alleged pain and suffering.” *Id.*

On July 15, 2011, Mr. Mullin sent a letter to Mr. Gilbert, setting forth Carrier’s total lien amount of \$144,718.06, consisting of \$21,397.23 for medical benefits and \$123,320.83 for indemnity benefits paid to Claimant as of the date of the letter, and asking Claimant’s counsel to provide Carrier with the current status of the third-party claim. Mullin Aff., Exh. A. On or about August 8, 2011, Claimant and BAE Systems executed a Stipulation for Order of Dismissal with Prejudice pertaining to the tort action; and Claimant’s claim in the tort action was thereafter dismissed with prejudice. Cl. Resp. at 3; *see also Ketchum v. BAE Systems Land & Armaments, L.P., et al.*, 2012 WL 206976 (M.D. Fla. 2012)(Emp. Rep., Exh. B). By letter faxed to Mr. Mullin on August 9, 2011, Claimant’s third-party attorney responded to Carrier’s request for information, stating that the lawsuit had been resolved and settled, and attaching a copy of the Release and Settlement Agreement. In his letter, Mr. Gilbert stated that “[a]s you can see, settlement in the civil court claim is representative of Plaintiff’s pain and suffering only; therefore, we are requesting that you please waive your workers’ compensation lien.” Mullin Affidavit, Exh. A. Thereafter, on or around August 15, 2011, Employer/Carrier filed a notice of controversion, citing Section 33(g) of the LHWCA. Emp. Mot., Exh. E. After the tort action, including BAE Systems’ third-party claim against Employer,⁵ was closed by the district court, Claimant filed with the court a motion seeking to re-open the action in order to resolve Employer’s entitlement to a Section 33(f) lien against tort settlement proceeds. Thereafter, by order of January 24, 2012, the district court denied Claimant’s motion to re-open the case, as well as Brown’s motion to enforce the lien, on the ground that good cause had not been shown for re-opening the underlying action. Emp. Rep., Exh. B.

Parties’ Arguments

In their Motion for Final Summary Decision, Employer and Carrier assert that they properly terminated the payment of all benefits to Claimant pursuant to the subrogation

“[i]n exchange for the consideration described in Paragraph 8, KETCHUM fully and completely waives, releases, and forever discharges BAE SYSTEMS, BROWN and WILLIAMS, and their predecessors, successors, all former, current and future related companies, divisions, subsidiaries, affiliates and parents, and collectively, their respective former, current and future directors, officers, employees, agents, representatives, attorneys, fiduciaries, assigns, heirs, executors, administrators, beneficiaries, trustees, and all others (collectively the “BAE SYSTEMS RELEASED PARTIES”) from any and all claims, charges, complaints, allegations, actions, causes of action, lawsuits, grievances, controversies, disputes, demands, agreements, proceedings, contracts, covenants, promises liabilities, judgments, obligations, debts, damages (including, but not limited to, actual, compensatory, punitive, and liquidated damages), attorneys’ fees, costs and/or any other liabilities of any kind, nature, description, or character whatsoever (collectively “Claims”) that KETCHUM may have against any or all of the BAE SYSTEMS RELEASED PARTIES whatsoever up to and including the effective date of this Agreement, whether known or unknown, suspected or concealed, and whether presently asserted or otherwise”

Mullin Aff., Exh. B.

⁵ BAE’s indemnity claim against Brown was ultimately dismissed as baseless, and in November, 2011, BAE and Brown settled the negligence claim. *Ketchum v. BAE Systems Land & Armaments, L.P., et al.*, 2012 WL 206976 (M.D. Fla. 2012) in Emp. Rep., Exh. B.

provisions set forth in Section 33(g) of the LHWCA, as Claimant settled his third-party lawsuit against BAE Systems and Williams without approval of Employer/Carrier. Employer asserts that “[p]ursuant to Section 933(e), the Employer/Carrier is entitled to obtain a dollar-for-dollar recovery against the Claimant of any monies received by him as consideration for settlement, for all medical and compensation benefits paid to date or which he would have been entitled to in the future, less legal expenses. Further, pursuant to Section 933(g), the Employer/Carrier is not required to pay any future medical or compensation benefits.” Emp. Mot. at 7. Employer asserts that Claimant’s “net recovery from the third party lawsuit was far below Zurich’s lien amount. The gross settlement amount would have been exceeded in four weeks beyond the date of the third party settlement of August 3, 2011.” *Id.* at 9. Based on the foregoing, Employer/Carrier request the issuance of “an order declaring that the Employer/Carrier is entitled to terminate the payment of future medical and indemnity benefits as a matter of law.” *Id.* at 9.

Claimant responded to Employer/Carrier’s motion by and through his workers’ compensation counsel, Mr. Taylor. In his Response, Claimant asserted that “[t]he basis of the Motion of the Employer/Carrier is the validity of the underlying third party settlement and lien involving the Claimant and such third party and Employer/Carrier;” and that, accordingly, Employer’s motion for summary decision was premature pending the resolution by the district court of Claimant’s motion to invalidate lien. Cl. Resp. at 1. As noted above, Claimant’s Response incorporates his “Motion to Invalidate Lien,” in which Claimant disputes Employer/Carrier’s asserted entitlement to both a Section 33(f) lien and discontinuation of benefits under Section 33(g). Cl. Resp., Exh. A at 7. While Claimant’s arguments primarily target Employer’s asserted entitlement to a Section 33(f) lien,⁶ Claimant also challenges Employer/Carrier’s right to cease payment of benefits pursuant to Section 33(g). Thus, Claimant argues that there are several “exceptions” to the application of both provisions, which he asserts are applicable under the facts of this case. *Id.* In that regard, Claimant first asserts that the “principles of equitable estoppel” should preclude the application of both Sections 33(f) and 33(g) in this case because “Brown and Zurich cannot remain silent about their lien in the face of explicit knowledge of a third-party suit and then come forward after settlement to their benefit and to the direct detriment of the employee by cutting off all future benefits and taking the employee’s entire net settlement.” *Id.* at 8. Second, citing case precedent interpreting Sections 33(f) and (g), Claimant asserts that although he did not obtain a written approval for the third-party settlement from either Employer or Carrier, Employer/Carrier have constructively consented to the settlement and thus waived Section 33(g)(1) defense.

In its Reply to Claimant’s Response, Employer/Carrier assert that Claimant’s request for a stay set forth in his Response is now moot, as the district court has denied Claimant’s motion to reopen the case and to invalidate Employer/Carrier’s lien by order of January 24, 2010. Emp. Rep., Exh. B. Employer/Carrier maintain that, in any event, “[t]he issue before the Department of Labor is enforcement of the Employer/Carrier’s right to terminate future medical and indemnity benefits pursuant to LHWCA §33(g) and 20 CFR §702.281,” while “[t]he relief which

⁶ E.g., Claimant argued that “Brown’s recovery [under Section 33(f)] is limited to taking credit for the net amount of the recovery” (*id.* at 7); that “principles of estoppel support invalidation of Zurich’s lien” in that “Brown and Zurich have waived their lien where they did not provide notice of the lien in the [tort] suit despite having knowledge of the suit” (*id.* at 8); and that “[s]tatute of limitations ran out” (*id.* at 14). The application of Section 33(f) is outside the scope of this proceeding.

had been sought in District Court by the Employer/Carrier is to recover the workers' compensation lien for past medical and indemnity benefits previously paid, pursuant to LHWCA §33(e) and (f)."⁷ Emp. Resp. at 2-3. Employer/Carrier state that Claimant concedes that he had failed to obtain Employer/Carrier's written approval of the settlement. Additionally, Employer/Carrier assert that Claimant failed to provide them with a prompt notice of the third-party claim, the lawsuit, or the settlement, as required by the applicable regulations at 20 C.F.R. §702.281(a)(1)-(3). *Id.* at 2. Employer/Carrier maintain that the case law, cited by Claimant, that has wavered from the written approval requirement of Section 33(g) is distinguishable, as in those cases the workers' compensation lienholder actively participated in the settlement process. *Id.* at 3. Employer/Carrier assert that they did not participate in the settlement between Claimant and BAE Systems, and that Claimant presented no supporting affidavits to the contrary. *Id.* Based on the foregoing, Employer/Carrier reiterate their request that "summary final order be granted as a matter of law denying any further payments of compensation or medical benefits by the Employer to the Claimant from August 3, 2011, onward." *Id.*

DISCUSSION

Standard of Review

Pursuant to 29 C.F.R. §18.40, an administrative law judge may enter a summary decision for a party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 29 C.F.R. §§ 18.40(d), 18.41(a). An issue is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is material if, under the substantive law, it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary decision because the factual dispute must be material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The party moving for summary decision has the burden of establishing the absence of evidence to support the non-moving party's case. *Id.* Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, come forth with specific facts to show that a genuine issue of material fact exists and that a reasonable jury could return a verdict for the non-moving party. *Reynolds v. County of San Diego*, 84 F.3d 1162, 1166 (9th Cir. 1996). OALJ procedural rules provide that "[w]hen a motion for summary decision is made and supported by the appropriate evidence, the party opposing the motion may not rest upon the mere allegations or denials of such pleading[, but] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); *see also Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (the judge is not required to comb the record for evidence to oppose the motion, but may limit his review to the documents submitted for the purposes of summary decision and those parts of the record specifically referenced therein). The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. *See Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

⁷ The district court denied Brown's request to enforce the lien on the ground that the underlying case has been closed. Emp. Rep., Exh. B.

In reviewing a request for summary decision, evidence and inferences must be viewed in the light most favorable to the non-moving party. *Liberty Lobby*, 477 U.S. at 262; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied, even if no opposing evidentiary matter is presented. *Vermont Teddy Bear*, 373 F.3d 241, 244 (2nd Cir. 2004) (internal citations omitted).

As Employer/Carrier correctly state, Claimant's request to postpone the resolution of Employer/Carrier's motion for summary decision rested entirely on the asserted relevance of Claimant's motion to invalidate lien, which Claimant had presented for resolution by the district court. As Claimant's motion has been denied by the district court on January 24, 2010 (Emp. Rep., Exh. B), Claimant's request to hold in abeyance Employer/Carrier's motion for a summary decision on his Defense Base Act claim is now moot.

Section 33(g) of the Longshore Act Requires Dismissal of Claimant's Claim

Section 33, 33 U.S.C. §933, addresses situations in which an employee is injured during the course of his employment and a third party may be liable for damages for that injury. In such situations, the employee need not elect between his compensation remedy and a third-party suit. If the employee initiates action against a third party within the time period allowed under Section 33(b) and recovers damages from the third party, the employer, pursuant to Section 33(f), is entitled to credit the employee's third-party recovery against its liability for compensation payments under the Act. The employer is not only entitled to credit the third-party recovery against its liability for compensation payments under the Act, but also for all past and future Section 7 medical benefits payable to the employee. *See, e.g., Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239 (1988), *aff'd*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988); *Inscoc v. Acton Corp.*, 19 BRBS 97 (1986), *aff'd mem.*, 830 F.2d 1188 (D.C. Cir. 1987). The Act does not expressly provide for reimbursement from a judgment or settlement obtained by the worker from a third party of compensation benefits that an employer has already paid. *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980). However, Section 33(f) has been interpreted as granting an employer both a lien against the settlement recovery for payments previously made, and a credit or offset against the settlement recovery for accrued or future benefits yet to be paid. *See, e.g., Peters v. North River Ins. Co.*, 764 F.2d 306, 17 BRBS 114(CRT) (5th Cir. 1985); *see generally Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998)(collecting cases). Under the 1984 Amendments, the employer may only set off the "net" amount recovered less the expenses "reasonably incurred" by the claimant in the course of the proceedings against the third party, including "reasonable" attorneys' fees. *See, e.g., Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in part and rev'd in part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991).⁸ If little or nothing is left after the lien and attorney's fees have been deducted from the recovery, the court may adjust the attorney's fees in order to obtain a sufficient recovery for the injured worker. The lien, however, remains inviolate and carrier cannot be liable for any of the attorney's fees. *Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 22 BRBS 42(CRT) (5th Cir. 1989).

⁸ Holding that employer may offset its workers' compensation liability against the total net third-party recovery even if it includes such items as pain and suffering and punitive damages.

Further, Section 33(g) provides a bar to 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 employer's prior written consent." The section is intended to ensure that employer's rights are protected in a third-party settlement and 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). *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev'd on other grounds*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). Section 33(g) requires the employer's and carrier's prior written consent for any settlement in an amount less than the compensation to which the employee would be entitled under the Act. If the third-party settlement is not approved in writing by the employer, the employee's right to benefits under the Act is barred. Under subsection 33(g)(2), if no written approval of a settlement is obtained as required in (g)(1), or if the employee fails to notify employer of any settlement obtained from or judgment against a third-party, then "all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged claimant's entitlement to benefits." *See also Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002)(holding that non-compliance with § 33(g)(1) of the Act results in the forfeiture of both disability compensation and medical benefits in accordance with Section 33(g)(2)). Further, Section 702.281 of the regulations, 20 C.F.R. §702.281(b), essentially repeats the Section 33(g) requirement of written approval and states that the failure to obtain the required approval relieves employer of liability for compensation pursuant to Section 33(f) and for medical benefits under Section 7. As the Supreme Court observed in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), "[n]otification provides full protection to the employer . . . because it ensures against fraudulent double recovery by the employee." *Cowart*, 505 U.S. at 483. However, as the Court cautioned, Section 33(g)'s forfeiture penalty also creates a trap for the unwary claimant. *Id.* Notably, the Board has held that because the Section 33(g) bar is in the nature of an affirmative defense, the employer bears the burden of proving that the claimant executed a settlement agreement without the employer's prior written approval. *Barnes v. General Ship Service*, 30 BRBS 193 (1996).

As Employer correctly points out, the parties' pleadings call on the undersigned to resolve Employer's asserted entitlement to a summary dismissal of this claim pursuant to the Section 33(g) forfeiture provision.⁹ Claimant does not challenge this formulation of the issue presented by the parties' pleadings filed with the OALJ. Thus, while Claimant's Response incorporates and relies upon the arguments set forth in his Motion to Invalidate Lien originally filed in the district court, these arguments will be considered to the extent they address Employer's rights under Section 33(g).

Adjudication of employer's motion for summary decision on the Section 33(g) issue requires consideration of a number of discrete questions, including: (1) whether a settlement agreement was executed between Claimant and BAE Systems/Williams; (2) whether Claimant qualified as a person entitled to compensation at the time of the settlement agreement; (3)

⁹ *See generally Ochoa v. Employers National Ins. Co.*, 724 F.2d 1171 (5th Cir. 1984), *reaff'd following remand*, 754 F.2d 1196, 17 BRBS 49(CRT) (5th Cir. 1985); *see also Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996).

whether the settlement agreement concerned the same disability for which Claimant claimed benefits against Employer/Carrier; (4) whether the settlement agreement was for a sum less than Claimant's entitlement to benefits against Employer/Carrier; (5) whether he failed to obtain prior written approval for the settlement agreement from Employer and/or Carrier; and (6) whether Employer/Carrier's participation in the third-party settlement precludes application of the Section 33(g) bar to this claim. If resolution of these questions entails no genuine issue of material fact, a summary decision dismissing this claim under Section 33(g) is appropriate at this time. *See* 29 C.F.R. §18.40; 33 U.S.C. § 933(g)(1)-(2); *Mabile v. Swiftships, Inc.*, 38 BRBS 19, 21 (2004).

a. A Settlement Agreement was Executed on August 3, 2011.

A copy of the Release and Settlement Agreement pertaining to Claimant's tort suit against BAE Systems and Williams reflects that it was executed on August 3, 2011. Emp. Mot., Exh. B. Further, both parties' submissions reflect the same. Cl. Resp. at 3; Mullin Affidavit, Exh. B; Emp. Reply, Exh. A. Thus, there is no genuine issue of material fact on this issue.

Claimant does not argue that the settlement agreement was not final. He does state, in passing (in reference to his constructive consent argument addressed below), that "[s]ettlement was not finalized until the Stipulation of Dismissal was filed on August 9, 2011"; according to Claimant, the district court entered an order of dismissal based on the parties' stipulations on August 16, 2011. Cl. Resp., Exh. A at 13. There is support in the case law for Claimant's position that dismissal of the underlying third-party suit may be material to determining whether a settlement has been executed. *See generally Barnes v. General Ship Service*, 30 BRBS 193 (1996);¹⁰ *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001); *Esposito*, 36 BRBS 10. In this case, however, the difference in dates is not material in addressing whether a settlement agreement was executed in the third-party tort action, and Claimant does not argue otherwise. *See generally Esposito*, 36 BRBS 10.

b. Claimant was a "Person Entitled to Compensation" at the Time the Settlement Agreement was Executed.

I find that Claimant qualified as a person entitled to compensation at the time the August 3, 2011 Release and Settlement Agreement was executed. A person who is being paid compensation by an employer/carrier either voluntarily or pursuant to an award qualifies as a person entitled to compensation. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 31 (1986). However, a claimant need not continue to receive voluntary compensation in order to continue to qualify as a person entitled to compensation. *See Estate of Cowart*, 505 U.S. at 477. As the Supreme Court explained, the entitlement to compensation for purposes of Section 33 vests as of the time the worker suffers a qualifying injury; it does not rely upon a concession of liability by the employer, or a finding of employer liability by an adjudicator. Further, the Board has held that in considering whether a claimant is a "person entitled to compensation," the term

¹⁰ In *Barnes*, claimant characterized the settlements as "executory," based on letters post-dating claimant's signing of the releases which stated that the settlement agreements were contingent upon employer's consent and would be rescinded if consent was not obtained. The Board disagreed that the settlements were executory, holding that rescission of an agreement must return both parties to the status quo ante, and, here, the court's dismissal with prejudice of the third-party actions foreclosed a restoration of the parties' original positions.

"compensation" refers to periodic disability benefits and not to payments for medical treatment under Section 7. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254, 264-265 (1994), *aff'd and modified on recon. en banc* 30 BRBS 5 (1996) (Brown and McGranery, JJ., concurring in part and dissenting in part).

Here, Claimant filed a claim asserting that he suffered injuries while employed with Employer in Afghanistan on July 20, 2009, for which he was voluntarily paid compensation and medical benefits by Carrier, in the total amount of \$144,718.06. Claimant became a person entitled to compensation as of the time of his workplace injuries in 2009 that qualified him to submit a claim for benefits under the DBA, and Employer's subsequent payment of compensation on the basis of said injuries confirmed that entitlement. *Cowart*, 505 U.S. at 477; *Dorsey*, 18 BRBS at 31. Claimant does not argue that this prerequisite to the application of the Section 33(g) bar has not been met, and I find that there is no genuine issue of material fact on this issue.

c. The Settlement Agreement with BAE Systems/Williams Concerned the Same Disability Claimed Against Employer/Carrier

The record before me reflects that Claimant's third-party tort suit was filed on account of the same injury or disability for which compensation was payable under the Act. *See Mullin Aff*, Exhs. B & C (Complaint and Demand for Jury Trial); Emp. Mot., Exh. C (1/27/10 formal demand to settle tort suit); Emp. Rep., Exh. B (district court order of 1/24/10). In responding to Employer's motion, Claimant does not argue otherwise.

I note that, in his letter to Scott Mullin, Claimant's third-party attorney, Mr. Gilbert, stated that the "[s]ettlement is representative of pain and suffering only. No w/c lien." Emp. Mot. at 5; Mullin Aff., Exh. A. Employer asserts that "despite Claimant/Gilbert's assertions that the release/settlement was strictly for pain and suffering only, **the release language was broad and non-specific, and precluded the Claimant or its assignees/subrogees (i.e., the Employer/Carrier) from bringing any claim against the tortfeasors.**" Emp. Mot. at 5-6 (emphasis in original). Employer's assertion is consistent with the terms of the Release and Settlement Agreement executed by Claimant in resolution of the tort suit¹¹ (Mullin Aff., Exh. B); and Claimant's response to Employer's motion is silent on this point. The fact that pain and suffering were included in Claimant's settlement of his suit for civil tort damages is not material to the resolution of Employer's motion. *See generally Force v. Kaiser Aluminum & Chemical*

¹¹ Employer has also submitted into the record Claimant's August 27, 2010 demand letter addressed to Brown and BAE Systems, in which Claimant stated that "Chad Ketchum continues out of work;" "[h]e is traumatized mentally and physically and he may never fully recover from the attack, persecution, false imprisonment and hostile treatment received at the hands of his employer. Mr. Ketchum will be if not already, permanently and totally disabled through the work comp case;" "Mr. Ketchum has suffered substantial physical and psychiatric impairments, and is unlikely to be able to return to gainful employment;" "[h]is mother is forced to provide care and treatment and Mr. Ketchum's quality of life and ability to engage in meaningful, fulfilling and lasting adult relationships have been permanently impaired and damaged;" "Mr. Chad Ketchum was to earn approximately \$148,000 per year for his work in Afghanistan. As a result of this attack and injury, he has not been able to work. His current contract was for 2 years. Moreover, his psychological damage has left him unable to return to work for any employer;" "[c]onsequently, in addition to the substantial uncompensated damages already incurred, I submit to you that my client is entitled to reasonable compensation for the non-economic damages." Emp. Mot., Exh. C.

Corp., 23 BRBS 1 (1989), *aff'd in part and rev'd in part sub nom. Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991)(interpreting § 33(f), the Board held that employer may always offset its workers' compensation liability against the total net third-party recovery of a party even if it includes such items as pain and suffering and punitive damages; the Ninth Circuit affirmed, holding that § 33(f) does not provide for apportionment among types of damages in third-party settlements); *see also Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *aff'd in part on other grounds and rev'd on other grounds*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986)(the Board stated that the ALJ did not err in refusing to reduce a § 33(f) offset of a third-party settlement for pain and suffering where there was no evidence establishing the amount of the settlement that constituted payment for pain and suffering; the D.C. Circuit affirmed, stating that employer's offset is for the "actual amount recovered" by the claimant, and that this result is consistent with the prevailing rule in state workers' compensation proceedings and under FECA.); *cf. Mabile v. Swiftships, Inc.*, 38 BRBS 19 (2004).¹²

*d. The Settlement Agreement Was for a Sum Less Than
Claimant's Presumptive Entitlement to Benefits Under the DBA*

Before the forfeiture provisions of Section 33(g)(1) may be invoked, a determination must be made as to the amount of compensation to which the "person entitled to compensation" is entitled under the Act in comparison to the amount of the third-party settlement, as the bar only applies if the settlement amount is less than the compensation entitlement. *See 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 in part and dissenting in part); *see also Gladney, et al. v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996) (McGranery, J., concurring in the result only) (holding, in case arising in the Fifth Circuit, that the ALJ erred in granting summary judgment in 750 cases without making findings of fact necessary under *Cowart*). The gross amount of the third-party settlement is the applicable figure for comparison purposes. *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996), *aff'g and modifying on recon. en banc* 28 BRBS 254 (1994); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995), *rev'g in part* 28 BRBS 20 (1994). Further, medical benefits are not included in the comparison between the settlement amount and amount of compensation to which the person is entitled under the Act. *Harris*, 28 BRBS at 267. In other words, the ALJ must compare the amount of the third-party settlement to the amount of compensation only, not including medical benefits (either past or potential future benefits), to which claimant is entitled under the Act. *Id.* Additionally, the Board held in *Linton v. Container Stevedoring Co.*, 28 BRBS 282 (1994), that the total amount of compensation to which the claimant would be entitled over his lifetime must be compared to the settlement amount, rejecting the claimant's contention that only accrued benefits may be considered. An ALJ may use any reasonable method to determine this lifetime amount; the determination necessarily will entail findings as to claimant's extent of impairment and life expectancy, and the applicable compensation rate. Amounts subject to a Section 3(e) credit are not subtracted from the amount due under the Act. *Linton*, 28 BRBS at 287-289.

Employer asserts that this requirement has been met in this case. In this regard, Employer states that

¹² *Mabile* involved the issue of apportionment of Employer's offset among "persons entitled to compensation."

“[a]ccording to the Release and Settlement Agreement, the Claimant and his counsel received \$155,000.00 in consideration of signing the Release. According to subsequent discussions with Mr. Gilbert, the Claimant would net approximately \$88,000.00 from the settlement.

... Both of these amounts were far less than what was projected to be the Employer/Carrier’s past and future medical and compensation expenses on the claim. At the time the third party case was settled on August 3, 2011, Zurich had claimed a lien of \$144,718.06, which was only \$10,281.94 less than the gross third party settlement. At that time, Ketchum had not returned to the workforce, was receiving ongoing indemnity benefits of \$2,401.24 biweekly, and was claiming ongoing disability due to his orthopaedic injuries and post-traumatic stress disorder. The payments the Claimant would have received pursuant to the Defense Base Act/Longshore and Harbor Workers’ Compensation Act, by extension, would have exceeded the gross third party settlement proceeds in another 24 weeks from the date of the third party settlement. Indemnity exposure would also have continued into the foreseeable future based upon the Claimant’s injuries. Furthermore, the Claimant’s expected net tort recovery from the third party settlement (\$88,000.00) was approximately \$56,718.00 less than the current lien amount as of July 29, 2011.”

Emp. Mot. at 4-5; Mullin Aff. At 2 (“I was also told by Mr. Gilbert that Mr. Ketchum’s net recovery after attorney’s fees and costs would be approximately \$88,200.00”). Claimant does not dispute Employer’s characterization of the relevant facts.

The record before me reflects that Employer voluntarily paid compensation benefits in the total amount of at least \$123,320.83,¹³ based on the maximum compensation rate (\$1,200.62) allowed under the Act. Employer’s only basis for discontinuing voluntary payments of compensation was its asserted entitlement to the Section 33(g) bar (*see* Employer’s Pre-hearing Statement of 8/31/11, Forms LS-207 and LS-208 in Emp. Mot., Exh. E). Further, undisputed evidence establishes that the gross amount of Claimant’s third-party settlement was \$155,000.00. The difference between the settlement amount and compensation paid to Claimant to date is \$31,679.17. Thus, it would take 26.39 weeks (approximately 6.5 months) of additional compensation payments for Claimant to exceed the settlement amount (31,679.17/1,200.62). Claimant’s Pre-hearing Statement (Form LS-18), dated August 11, 2011, reflects that his current claim encompasses a request for “[e]ntitlement to wage loss since cessation (without notice) approximately June 27, 2011; payment for psychiatric care; penalties and interest per March 30, 2011 recommendation of District Director; prescription reimbursement; penalties, interest, costs, attorney’s fees.” In his most recent communication with this Office (*i.e.*, Claimant’s Response to Employer’s Motion, filed on 1/10/12), Claimant continued to assert that “Mr. Ketchum established a federal workers’ compensation case where he was receiving medical treatment and

¹³ As detailed below, it appears that additional compensation payments of \$2,744.28 and \$857.60 were made to Claimant for July-August 2011; indeed, Employer’s Form LS-208 states that temporary total disability benefits were paid from 7/30/09 until 8/8/11 in the total amount of \$126,922.70. Viewing conflicting evidence in the light most favorable to Claimant, I will rely on the lesser amount of \$123,320.83 in my analysis of this issue.

surgical intervention for injuries to his wrist/hand, psychiatric treatment due to suffering Post Traumatic Stress Disorder, and indemnity benefits due to this inability to work as a result of said medical and psychiatric conditions.” *Id.* at 5. As of the date of this Order, approximately 9 months since the benefits had been discontinued by Employer in July-August 2011,¹⁴ there is no indication that Claimant has returned to work and he continues to assert entitlement to past and ongoing compensation benefits. Given this timeline, it is unnecessary for me to determine in this case Claimant’s life expectancy or estimate his entitlement to compensation over his lifetime; I note, however, that nothing in the record before me suggests that Claimant, who was 33 years old at the time of the injury,¹⁵ has a diminished life expectancy. Indeed, in his Motion to Invalidate Lien filed with the district court, Claimant asserted that “Mr. Ketchum is ... unable to work due to his PTSD and physical deficits,” and expressly relied on cases where “the expected workers’ compensation benefits were far greater than the damages recoverable by the Plaintiffs in the tort case, just as in this case.” Emp. Rep., Exh. C at 10, 12 (citations omitted). Based on the foregoing, in view of Employer’s voluntary payment of benefits and Claimant’s request for additional temporary total disability benefits and ongoing benefits, I find that the sum Claimant agreed to accept in settlement of his tort suit fell below his potential entitlement under the DBA. Claimant has not pointed out any material issues of fact, and I find none, that could support a contrary conclusion.

e. Claimant Failed to Obtain Prior Written Approval from Employer and Carrier

The record establishes that Claimant failed to obtain a written consent from either Employer or Carrier prior to entering into a third-party settlement. Cl. Resp.; Mullin Aff.; Emp. Reply, Exh. A (Emp. Request for Admissions with responses). Carrier’s subrogation specialist, Mr. Mullin, attests in his Affidavit that “[a]t no time prior to August 9, 2011, did Mr. Gilbert, the Claimant or any other individual request my approval, or the approval of Zurich, the Employer/insured or any of its agent or representatives, with regard to the settlement of the third party case.” *Id.* Further, Mr. Mullin attests that “[p]rior to August 9, 2011, there was no request for the execution of an LS-33 form (Approval and Compromise of Third Party Cause of Action).” He further attests that “[n]either Zurich or the Employer/insured AAR Brown International gave its approval for the third party settlement, nor was an LS-33 executed by the Employer/Carrier.” Claimant concedes this point, but argues that the Section 33(g) bar should not apply based on Employer/Carrier’s involvement in the tort suit (this argument is treated below). Cl. Resp. at 9.

f. There is No Genuine Issue of Material Fact as to Whether Employer/Carrier Participated in the Third-Party Suit and/or Settlement Process to a Degree That Would Preclude the Application of the Section 33(g) Bar.

Claimant essentially concedes that the prerequisites to the application of Section 33 bar are met, but argues that the Section 33(g) should not be applied in this case pursuant to case law holding that an employer/carrier may be found to have constructively consented to a third-party settlement for purposes of Section 33(g)(1) “when the employer or carrier is actively

¹⁴ Employer asserts that the benefits were discontinued on August 9, 2011 (Emp. Mot. at 6; Exh. E); Claimant states that the benefits were cut off on July 18, 2011.

¹⁵ See Claimant’s Complaint and Demand for Jury Trial pertaining to his tort case. Mullin Aff., Exh. C.

participating in a third-party settlement negotiations.” Cl. Resp. at 9. According to Claimant, Employer's and Carrier's involvement in the third-party tort suit and settlement was sufficient to constitute constructive consent to the terms of Claimant's settlement with BAE Systems/Williams. In this regard, Claimant asserts that “Zurich was well aware of and involved intimately in the settlement negotiations of the present matter, and should be estopped from claiming a Section 33(g) bar like in the *Hoage* case.” *Id.* at 12-13, citing *Metro. Casualty Ins. Co. v. Hoage*, 89 F.2d 798 (D.C. Cir. 1937). Claimant asserts that both “Brown and Zurich were an intimate part of the tort suit” from the time they were brought into the tort suit as third-party defendants by BAE Systems on June 8, 2011. *Id.* at 10, 13. Claimant asserts that Carrier was involved in the third-party suit as a “Third Party Defendant” (*id.* at 9) and/or as “the Carrier for both [the tort suit] and the workers' compensation claim” (*id.* at 7, 10, 13). Claimant elaborates that

‘[b]y July 18, 2011, within three days after sending the letter notifying of the lien, Zurich cut off all of Mr. Ketchum's workers' compensation benefits. Nothing had been filed in the Court docket about settlement. No settlement agreement and release had even been drafted. How could Zurich know about a settlement? Zurich was intimately involved with this case. Zurich was a Third Party Defendant, and importantly, Zurich had ownership interest in BAE.

On this point, settlement was not finalized by July 18, 2011. Zurich cut off all workers' compensation benefits prematurely, which both demonstrates knowledge of the settlement and an intent to truncate benefits without attempting to remedy the situation for the benefit of its insured, Mr. Ketchum (sic). At this point, Zurich could have gotten involved and explained to Plaintiff's counsel the implications of settlement without approval. Instead, Zurich silently cut off benefits and remained silent until August 12, 2011, three days after a Stipulation of Dismissal with Prejudice was entered in the [tort] case. At that point, Zurich resurfaced to explain through a terse, cryptic letter by Mr. Mullin that Zurich has not waived its lien or approval (sic) the settlement.

It was only on August 16, 2011 that Plaintiff's counsel finally was able to understand Zurich's position on the settlement, lien, and workers' compensation benefits for Mr. Ketchum. Through a letter from Zurich's counsel, Zurich claimed a right to all Mr. Ketchum's tort case settlement funds and a right to cut off all future workers' compensation benefits. Zurich's actions are inappropriate given their knowledge, involvement, and silence regarding settlement of the tort case.

....

Moreover, Zurich took actions to explicitly refuse to approve the settlement on August 16, 2011. Through Mr. Bamdas, Zurich relayed its message that it would not approve the settlement. It knew of the potential for settlement approximately one month earlier, but it waited until this date, the date the Order of Dismissal was issued, to refuse to approve the settlement, or to provide insight on Zurich's thoughts about the settlement in any manner whatsoever. Zurich could have rejected or approved of the settlement at any point before this, but failed to do so, instead keeping silent to secure its financial incentives from the lien recovery and truncating workers' compensation benefits.

Section 33(g)(1) is intended to ensure that employer's rights are protected in a third-party settlement and 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); *United Brands Co. v. Melson*, 569 F.2d 214, 8 BRBS 239 (5th Cir. 1978). Since both the employer and carrier had knowledge of the case and the potential settlement in the tort case, that concern was properly considered and cannot prevent the settlement funds from being distributed to Mr. Ketchum. Instead Zurich chose to remain silent about its rights in the face of an impending settlement and dismissal with prejudice.

Indeed, Zurich is the carrier for Brown in both the present tort suit and the workers' compensation claim arising from the same incident. Accordingly, Zurich was directly involved in all communications regarding both the workers' compensation case and the tort case. Throughout this time, Zurich said nothing of its intention to assert a lien or cut off workers' compensation benefits.

....
Moreover, both Zurich and Brown are contemplated in the settlement and release. Evidence of the parties' involvement is explicitly present in the settlement agreement and release, since Zurich made sure their attorneys included a release by plaintiffs for both entities in the tort case. Accordingly, their interests have already been appropriately considered to comply with the *Melson* holding."

Cl. Resp. at 11-14.

Employer, for its part, asserts that, in contrast to BRB decisions invoked by Claimant, Employer and Carrier did not actively participate in Claimant's settlement with BAE Systems. Emp. Rep. at 3-4. Employer asserts that "[i]n fact, they were not participants in the settlement at all. They were **not included as signatories** on the settlement agreement, **never gave written or verbal approval**, either explicit or tacit, and **in no way participated** in the settlement." *Id.* at 4.¹⁶ Employer points out that Claimant presented no supporting affidavits which would establish that Employer/Carrier actively participated in the settlement between Claimant and BAE Systems.

In support of his assertion that Employer/Carrier should be found to have constructively consented to the tort settlement, Claimant points to the language of the Release and Settlement Agreement that provides for a waiver and release by Claimant of "BAE SYSTEMS, BROWN, and WILLIAMS ... (collectively the 'BAE SYSTEMS RELEASED PARTIES')" from any and all claims and liabilities that Claimant may have against them. Emp. Resp., Exh. B. According to Claimant, this provision confirms that Carrier was involved in the third-party settlement as "a Third Party Defendant" and/or "carrier for Brown in the tort suit," and that "Zurich made sure their attorneys included a release by plaintiffs for both entities in the tort case." Cl. Resp. at 13-14. As further evidence of Employer/Carrier's "intimate involvement" in the settlement process, Claimant asserts that benefits were discontinued before the third-party settlement was finalized. In this regard, the record reflects the following pertinent information. On June 8, 2011, BAE Systems filed a third-party complaint against Brown, bringing Brown into the tort case as a third-party defendant. In June 2011, Claimant's third-party attorney, Mr. Gilbert, contacted Mr.

¹⁶ Citing Claimant's response to its Request for Admissions, Emp. Rep. at 2, Exh. A.

Mullin, subrogation specialist for Carrier, requesting information as to the existence of any lien. Cl. Resp. at 2. On July 15, 2011, Mr. Mullin sent a letter to Mr. Gilbert containing a notice of lien. Mullin Aff., Exh. A. Mr. Mullin's letter set forth the lien amount asserted by Carrier and requested that Mr. Gilbert complete a questionnaire regarding the identity of the third-party defendant, whether the third-party investigation was complete, whether the matter was in claim, whether the matter was in suit, and the status of any pending lawsuit. According to Claimant, on or about August 8, 2011, Claimant and BAE Systems executed a Stipulation for Order of Dismissal with Prejudice pertaining to the tort action (Cl. Resp. at 3). According to Mr. Mullin's Affidavit, on August 9, 2011, he received a faxed completed copy of Mr. Gilbert's response to the questionnaire, which was dated by Mr. Gilbert on August 5, 2011; a copy of this document attached to the Affidavit reflects that the faxed submission was indeed received (and electronically dated) August 9, 2011. *Id.*, Exh. B. In responding to the questionnaire, Mr. Gilbert indicated that the third-party lawsuit had been filed and resolved, and he attached a copy of the fully executed Release and Settlement Agreement. *Id.* Employer states that benefits were terminated on or about August 9, 2011, *i.e.*, the date Mr. Mullin received response to his notice of lien from Mr. Gilbert. *Id.*, Exh. B. Claimant, by contrast, asserts that benefits were terminated on July 18, 2011, three days after Mr. Mullin sent notice of lien to Mr. Gilbert. The record of TTD payments attached to Mr. Mullin's Affidavit reflects that Claimant was last paid his regular weekly TTD benefit of \$1,200.62 for the period July 12-18, 2011 (entry date is 7/12/11). The record further reflects two additional payments: \$2,744.28 for the period 7/19/11 – 8/3/11 (entry date is 8/10/11) and \$857.60 for the period 8/4/11 to 8/8/11 (entry date is 8/15/11).¹⁷ The last two payments were evidently made after Mr. Mullin prepared a notice of lien, stating the lien amount as \$123,320.83 in compensation benefits and a total lien of \$144,718.06.

Viewing the evidence (including any factual inferences) in the light most favorable to Claimant, I find that Employer and Carrier's involvement in the third-party tort suit and settlement process, if any, was insufficient to constitute constructive approval of Claimant's settlement with BAE Systems/Williams; and that no issues of material fact exist that could support a contrary conclusion if resolved in Claimant's favor. Arguably, Claimant has demonstrated the existence of conflicting evidence as to whether or not Employer/Carrier had knowledge of the settlement negotiations between Claimant and BAE Systems/Williams in July 2011. However, the circumstantial evidence cited by Claimant does not establish the level of "active participation" by Employer/Carrier in the third-party settlement negotiations that could support a finding of constructive consent. At most, the evidence cited by Claimant could support Claimant's assertion that Employer/Carrier were aware of the settlement process. I note that Employer/Carrier do not expressly deny having such knowledge before the third-party settlement was executed. However, as detailed below, Board precedent holds that neither employer's participation in the third party suit, nor employer/carrier's mere knowledge of third-party settlement negotiations is insufficient to negate the requirement of a prior written approval under Section 33(g).

It is undisputed that neither Employer nor Carrier signed the settlement agreement. Contrary to Claimant's assertion, the district court order of January 24, 2012 denying Claimant's

¹⁷ Combined, these 2 amounts equal 3 regular TTD payments of \$1,200.62 and cover a period of 3 weeks.

motion to invalidate lien states that Zurich was not a party to the tort suit.¹⁸ As detailed above, it is undisputed that neither Claimant nor his third-party attorney, Mr. Gilbert, requested or obtained from either Employer or Carrier a written approval of the BAE Systems/Williams settlement prior to its execution on August 3, 2011, as required by Section 33(g)(1). *See Mapp v. Transocean Offshore USA, Inc.*, 38 BRBS 43 (2004)(holding that the plain language of Section 33(g)(1) requires that claimant obtain the prior written approval of both employer and its carrier).¹⁹ Both Employer and Carrier deny any participation in the third-party settlement process, and Claimant and his third-party attorney admittedly did nothing to involve Employer/Carrier in the settlement negotiations, convey settlement offer(s), ascertain their position with respect to the settlement amount or dismissal of Claimant's tort claim, or otherwise involve Employer/Carrier in the settlement process. Based on the undisputed evidence before me, it was not until August 9, 2011 – after Claimant and BAE Systems had executed a Stipulation for Order of Dismissal with Prejudice in the tort suit (Cl. Resp. at 3) -- that Mr. Gilbert provided information as to the third-party settlement to Carrier. I have previously found that Claimant, in fact, settled his tort suit for less than his entitlement under the DBA. Indeed, in Claimant's Motion to Invalidate Lien prepared by Mr. Gilbert (and incorporated into Claimant's Response to Employer's present motion), Mr. Gilbert acknowledged that his intention was for Claimant to settle the tort suit against BAE Systems/Williams while continuing to receive the benefits under the Defense Base Act from Employer/Carrier. This pleading represents an admission by Mr. Gilbert that he was unaware of the implications of failing to obtain Employer's approval under Sections 33(f) and (g) of the LHWCA. Mr. Gilbert stated that, upon learning of the Section 33 implications from Carrier's counsel on or about August 16, 2011, he requested approval of the tort settlement from Employer/Carrier after the settlement had been executed, at which time approval was denied. Cl. Resp. at 11. Tellingly, in his Motion to Invalidate Lien, Mr. Gilbert complains at length about Employer/Carrier's failure to educate him regarding the implications of Section 33 before the settlement was executed, and argues that Employer/Carrier's silence dealt an unfair blow to Claimant when Employer/Carrier asserted their rights under subsections 33(f) and (g).

The Board has rejected the notion that mere knowledge may provide a basis for a finding of constructive consent; rather, as Claimant acknowledges, *active* participation is required. In delineating the constructive consent/implied waiver exception, the Board observed that the legislative history of the 1972 Amendments indicates that Congress intended to reject theories such as estoppel and substantial compliance to avoid the effect of non-compliance with Section 33(g). *See Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *see also Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), *appeal dismissed sub nom. Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987) (Employer's knowledge of a settlement and acceptance of its proceeds after the settlement is finalized is not a

¹⁸ *See Ketchum v. BAE Systems Land & Armaments, L.P., et al.*, 2012 WL 206976 (M.D. Fla. 2012).

¹⁹ In *Mapp*, the fact that employer, by virtue of an indemnity agreement, actively participated in the third-party proceedings did not obviate claimant's need to obtain carrier's approval. Under the circumstances of that case, moreover, employer's approval of the settlement could not be imputed to carrier. The Board therefore affirmed the ALJ's finding that claimant's claim was barred due to his failure to obtain the prior written approval of employer's longshore carrier when he entered into the third-party settlement for an amount less than that which he would be entitled to receive under the Act.

waiver of its rights under § 33(g) where employer actively opposed the settlement during the negotiations).²⁰ In *Nesmith*, the Board rejected claimant's argument that a claims adjuster participated in the settlement negotiations by conveying proposed offers to her principle, the carrier. *Nesmith*, 19 BRBS 176. Inasmuch as claimant did not obtain prior written approval under subsection (g)(1), her claim for benefits was barred. The Board stated that it is contrary to the Section 33(g)'s purpose of preventing claimant from unilaterally bargaining away funds to which employer may be entitled, to characterize carrier's mere knowledge of the settlement proceedings when it opposed the settlement as a waiver of its right to approve the settlement. *Id.*

Claimant relies on Board decisions where claimants' failure to obtain written consent did not entail the application of Section 33(g) bar as employer/carrier were deemed to have constructively consented to the third-party settlement. However, these cases are distinguishable, as in those cases the workers' compensation lienholder actively participated in the settlement process. In particular, Claimant argues that, like in *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., concurring), Zurich "participated in the suit as a Third Party Defendant, had direct knowledge of the suit and the settlement negotiations, and had its interests contemplated on the settlement agreement and release, where its insured, Brown, was expressly released from tort liability." Cl. Resp. at 9. In *Gremillion*, unlike in the present case, the employer was both a third-party defendant and an intervener which participated in the settlement negotiations and joined in the Joint Motion for Partial Dismissal. Although the employer did not sign the release, the document recited an agreement of all parties to the case, and the employer did not dispute it. Specifically, the release recited the agreement among the parties whereby employer/carrier agreed to waive its right to reimbursement and to dismiss its intervention; claimant in return agreed to drop his suit against employer. Significantly, the release further provided that employer retained its rights to a credit and specified the credit amount. Thus, the Board noted that "employer specifically benefit[ed] from the accord by avoiding potential exposure to tort and Jones Act liability, and protect[ed] its potential credit, based on the gross amount of the settlement proceeds, against any 'additional compensation' to which claimant 'may be entitled in the future.'" *Gremillion*, 31 BRBS at 166; *cf. Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 117 S.Ct. 796, 31 BRBS 5 (CRT)(1997)(employer was not a party to, nor a signatory of, a third-party settlement, and therefore, did not have the right to enforce the terms of the agreements). On those facts, the Board concluded that "employer acted directly 'to ensure[], by its own action, the protection of its offset rights,'" and affirmed the ALJ's finding that Section 33(g) did not bar the claimant's entitlement to benefits. *Gremillion*, 31 BRBS at 166, citing *Sellman, infra; Deville, infra*. By contrast, here, Claimant has not demonstrated that Employer/Carrier participated in the third-party settlement to a degree that would renders Section 33(g) inapplicable, and has raised no factual issues of disputed fact in this regard.

Claimant further relies on *Sellman, supra*, and *Deville v. Oilfield Industries*, 26 BRBS 123 (1992). Cl. Resp. at 10. In *Sellman*, the employer was a co-plaintiff in the third-party suit,

²⁰ In *McDonald v. Aecom Technology Corp.*, __ BRBS __ (2011), the Board held that, pursuant to the plain language of Section 3(b) of the Defense Base Act, the applicable law in DBA cases is determined by the location of the office of the district director that filed and served the [ALJ's] decision." Slip op. at *9. In this case, the law of the U.S. Court of Appeals for the Eleventh Circuit governs, as Claimant's DBA claim was referred for formal hearing by the District Director of OWCP for the Jacksonville, Florida, District Office, which lies within the jurisdiction of the Eleventh Circuit.

participated in the settlement negotiations, recovered directly from the defendants, and then refused to give written approval of claimant's settlement. The Board held that employer gave constructive approval to the settlement so that subsection (g)(1) did not bar the claim. The Board also held that when an employer is a party to the third-party action and encourages a settlement to which it is also a party, Section 33(g) has no application and cannot bar the claim. Under the facts of that case, the Board concluded that claimant could not act to the detriment of employer. In affirming the Board's decision on this issue, the Fourth Circuit agreed that the purposes of Section 33(g) would not be served by permitting the termination of benefits where employer has ensured by its own action the protection of its offset rights. The court held that Section 33(g) is not applicable where the employer is a party to and directly participates in the third-party litigation and joins in the settlement negotiations, ultimately entering into an agreement to its benefit. The court held that, where an employer takes action in third-party litigation to protect its own interests, the purposes of Section 33(g) are met and the requirement for prior written approval is unnecessary. *Sellman*, 954 F.2d at 242, 25 BRBS at 106(CRT). The court stated that the statutory language supports this construction as it refers to a situation where "the person entitled to compensation" reaches a settlement, consistent with purpose of Section 33(g) to prevent unilateral action by claimant detrimental to the employer. The court found it significant that the Act contains no approval requirement where employer is also a participant in the settlement. Similarly, in *Deville*, the Board held that the employer's active participation as an intervener on claimant's side in the third-party litigation, including appearing at the hearing, contributing to the settlement agreement by obtaining a provision for offset, and signing the release, precluded application of Section 33(g)(1). Assuming Section 33(g)(1) applied, the Board held that employer gave the required written approval by signing a release. Consequently, the Board held that Section 33(g) did not bar the claimant's entitlement to benefits. *Id.* at 131-32.

The holdings in *Gremillion*, *Sellman* and *Deville* relied on employer's active participation in the third-party proceedings, direct involvement in third-party settlement negotiations, and clear evidence that claimant did not act unilaterally and that employer was afforded sufficient opportunity to protect its interests in the settlement. These factual predicates are absent in the present case, and I find no disputed issue of material fact in this regard. While Claimant argues at length that Employer/Carrier prejudiced Claimant by remaining "silent" while Claimant was working out a settlement with BAE Systems/Williams, it is an employer's active participation in a third-party settlement rather than silence and inaction that have been deemed to constitute constructive consent.

Claimant further argues that the present case is "directly analogous" to the facts of *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), which Claimant characterizes as follows: "because that third-party settlement involved an asbestos claim the employer has been involved with defending, the employer was NOT entitled to any offset, credit, or Section 33(g) preclusion due to any unapproved third-party settlements by the employee/plaintiff." Cl. Resp. at 13. However, *Goody* stands for the proposition that claimant who suffered two separate injuries as a result of distinct exposures with two employers -- asbestosis while working at Electric Boat and chronic obstructive pulmonary disease while working for employer (without any asbestos exposure) -- did not have to obtain employer's approval for his third-party settlements concerning his asbestosis. The Board reasoned that, under Section 33(b) of the Act, employer

was not one to whom claimant's right to file suit could be assigned. The present case is factually distinguishable, and Claimant does not argue otherwise. Similarly, Claimant cites *Metro. Casualty Ins. Co. v. Hoague*, 89 F.2d 798, 800 (D.C. Cir. 1937), for the proposition that carrier is not entitled to the Section 33(g) bar where it was privy to all the proceedings leading up to the bringing of the damages suit and its settlement. Cl. Resp. at 12-13. In *Hoague*, the D.C. Circuit held that where insurer's agent had instigated settlement of the suit against a third party tortfeasor for wrongful death of employee, and insurer and employer had brought suit to avoid statutory payment to the Treasurer of United States on the ground that claimant's dependency had been asserted, insurer could not rely on Section 33(g) to avoid liability to claimant for compensation in excess of amount of settlement on the ground that settlement was effected without written approval of employer. Again, Claimant in this case has not set forth any facts indicating a comparable degree of participation in the third-party settlement by Employer or Carrier in the present case.

Notably, in *Esposito*, 36 BRBS 10, in deeming the degree of employer's participation in a third-party suit insufficient to constitute constructive consent, the Board emphasized the need for active participation by the employer, as opposed to mere knowledge of the settlement process. The Board reasoned as follows:

“[w]e reject claimant's assertions that employer's actions in this case amount to a constructive approval of the settlement with A.G. Ship, and we affirm the ALJ's determination that employer's involvement in the third-party litigation and settlement was insufficient to render Section 33(g)(1) inapplicable. This case is distinguishable from *Sellman, Deville* and *Gremillion* in that the employer's participation in the third-party litigation was extremely limited. In fact, employer in this case participated in the third-party case to a lesser degree than did the employer in *Pool*, a case where the Board held Section 33(g)(1) applied. First, as the ALJ found, employer here was a named defendant in the tort suit; thus, it did not appear in the case on claimant's side. Second, employer was dismissed from the case in March 1998, nearly one and one-half years before the trial and settlement, and employer's attorney, Mr. Fazio, remained active only for discovery purposes. While there is conflicting evidence as to whether he was aware of the settlement process and the final negotiations, and as to whether he made a congratulatory comment when informed of the \$60,000 settlement, the ALJ found Mr. Fazio was not involved in the negotiations themselves, and he did not sign or consent to the general release. Finally, Mr. Simon[, employer's workers' compensation attorney], although aware of claimant's responsibility under the Act, was even less involved in the third-party suit than Mr. Fazio, and, as the ALJ stated, was under no obligation to explain the law to Mr. Katz [, claimant's third-party attorney]. As the ALJ rationally found, employer's participation in the third-party litigation did not rise to the level which would constitute constructive approval of the settlement with A.G. Ship and render Section 33(g)(1) inapplicable.”

Esposito, 36 BRBS 10, citing *Pool v. General American Oil Co.*, 30 BRBS 183, 188 (1996) (Brown, J., dissenting),²¹ *Perez v. International Terminal Operating Co.*, 31 BRBS 114, 117 (1997) (Smith, J., concurring)²²(additional citations omitted). In the present case, as in *Esposito*, Employer did not appear in the tort suit on Claimant's side. While, unlike in *Esposito*, Employer was still a party to the tort suit at the time of Claimant's third-party settlement with BAE Systems/Williams, Employer had been brought into the suit only recently by BAE Systems and was in the process of gathering information from Claimant regarding the status of the tort suit. See Mullin Aff. Neither Claimant, nor his counsel has averred that Employer/Carrier was directly involved in the settlement negotiations, or that they signed or consented to the settlement and release or dismissal of the tort suit. In sum, viewing the facts in the light most favorable to Claimant, I find that Claimant's contention that Employer/Carrier constructively consented to the third-party settlement has no basis in the law, and that there is no genuine issue of material fact that could support the contrary conclusion if resolved in Claimant's favor.

Equitable Estoppel

Much of Claimant's Response is devoted to his argument that the doctrine of equitable estoppel²³ should preclude the application of Section 33(g) bar. Claimant asserts that "employer has effectively waived the right to subrogation through the principles of estoppel. Brown and Zurich cannot remain silent about their lien in the face of explicit knowledge of a third-party suit and then come forward after settlement to their benefit and to the detriment of the employee by cutting off all future benefits and taking the employee's entire settlement amount." Cl. Resp. at 8, 11-12. Relatedly, as noted above, in his Motion to Invalidate Lien (incorporated in Claimant's present Response), Claimant's third-party counsel, Mr. Gilbert, complained at length regarding Carrier's attorney's failure to educate him on the implications of Section 33(g) before the settlement was executed, and argued that Employer/Carrier's silence unfairly prejudiced Claimant when Employer/Carrier subsequently asserted their rights under subsections 33(f) and (g). In *Esposito*, 36 BRBS 10, the Board rejected analogous argument. In that case, claimant's third-party attorney testified that he was unaware of the need for prior written approval of a third-party settlement, and claimant argued that employer's attorney had a duty to inform claimant's third-party attorney of the requirements under the Act, especially since they had been

²¹ In *Pool*, the Board concluded that mere participation by an employer in a third-party action is not sufficient to affect the applicability of Section 33(g)(1). The Board held that the facts of *Sellman* and *Deville* were distinguishable, concluding that the employer's participation in the third-party suit was insufficient to render Section 33(g) inapplicable or provide a basis for concluding that employer approved the settlement. *Pool*, 30 BRBS at 188. In *Pool*, the employer, through its carrier, intervened in the third-party suit and participated, to some extent, in the settlement process; however, the carrier's counsel distanced himself from the settlement negotiations, specifically refused to agree to any settlement and did not sign any settlement documents. *Id.* A majority of the panel concluded that, as the carrier did not appear on the side of the claimant and did not sign the settlement, its actions were insufficient to render Section 33(g)(1) inapplicable or to constitute constructive approval of the settlement. *Id.*

²² In *Perez*, the employer's participation in the third-party suit also was held to be insufficient to constitute approval of the settlement. In *Perez*, the employer was impleaded into the case by the third-party defendant. The employer agreed to compromise its lien to promote the settlement negotiations, but it maintained the position that it would not become involved in the third-party proceedings nor would it consent to the actions therein. Therefore, relying on its decision in *Pool*, the Board affirmed the ALJ's determination that Section 33(g)(1) barred the claimant's entitlement to future compensation. *Id.*

²³ Claimant's Motion to Invalidate Lien filed with the district court relied instead on the principle of promissory estoppel. Emp. Rep., Exh. C. This argument has not been raised before me and will not be addressed.

discussing employer's lien and potential settlements. In affirming the ALJ's application of Section 33(g) bar, the Board quoted the ALJ's statement that he was "unaware of any law or duty" requiring employer's attorney to instruct claimant's attorney on the elements of Section 33(g); the Board concluded that employer's attorney was, indeed, "under no obligation to explain the law to [Claimant's attorney]." The courts and the Board have acknowledged the harsh consequences of failure to comply with Section 33 provisions in cases such as this one. Thus, in *Esposito*, the Board quoted the following language from the Supreme Court's decision in *Cowart*:

"[w]e do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary.... If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the Courts."

505 U.S. at 483-484, 26 BRBS at 53(CRT)(the Court declined to address the effect of employer's participation in the third-party litigation in that case as it had not been included in the question on which *certiorari* was granted). As discussed above, Board decisions recognizing exceptions to the prior written approval requirement have focused on Employer's participation in a third-party litigation and settlement process, rather than on equitable arguments advanced by Claimant in this case. *See also Nesmith*, 19 BRBS 176 (legislative history of the 1972 Amendments indicates that Congress intended to reject theories such as estoppel and substantial compliance to avoid the effect of non-compliance with Section 33(g)); *see generally Fisher v. Todd Shipyards Corp.*, 21 BRBS 323 (1988)(holding that § 33(g)(2) places on claimant an affirmative duty to notify employer of the third-party settlement, and that employer's mere knowledge of the settlement or the absence of prejudice to employer will not suffice to prevent the bar to compensation from being invoked). Thus, on the facts of this case and in view of the applicable law, Claimant's reliance on the doctrine of equitable estoppel must be rejected.

Viewing all the evidence and inferences in the light most favorable to the non-moving party, I find that a summary decision on the issue of Section 33(g) bar is appropriate in this case. Employer/Carrier have met their burden of establishing the absence of material evidence to support Claimant's case. Claimant, on the other hand, has failed to show that a genuine issue of material fact exists and that a rational trier of fact could resolve the issue of Section 33(g)'s applicability in his favor.

ORDER

Because of Claimant's failure to comply with Section 33(g) of the Act, he has no further remedy under the Longshore Act as to his claim for physical and psychological injuries described above arising from the accident of July 20, 2009 against Employer/Carrier; and any benefits under the Longshore Act or Defense Base Act as to that claim are now precluded. Accordingly, Employer/Carrier's motion for summary decision is GRANTED, and this matter is DISMISSED.

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PAUL C. JOHNSON, JR.
Associate Chief Judge

Washington, D.C.