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Issue Date: 01 May 2012

Case No.: 2011-LDA-00387

OWCP No.: 02-136455

In the Matter of:

**DAVID G. NEWTON-SEALEY,
Claimant**

v.

**ARMORGROUP, LTD.,
Employer**

and

**FIDELITY AND CASUALTY CO. OF NY
c/o CNA GLOBAL
Carrier**

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Defense Base Act (the Act),¹ brought by Claimant against Employer and Carrier.² On 11 Apr 11, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel and agreed that the sole issue in dispute was the applicability of Section 33(g). They agreed to waive a personal hearing and that I would issue a decision based upon their stipulations, written exhibits, and briefs.

¹ 42 U.S.C. § 1651 (2011) (the Defense Base Act is an extension of the Longshore and Harbor Workers' Compensation Act 33 U.S.C. §§ 901-950).

² For simplicity, both Employer and Carrier are collectively referred to herein as "Employer."

My decision is based upon the entire record, which consists of the following:³

Stipulations
Exhibits (EX) 1-40⁴

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, and the arguments presented.

STIPULATIONS

I adopt and incorporate by reference all stipulated facts as part of my findings of fact. They include in pertinent part that Claimant was injured on 23 Mar 04 in Iraq when his Land Rover, which was the last vehicle in a convoy, engaged in defensive maneuvers to block a passing unknown vehicle which appeared to be a threat. His Land Rover was struck and rolled over. Claimant sustained neck, shoulder, back, chest, head, and brain injuries, including traumatic brain injury with brainstem and frontal lobe dysfunction. His injuries fell within the coverage of the Act and Carrier was on the risk for those injuries under the Act. Claimant's average weekly wage was \$1,676.71. He was rendered temporarily totally disabled at the time and remains so.

United Kingdom law allows injured employees to sue their employers in contract and in tort. On 30 Apr 07, Claimant filed suit in the United Kingdom against (1) ArmorGroup Services Limited (hereinafter "AG UK"), which is now G4S Risk Management Limited; (2) AG Jersey, which is now G4S International Employment Services Limited; and (3) ArmorGroup International PLC (hereinafter "AG PLC"), which is now ArmorGroup International Limited. The suit sought recovery for the same damages that were the subject of the Defense Base Act Claim that he filed on 3 May 07. Continental Insurance Company had no liability to or on behalf of any of the named defendants in the UK suit.

After a summary judgment hearing was held and a decision issued on 14 Feb 08, Claimant entered into an agreed settlement with AG Jersey, AG UK, and AG PLC on 16 Dec 09, receiving \$89,329.35, which was less than the compensation Claimant would be entitled to under the Act (Claimant is a person entitled to compensation as defined by 33 U.S.C. § 933(g)(1)). The written approval of Continental Insurance Company as the carrier was not obtained prior to the execution of the settlement. No written approval of Continental Insurance Company or Employer was filed in the office of the deputy commissioner.

³ I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of exhibits and items of evidence that I did not consider those things not specifically mentioned or cited.

⁴ The exhibits includes some (1-24) offered jointly and some (25-40) offered by Claimant and admitted over Employer's objections as to relevance and completeness.

FACTUAL BACKGROUND

ISSUES & POSITIONS OF THE PARTIES

The parties disagree solely on whether or not the claim is barred by Section 33(g). They do not dispute that Claimant was a person entitled to compensation and entered into a settlement for an amount less than he would be entitled to under the Act. They agree that no written consent was obtained from the carrier on the risk for the claim under the Act. They vigorously disagree on whether the settlement was with a third party within the meaning of Section 33(g) or in the alternative whether Section 905(b) would apply.⁵

LAW

Section 33(g) and Third Party Settlements

Employees injured under the Act who may also have a cause of action against a third party as a consequence of the same injury are not required to choose one remedy over another.⁶ However, if the employee exercises the right to seek damages from a third party, the Act protects the derivative rights of the employer and carrier.

⁵ The parties both briefed short arguments related to Sections 905(a) and 905(b) of the Act. Claimant argues that the named entities should be considered his employer(s) for purposes of the Act. He first notes that though Section 905(b) of the Act provides that an employer is a third party where it is also the owner of a negligent vessel, the law “offers no such guidance in plain language regarding corporate structures involving subsidiaries” (Claimant’s Brief on Written Submissions at 5). Claimant then cites *Fisher v. Halliburton* for the proposition that when multiple entities act as a single entity, they may be treated as a single employer under the Act. 703 F.Supp. 2d 639 (S.D. TX 2010). Employer responds that in *Fisher*, the multiple corporate affiliates established they were one employer, but Claimant was unable to do so (Respondents’ Petition for Relief Under 33 U.S.C. § 933(g) at 29). Employer adds that with respect to Section 905(b), AG Jersey is akin to an employer who stands as a third party in a vessel negligence case. An employer who is also a vessel owner is a third party when Claimant recovers funds from the vessel in other proceedings, and in this case, Claimant recovered funds from Employer in other proceedings, making it a third party.

Employer also notes that Section 905(a) is immaterial. That section provides that a contractor is deemed an employer of a subcontractor’s employees only if the subcontractor fails to secure payment of compensation as required by Section 904 of the Act. Employer’s position is that whether AG UK or AG Jersey paid for the insurance policy to provide coverage under the DBA, AG Jersey’s employees (like Claimant) were covered by a DBA insurance policy held by CNA, as required.

I agree that neither subsection is dispositive here. There was no failure to secure required compensation—Claimant was covered under the DBA insurance policy held by CNA. And, if Section 905(b) were to be applicable by analogy (which neither party vigorously argued), Employer would be considered a third party. Therefore, the real issue is whether or not Section 933(g) applies to bar Claimant’s claim.

⁶ 33 U.S.C. §933(a).

(1) If the person entitled to compensation . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensationThe approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.⁷

The language of Section 33(g) has been strictly interpreted and applied to employees notwithstanding harsh results. It requires prior approval even if, at the time the employee settles with a third party, the employer is neither paying compensation to the worker nor subject to an order to pay under the Act.⁸ It applies to past as well as future medical benefits.⁹ It applies even when the employer/carrier has contracted with the third party to waive their subrogation rights to recover benefits already paid.¹⁰ The employer/carrier's right to set-off the amount of the settlement against future payments is independent of the right to subrogation.¹¹ Whether or not approval of the Employer is obtained prior to a settlement, if the claimant's third party recovery exceeds the amount of compensation due, the employer has no further compensation obligation.¹² The employer/carrier bears the burden of proof under Section 33.¹³

⁷ 33 U.S.C. §933(g).

⁸ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482-83 (1992).

⁹ *Esposito v. Sea-Land Services, Inc.*, 36 BRBS 10 (2002).

¹⁰ *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 645 (5th Cir. 1986).

¹¹ *Id.* at 646-47; *Jackson v. Land & Offshore Servs., Inc.*, 855 F.2d 244, 246 (5th Cir. 1988).

¹² 33 U.S.C. §933(f); *Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 558 (5th Cir. 1989).

¹³ *I.T.O. Corp. of Baltimore v. Sellman*, 967 F.2d 971, 973 (4th Cir. 1992); *Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992).

Answering whether or not a third party is liable in damages, or a third-party suit settled by an employee was meritorious, is beyond the scope of the administrative law judge's authority and he or she is not required to look beyond the pleadings and the result.¹⁴

In a case where the claimant settles a negligence action against multiple third-party defendants, including the employer as one of the third-party defendants, the employer's involvement and signature on the settlement may be sufficient to partially comply with the Section 33(g) requirement.¹⁵ However, even that will not satisfy Section 33(g) in its entirety if the carrier's written approval is not obtained, particularly if the longshore carrier is not the carrier on the third-party action.¹⁶

Neither lending nor borrowing employers are considered third parties for the purposes of Section 33(g).¹⁷ In some cases the employer may be considered a third party.¹⁸ For example, in the case of injuries caused by the negligence of a vessel, the vessel itself qualifies as a third person and a covered employee may seek damages against it in accordance with Section 33.¹⁹ That applies even if the owner of the vessel is the employer.²⁰

Borrowed Servant Doctrine

Section 2(4) of the Act defines "employer" as

an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).²¹

¹⁴ *Marmillion v. A.M.E. Temp Svcs.*, BRB No. 05-0543 (Mar. 23, 2006) (unpublished), citing *Equitable Equip. Co. v. Dir., OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167 (CRT) (5th Cir. 1999).

¹⁵ *Deville v. Oilfield Indus.*, 26 BRBS 123 (1992); *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997).

¹⁶ *Mapp v. Transocean Offshore USA Inc.*, 38 BRBS 43 (2004).

¹⁷ *Redmond v. Sea Ray Boats*, 32 BRBS 195 (1998).

¹⁸ *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 303 (3d Cir. 1995) (applying §933(f), "[w]e believe that the only meaningful interpretation of § 933(f) is to treat the employer as a third party whenever the employee recovers funds from the employer in other legal proceedings").

¹⁹ 33 U.S.C. § 905(b).

²⁰ *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530 (1983); *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).

²¹ 33 U.S.C. § 902(4).

Where an employee is hired and compensated by one entity, but is then assigned to work for another, the identification of the *de jure* employer is not always clear under the borrowed employee doctrine.²² That doctrine has been applied to workers under the Act and an employee “may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.”²³ Thus, a borrowing employer may be liable under the Act.²⁴

Determining if there is a borrowing employer involves the application of a nine-part test.²⁵ The test weighs the following factors: 1) Who has control over the employee and the work he is performing, other than mere suggestions of details or cooperation? 2) Did the employee acquiesce in the new work situation? 3) Who furnished tools and place for performance? 4) Who had the right to discharge the employee? 5) Who had the obligation to pay the employee?²⁶ 6) Did the original employer terminate his relationship with the employee? 7) Whose work was being performed? 8) Was there an agreement or meeting of the minds between the original and borrowing employer? 9) Was the new employment over a considerable length of time?

The principle focus of the test should be whether the second employer itself was responsible for the working conditions experienced by the employee and the resulting risks incurred and whether the new employment was for a sufficient duration that the employee could evaluate the risks and acquiesce to them.²⁷

Liability of Parent for Subsidiary

A corporation and its stockholders are generally to be treated as separate entities.²⁸ The fact that there is a single corporate stockholder does not change that general principle.²⁹ Corporate exercise of the rights of stock ownership, including the election of directors or a duplication of some or all of the directors or executive officers is not fatal to the maintenance of distinct entities.³⁰ However, in the appropriate circumstances the

²² *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220 (1909).

²³ *Total Marine Services v. Director, OWCP*, 87 F.3d 774, 777 (5th Cir. 1996) (quoting *Anderson*, 212 U.S. at 220).

²⁴ *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985).

²⁵ *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 376 (5th Cir. 1985), citing *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969).

²⁶ If the borrowing employer pays the lending employer an hourly rate for the employee’s work and then the lending employer pays the worker at a lower hourly rate, the borrowing employer is essentially paying the worker. *Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 618 (5th Cir. 1986).

²⁷ *Gaudet v. Exxon Corp.*, 562 F.2d 351, 357 (5th Cir. 1977).

²⁸ *Burnet v. Clark*, 287 U.S. 410, 415 (1932).

²⁹ *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998).

³⁰ *Id.*

interaction and control between the parent and wholly-owned subsidiary may go so far as to justify piercing the corporate veil and holding the shareholder Holding company as one with the subsidiary.³¹ In choosing what law to apply to determine the legal relationship between a parent and a wholly-owned subsidiary, and deciding whether the corporate veil should be pierced, courts generally apply the local law of the state of incorporation.³²

Under the principle of collateral estoppel, when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be litigated again between the same parties in the future.³³ The principle applies when the legal standards are the same³⁴ and the parties or their privies had a full and fair opportunity to litigate the claim or issue.³⁵

EVIDENCE

*Claimant testified at deposition and made statements in pertinent part:*³⁶

He found out about the ArmorGroup job from a website that said to call a number in London. He did and spoke to Caroline Ruarte. She invited him for an interview at the ArmorGroup office in London. She gave an hour long presentation, but never mentioned anything about an office in Jersey or that the actual employer would be AG Jersey rather than ArmorGroup Service in London.

After a medical examination, she offered him a job and gave him a contract. At no point was he told he was working for ArmorGroup Jersey. He was hired by ArmorGroup Jersey and deployed to Ar Rutbah, Iraq on 1 Jun 03. For nine weeks he was a bodyguard for two engineers who worked for Bechtel. Then he was ordered by ArmorGroup International, London, to go to Baghdad escorting Bechtel engineers to and from jobs. He then moved to Al Hillah, where he did the same work until he was injured on 23 Mar 04. He took directions from Russ Bishop, who was in charge of all ArmorGroup employees in Iraq, and whom he believed was working for ArmorGroup in London. His weapons were provided by Troy Spears, who was from ArmorGroup. His ArmorGroup point of contact was

³¹ *Chicago, M. & St. P.R. Co. v. Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 498 (1918).

³² RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 307 (1971); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132-133 (2d Cir. 1993) (citing § 307 for proposition that law of the state of incorporation determines when veil is pierced); *Autrey v. 22 TexasServ. Inc.*, 79 F. Supp. 2d 735, 740 (S.D. Tex. 2000) (“[t]his Court looks to the law of the state of incorporation for each corporate Defendant to determine whether its corporate entity should be disregarded”) (citing § 307).

³³ *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1994) (en banc), *aff’g* 27 BRBS 80 (1993), *aff’d sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309 (9th Cir. 1998).

³⁴ *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000).

³⁵ *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31 BRBS 109 (CRT) (1st Cir. 1997); *In re Raynor*, 922 F.2d 1146 (4th Cir. 1991).

³⁶ EX-6, 10-12.

Caroline Ruarte in London. During this time he was actually working for and employed by for ArmorGroup Jersey.

His work orders came from London, which was the head office. He understood his employer to be ArmorGroup, since it is a group. When he interviewed, ArmorGroup Jersey and Services were not mentioned. The representative talked about how big and good ArmorGroup is and never mentioned or distinguished ArmorGroup Services or ArmorGroup Jersey. He hired on with ArmorGroup. No one pointed out that ArmorGroup was really a number of other smaller companies. No one identified themselves as being from ArmorGroup Jersey, Services or International. He knew the pay checks were cut from Jersey, but they were in U.S. dollars and he figured that was an accounting tactic for taxes. He has never been to Jersey and his only contact was to e-mail his bank account information to Jersey. He didn't realize there might be different and separate companies until the legal proceedings started and ArmorGroup told him they had nothing to do with him and he had been working for ArmorGroup Jersey.

After he was injured, ArmorGroup paid him \$1000 per week for about 20 months. He did not deal with Jersey. CNA picked up paying him after that. He was able to sue his employer under UK law, and settled the case with ArmorGroup for \$55,000. Another \$120,000 went to court costs and legal fees.

Claimant's employment and pay records show in pertinent part:³⁷

On 30 May 03, ArmorGroup Service (Jersey) Ltd. (as the "company") contracted to employ Claimant as a watchkeeper to Bechtel in Iraq. Claimant was to carry out duties as assigned by the company or by Bechtel. The company was to pay Claimant and provide his equipment. The contract could be terminated by the company, Claimant, or if Bechtel requested Claimant leave Iraq. The company agreed to provide insurance in the event of injuries or illness. On 4 Dec 03, ArmorGroup Services (Jersey) Ltd. sent him a letter confirming changes in his job title, on- and off-duty schedule, and compensation. Claimant signed the modification on 12 Dec 03.

His salary was paid by ArmorGroup Services (Jersey) Ltd. He exchanged emails with Catherine Boheaof "AGS Jersey" to clarify bank account information. He filed claims on a form titled "ArmorGroup Services (Jersey) Ltd. – Expense Claim Form," but was told to forward it to ArmorGroup Service Ltd. in London.

³⁷ EX-1-5.

*Christopher Beese stated in pertinent part:*³⁸

He is the chief administrative officer of ArmorGroup Service Ltd. (AG UK). He is on the board of directors of ArmorGroup International PLC (AG PLC). ArmorGroup has approximate 9,000 personnel working around the world, including Iraq, Afghanistan, Africa, Latin America, and Russia.

AG PLC is the parent company of all ArmorGroup subsidiaries. It is a publically-listed company registered in London with a board of four directors. It is the sole shareholder of the subsidiaries, but each subsidiary is distinct and independent with an independent board of directors.

AG UK was originally created in 1981 as Defence Systems Ltd., to offer high grade security to corporate and governmental clients. It subsequently changed its name to ArmorGroup Service Ltd. and became a wholly-owned subsidiary of AG PLC in 2003. It employs 125 personnel in the United Kingdom and provides security training, but does not employ security operatives overseas. When it does contract to provide overseas security, it typically does so by subcontracting with AG Jersey.

AG Jersey was initially created in 1995 to provide manpower to United Nations peacekeeping missions. It now provides the manpower to meet the obligations of Group companies to provide security around the world. It also contracts directly with clients. It hires, fires, pays, assigns, and controls those employees through regional directors and country managers, who are also employees of AG Jersey. Since Jersey is a relatively remote location, AG Jersey contracts with AG UK to recruit and interview potential employees in London.

In Iraq, Bechtel, a construction and project management company, required security for its engineers and contracted with AG UK to obtain that security. AG UK in turn subcontracted that out to AG Jersey, but according to the existing contract it had with AG Jersey, AG UK conducted the recruitment and interviewing of the potential employees for the Bechtel contract. The interview emphasized that the employment would be with AG Jersey, not AG UK.

AG PLC had no involvement in the Bechtel contract and neither AG PLC nor AG UK exercised any control over Claimant's activities in Iraq. Troy Spears did not work for AG PLC or AG UK.

³⁸ EX-7.

A letter from Christopher Beese showed in pertinent part:³⁹

On 18 Aug 05, he sent Claimant's attorney a letter on ArmorGroup Services Ltd. letterhead indicating that Carrier provides "our" coverage under the Act and the matter should be worked through them. He signed the letter as Chief Administrative Officer and copied Ian Dulake at ArmorGroup Services (Jersey) Ltd.

Ian Dulake stated in pertinent part:⁴⁰

He is a director of AG Jersey and is the personnel manager. AG Jersey was established in Jersey for financial reasons. It now supplies most expatriate staff for various ArmorGroup contracts. By being employed by AG Jersey, rather than another ArmorGroup entity, employees realize significant financial advantages. AG UK does provide recruiting and interview services to AG Jersey, but AG Jersey retains all hiring and firing authority. AG Jersey secured insurance under the Act for the benefit of its employees. Claimant was hired by AG Jersey in May 2003 and would have been specifically told by Caroline Ruarte of AG UK that he was working for AG Jersey.

David Howarth stated in pertinent part:⁴¹

He worked with Claimant in Iraq. When he was hired, everything having to do with his recruitment, interviewing, and orientation was done in ArmorGroup's London office. He never realized he had contracted to be employed by AG Jersey. The Jersey office was never discussed.

John McLellan stated in pertinent part:⁴²

He worked with Claimant in Iraq. When he was hired, everything having to do with his recruitment, interviewing, and orientation was done in ArmorGroup's London office. He never realized he had contracted to be employed by AG Jersey. The Jersey office was never discussed.

³⁹ EX-26.

⁴⁰ EX-8.

⁴¹ EX-13.

⁴² EX-14.

Grant Hopwood stated in pertinent part:⁴³

He worked with Claimant in Iraq. When he was hired, everything having to do with his employment was done in ArmorGroup's London office. He never had any contact with the Jersey office and thought he was working for ArmorGroup in London.

Ross Menzies stated in pertinent part:⁴⁴

He worked with Claimant in Iraq. When he was hired, it was all done through ArmorGroup's London office and no one mentioned that he would be working for ArmorGroup Jersey. Later, when they amended his contract, he did notice the ArmorGroup Jersey logo on the paperwork.

Documents from High Court of Justice, Queen's Bench Division, Sheffield District show in pertinent part:⁴⁵

On 30 Apr 07, Claimant filed suit for breach of contract and negligence against all three ArmorGroup entities. He alleged AG UK had contracted to provide security to Bechtel, AG Jersey was a manpower-only contractor to supply the manpower for that contract, and AG PLC was a holding company for all AG companies. He also alleged that one, both, or all of the entities controlled operations in the performance of the Bechtel contract and that since he was in the temporary employment of AG UK and/or AG PLC, as well as the general employment of AG Jersey, all three owed a contractual duty of due care and compensation in the event of injury. He also alleged that all three AG entities were liable in tort for his injuries.

On 20 Jun 07, AG UK filed its answer, denying that it had any contractual relationship with Claimant or that he was in its employment at any time. It also denied having acted with any negligence. The filing was signed by David Beese, as director. AG PLC filed its answer the same day, also signed by David Beese, as director. AG PLC denied that it had any contractual relationship with Claimant or that he was in its employment at any time. It also denied having acted with any negligence.

⁴³ EX-15.

⁴⁴ EX-16.

⁴⁵ EX-17-18, 20-23.

On 24 Jul 07, AG Jersey filed its answer, arguing that Claimant was its employee, that the contract included a choice of law clause foreclosing the UK suit, and that in any event it met any duty of care it may have had to Claimant either in contract or in tort.

On 14 Feb 08, the court ruled that there was no contractual relationship between Claimant and AG UK or AG PLC, but that they could be liable to Claimant in tort based on their proximate relationship. On 16 Dec 09, Claimant and all three ArmorGroup entities entered into a confidential settlement.

A letter from Employer's counsel states in pertinent part:⁴⁶

He attended a mediation of Claimant's case in June 2009 and informed Claimant's attorney on the suit that any settlement had to be approved by Carrier. He had further contact with that attorney in September or October and November of 2009, and again on 7 Dec 09. He first learned of the settlement on 4 Feb 10 and still had no direct knowledge of its terms.

A letter from Claimant's attorney on the suit states in pertinent part:⁴⁷

He was never told by Employer's counsel that any settlement had to be approved by Carrier. Employer's counsel told him the Carrier would take a credit for any amount and if the amount paid to Claimant was in the range of fifty to seventy thousand pounds, Carrier would have no real interest, because that amount would not impact his monthly payments under the Act.

Carrier's records show in pertinent part:⁴⁸

It provided coverage under the Act from 1 Jun 03 to 1 Jun 04 with ArmorGroup Service Ltd. as the named insured. On 12 Dec 05 and 28 Feb 06, it sent Claimant's attorney letters that requested more information and referred to the employer as "ArmorGroup."

⁴⁶ EX-19.

⁴⁷ EX-39.

⁴⁸ EX-24. 29-30.

*Department of Labor records states in pertinent part:*⁴⁹

The initial notice to Claimant on 29 Jul 04 refers to ArmorGroup International Ltd. as the employer. Claimant named ArmorGroup as the employer in his claim and ArmorGroup International Ltd. was identified by the claims examiner as the employer. On 28 Jun 10, Claimant submitted an amended claim, naming all three entities. He also requested an informal conference, arguing that the ArmorGroup was a single entity and there was no settlement with a third party to invoke Section 33(g).

*Letters by various counsel in the case show in pertinent part:*⁵⁰

On 20 Mar 06 Richard Martin wrote a letter to Carrier indicating that he represented ArmorGroup and discussing how it was handling Claimant's case. It captioned the employer as ArmorGroup and expressed ArmorGroup's interests in resolving the case as quickly as possible. He did so again on 20 Apr 06. On 28 Apr 06, he wrote to the District Director, noting that he represented ArmorGroup International Ltd. and was seeking assistance in obtaining Carrier's cooperation. In his extensive recitation of the history of the case, he referred to ArmorGroup. On 9 Jun 06, he wrote Claimant as ArmorGroup's representative and discussed a number of details related to the accident. He noted that ArmorGroup had been paying Claimant and expected Carrier would begin doing so.

On 21 Nov 06, Speechly Bircham, L.L.P. wrote Claimant's counsel and noted they were representing ArmorGroup Services Ltd. and ArmorGroup Services Jersey, Ltd. (even though that entity had local counsel in Jersey). They also indicated Jones Day was the solicitor for the ArmorGroup group of companies. The letter encouraged Claimant's attorney to help Claimant work with Carrier.

On 13 Sep 07, Sean Monaghan wrote one of Claimant's doctors and asked for medical records, indicating he represented Carrier and ArmorGroup Services.

DISCUSSION

Section 33(g) applies if a person entitled to compensation settles with a third party for the same injury for which the employer would be liable under the Act, for an amount less than that to which he would be entitled under the Act, and without the prior written approval of the Employer and Carrier. The parties stipulated that: Claimant is a person entitled to compensation under the Act; he entered into a settlement that included his

⁴⁹ EX-25, 28, 40.

⁵⁰ EX-31-36.

injury covered by the Act with AG Jersey, AG UK and AG PLC for an amount less than his entitlement under the Act; and he did not obtain the prior written approval of Carrier.

Since Employer concedes that AG Jersey is not a third party, the sole question is whether either AG UK or AG PLC qualify as third parties under the Act. If so, Section 33(g) applies and the claim is barred. Employer insists that AG Jersey was Claimant's employer under the Act and both AG UK and AG PLC are third parties. Claimant maintains that since there was a lending/borrowing employer relationship between AG Jersey and AG UK, AG UK could not have been a third party. Claimant also argues that by virtue of their interrelationships and controls, the three entities were essentially one and Claimant was employed by and entered into a settlement with a single entity, ArmorGroup. He concludes that there was no third party and no requirement to obtain Carrier approval.

At the outset, I observe that the evidence in the factual record is largely consistent. With one dramatic exception,⁵¹ there does not seem to be a significant dispute about what was said and what was done. The evidentiary record reveals that the role of AG Jersey was limited to some personnel and financial/payroll functions and that it was located in Jersey for the purpose of taking advantage of a very favorable tax situation. The statements of Claimant and his coworkers make it clear that they certainly did not appreciate the distinction between the three ArmorGroup entities and reasonably believed they worked for a company they (and apparently almost everyone else) generally referred to as ArmorGroup.

Although Christopher Beese and Ian Dulake said they were sure that during the interview process potential employees would have been clearly informed that they were to be in the specific employ of AG Jersey, none of the workers corroborated that. In fact, the record does little to support Beese and Duke, since up to and following the accident, no one involved in the case, from directors to attorneys to employees, seemed to distinguish the three entities and regularly acted as if ArmorGroup was a single entity. It was not until litigation ensued in the courts of the United Kingdom that distinctions began to be drawn.

That context provides an appropriate starting point to assess Claimant's argument that AG Jersey and AG UK were in a lending/borrowing relationship. Based on the consistent statements of Claimant and his coworkers, it appears that other than issuing checks, AG Jersey did very little. The work being done, providing security work for Bechtel, was the contractual obligation of AG UK. Even though that obligation may have been subcontracted out to AG Jersey, and even though the supervisors may have also been nominal employees of and paid by AG Jersey, it appears that operational control

⁵¹ See EX-19 and EX-39. The statements of the counsel are so diametrically opposed on a matter so central that it is difficult to attribute the inconsistency to flawed recollection or misunderstanding.

was exercised by AG UK. For instance, even though the employee expense form may have included AG Jersey in the header, employees were instructed to submit the form to AG UK. AG UK (albeit by contract for AG Jersey) appears to have done the hiring and assigning.

In short, the employees were recruited by AG UK, interviewed by AG UK, told they were hired by AG UK, assigned by AG UK, and dealt with AG UK operational issues; all in furtherance of performing the security services AG UK had contracted to provide Bechtel. Other than being paid by an office in Jersey, they had no reason to believe they were anything other than employees of AG UK. Consequently, although the contractual documents may establish that they were *de jure* employees of AG Jersey, I find that the evidence establishes that under the Act, AG UK was a borrowing employer and was not a third party under Section 33(g).

On the other hand AG PLC, as a single discrete entity, clearly does not qualify as an employer under the borrowed servant analysis. Therefore, whether or not AG PLC was a third party depends exclusively on its holding company relationship with AG UK and AG Jersey. The critical question is whether because of that relationship they are essentially one legal entity. The answer to that question requires the application of United Kingdom law and was litigated by the parties in the courts of the United Kingdom.

In its ruling, the United Kingdom court specifically addressed the question of whether there was privity of contract between Claimant and the three AG entities. It found a contract existed between Claimant and AG Jersey, but not between Claimant and AG UK and AG PLC. Implicit in that finding is the legal conclusion that AG PLC is an independent legal entity from AG Jersey. If it were not, a contract between Claimant and AG Jersey would by definition also be a contract between it and AG PLC.

Since I found AG UK to be a borrowing employer and consequently not a third party under Section 33(g), if AG PLC were one with AG UK, it would not be a third party. The United Kingdom Court addressed but did not decide the issue of temporary employment. However, it did specifically hold that even had there been a contract between AG UK and Claimant, it would not have extended to AG PLC. As a result, AG PLC stands apart from both AG UK and AG Jersey and is a third party under the Act.

In summary, both AG Jersey and AG UK, even as separate and distinct legal entities were employers under the provisions of the Act and Claimant's settlement with them did not involve a third party. However, the same was not true of AG PLC. It would be an employer only if its relationship with either AG Jersey or AG UK was sufficient to make it one with them. That question was litigated and decided in a United Kingdom court, which ruled that AG PLC was distinct from both AG Jersey and AG UK and not liable in contract to Claimant. The same court, however, also ruled that AG PLC would remain as a defendant in tort and Claimant should be allowed to prove that it could have

foreseen a duty to him. It was that potential tort liability that presumably was the subject of the settlement into which Claimant entered with AG PLC, a settlement for which Claimant failed to obtain Carrier approval.

Unlike many other provisions of the Act, Section 33(g) has been strictly applied to the equitable detriment of claimants who suffered severe injuries and disabilities and otherwise may have had cognizable claims. It presents danger for unwary counselors who advise their clients to enter into settlements and unknowingly jeopardize their entitlement to a far greater amount under the Act. Then, when the Employer or Carrier (who may or may not have warned Claimant's counsel⁵²) raises the defense, counsel is forced to argue that the section does not apply and hope the Employer fails to carry its burden on the issue. In this case, counsel's argument failed and Employer carried its burden of proof.

The claim is dismissed.

ORDERED this 1st day of May, 2012 at Covington, Louisiana.

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PATRICK M. ROSENOW
Administrative Law Judge

⁵² See n. 51.