



BRB No. 20-0023

DIANE, WESLEY, KURT and RACHEL)
PITRE and KATIE GIBBONS)
(Survivors of STEWARD PITRE))

Claimants-Petitioners)

v.)

HUNTINGTON INGALLS,)
INCORPORATED (AVONDALE)
OPERATIONS))

Self-Insured)

Employer-Respondent)

NOT-PUBLISHED

DATE ISSUED: 05/08/2020

DECISION and ORDER

Appeal of the Order Granting Summary Decision and Dismissing Claim of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Lawrence J. Centola, III (Martzell Bickford & Centola, APC), New Orleans, Louisiana, for claimant.

Frank J. Towers and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Order Granting Summary Decision and Dismissing Claim (2016-LHC-00517) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of

fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Steward Pitre, the employee, died of lung cancer on July 15, 2016. The claimants, Pitre’s widow and children,¹ filed a negligence suit against employer and third parties in state court alleging his death was related to workplace asbestos exposure. The case was removed to federal court, and the court granted summary judgment to employer on the basis that claimants’ exclusive remedy against employer is under the Act. *See* 33 U.S.C. §905(a). Claimants filed a claim under the Act against employer on March 5, 2018. Meanwhile, claimants’ other tort claims proceeded and were ultimately settled.²

Employer filed discovery requests seeking information about the settlements. When claimants would not comply, employer filed a motion to compel production. Employer contended its liability under the Act is extinguished under Section 33(g), 33 U.S.C. §933(g), by claimants’ entering into third-party settlements without obtaining its prior written approval.³ *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS

¹ It is unclear from the record whether any of the children would be entitled to death benefits under the Act. *See* 33 U.S.C. §§902(14), (18), 909.

² In claimants’ interrogatory answers, they stated settlements were reached with Hopeman Brothers, CBS, Taylor Seidenbach, Foster Wheeler, and Occidental Chemical Corporation.

³ Section 33(g)(1), (2) provides:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer’s carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). . . .

(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

49(CRT) (1992). Claimants responded that, absent a court order, the agreements could not be provided without violating their confidentiality provisions. The administrative law judge issued an Order Granting Employer's Motion to Compel Discovery Responses. Thereafter, in view of claimants' continuing refusal to provide the settlement agreements, notwithstanding the administrative law judge's order, employer filed another motion to compel. Claimants' counsel informed the administrative law judge he did not intend to produce the agreements. Order to Show Cause and Canceling Hearing at 2.

The administrative law judge conducted a conference call during which claimants' counsel reiterated he would not produce the agreements, even if the administrative law judge issued a "confidentiality order." *Id.* The administrative law judge allowed the parties to file briefs addressing whether claimants' refusal to provide the third-party settlement agreements should be viewed as an admission of employer's assertion that the claim is barred under Section 33(g). *Id.* Claimants responded that Section 33(g) does not apply because employer had notice of the settlements and there is no evidence the settlements were for less than claimants' entitlement to compensation under the Act because the compensability of the claim had not yet been ascertained. They also asserted there is no evidence the third-party claims fall within the provisions of Section 33(a) governing claims for a death for which compensation is payable under the Act. Employer responded that if claimants did not turn over the documents, an adverse inference should be drawn against them and the Section 33(g) bar invoked.

In his Order Granting Summary Decision and Dismissing Claim (Order), the administrative law judge rejected as wholly without merit claimants' contentions they should not have to provide the settlement agreements because employer did not accept the informal conference recommendation⁴ and it was aware of the negotiations to settle the third-party suits. Order at 4. He also rejected claimants' argument they need not provide discovery documents related to the third-party settlements because there is insufficient evidence of their amount and the value of the death benefits claim. The administrative law judge stated this is precisely why employer seeks discovery of the agreements as it must determine if the settlements are for an amount less than the compensation to which the persons entitled to compensation (PETC) would be entitled under the Act. Moreover, he found claimants are obligated to disclose the amount of compensation sought pursuant to

terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter. 33 U.S.C. §933(g)(1),(2).

⁴ Claimants' attorney stated the district director recommended employer pay \$115 per week in widow's benefits. Sept. 5, 2019 Response to Show Cause Order at 2.

his discovery orders. *Id.* at 5. The administrative law judge concluded claimants did not show good cause for failing to provide employer with the third-party settlement agreements and drew an adverse inference that the information would establish employer's defense under Section 33(g). *Id.* Thus, he granted employer's motion for summary decision and dismissed the claim.

On appeal, the claimants challenge the dismissal of their claim. Employer responds, urging affirmance.

An administrative law judge may grant summary decision when no genuine issues of material fact exist and a party is entitled to a decision as a matter of law. 29 C.F.R. §18.72; *see, e.g., Cathey v. Serv. Employees Int'l, Inc.*, 46 BRBS 69 (2012), *clarified on recon.*, 47 BRBS 9 (2013). Claimants aver the administrative law judge erred by granting summary decision because there is no evidence Section 33(g) applies. Specifically, there is no proof their settled third-party tort claims are related to their claim under the Act. Claimants contend, for example, their settled tort claims cover pain and suffering, whereas death benefits are sought under the Act.

Section 33(g) applies to settlements/judgments in suits a PETC files which fall within Section 33(a).⁵ Thus, in order for Section 33 to apply, the third-party recoveries must be for the same disability or death that is compensable under the Act. *See, e.g., Todd Shipyards Corp. v. Director, OWCP [Chavez]*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998); *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1994); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Contrary to claimants' contention, it is not material that remedies available in a tort suit, such as pain and suffering, are not remedies the Act provides. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). If the third-party suits and

⁵ Section 33(a) states:

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

33 U.S.C. §933(a).

the compensation claim are both based on the deceased employee's death due to asbestos exposure, Section 33 applies if its conditions are met.⁶

To establish a Section 33(g) defense, employer must show a PETC's settlement is for the same disability or death for which it may be liable for benefits under the Act and the aggregate gross recoveries are less than that PETC's entitlement under the Act. *See, e.g., Goff v. Huntington Ingalls Industries, Inc.*, 51 BRBS 35 (2017). Although it is employer's burden to establish the elements of its defense, *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999), the administrative law judge found claimants' refusal to comply with the order to disclose the settlement agreements prevents employer from accessing the information necessary for its defense. He therefore drew an adverse inference against claimants and found employer established the elements of a Section 33(g) defense.

We affirm the dismissal of the claim based on the administrative law judge's drawing an adverse inference against claimants due to their repeated refusal to provide the settlements to employer during discovery. In the conference call, claimants' attorney rejected the administrative law judge's offer of a confidentiality order notwithstanding the administrative law judge's indication that claimants' continued refusal to provide employer with the agreements could result in an adverse inference.⁷ Order to Show Cause and Canceling Hearing at 2. It is well-established that when a party has relevant evidence within its control which it fails to produce, the factfinder may find the failure gives rise to an inference that the evidence is unfavorable to it. *See, e.g., Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). In addition, the Rules of Practice and Procedure Before the Office of Administrative Law Judges, which the administrative law judge cited, states:

(b) Failure to comply with a judge's order -

⁶ An employer is entitled to a credit under Section 33(f), 33 U.S.C. §933(f), for the net amount of the PETC's third-party recovery for the same disability or death, including, for example, damages for pain and suffering and punitive damages. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 29 BRBS 113(CRT) (5th Cir. 1995), *aff'd*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

⁷ After refusing the administrative law judge's offer of a confidentiality order, there is no indication in the record that claimants sought any alternative protective measures. *See* 29 C.F.R. §18.52(a). We, therefore, deny the claimants' request that we remand the case for the administrative law judge to conduct *in camera* review of the settlement agreements.

(1) ***For not obeying a discovery order.*** If a party . . . fails to obey an order to provide or permit discovery, . . . the judge may issue further just orders. They may include the following:

(i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

29 C.F.R. §18.57(b)(1)(i). Moreover, claimants defied an order to compel discovery of the agreements and such “willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference.” *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R. B.*, 459 F.2d 1329, 1338 (D.C. Cir. 1972). Even though the settlements were confidential, the administrative law judge rationally concluded they are relevant and permissibly found claimants did not show good cause for ignoring his order to produce them. He thus did not abuse his discretion in finding the settlements established employer’s defense under Section 33(g) based on the adverse inference. Order at 5. Claimants have not established error in this conclusion.

Accordingly, we affirm the administrative law judge’s Order Granting Summary Decision and Dismissing Claim.

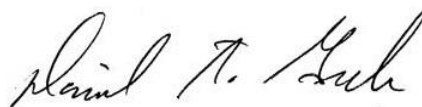
SO ORDERED.



GREG J. BUZZARD
Administrative Appeals Judge



JONATHAN ROLFE
Administrative Appeals Judge



DANIEL T. GRESH
Administrative Appeals Judge