No. _____

In the Supreme Court of the United States

_____

CLARENCE J. SIMON, JR.,
Petitioner,

VERSUS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, LONGNECKER PROPERTIES, INCORPORATED, AND SEABRIGHT INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

This case poses important questions regarding Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA).

Question I. Is a longshore worker permanently disqualified from receiving any benefits from his employer because his counsel, who lacked actual or apparent authority to finalize a settlement on the worker's behalf, reached a tentative third-party settlement?

Question II. If 33 U.S.C. § 933(g) was written to allow employers to offset liability by the amount of a third-party settlement, may all compensation be denied to an injured worker who did not accept the third-party offer, did not sign a release, and did not receive any funds?

Question III. Was the Jones Act, General Maritime Law, 905(b), or other legal regime that may have been applicable in the district court, the third party case, sufficiently independent of the more specific requirement of § 933(g) so that a finding of a settlement by the district court was neither collateral estoppel nor binding on the administrative judge or the BRB and the doctrine was erroneously applied?

RULE 14.1 STATEMENT - LIST OF PARTIES

Petitioner (claimant-petitioner below) is Clarence J. Simon, Jr.

Respondents (defendants-respondents below) are Longnecker Properties, Incorporated and Seabright Insurance Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clarence J. Simon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Fifth Circuit.

OPINIONS BELOW

The judgment of the court of appeal, *Simon v. Dir., Office of Workers' Comp. Programs*, United States Dep't of Labor, 816 F. App'x 1006, (Mem)–1007 (5th Cir. 2020) was entered on August 20, 2020. The timely rehearing application was denied on October 19, 2019. The adverse decision of the Benefits Review Board, which summarizes the procedural history of the case in the district court, in a prior appeal to the Fifth Circuit, and before the Administrative Law Judge, may be found at Clarence J. Simon, Claimant-Petitioner, BRB No. 17-0579, 2018 WL 6017792, at *1–7 (DOL Ben. Rev. Bd. Oct. 11, 2018)

JURISDICTION

The Fifth Circuit entered its decision on August 20, 2020 and denied rehearing on October 19, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

33 U.S.C. § 933(g) reads as follows:

(g) Compromise obtained by person entitled to compensation

> (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). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(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.

(3) Any payments by the special fund established under section 944 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a) of this section. Notwithstanding any other provision of law, such lien shall be

> enforceable against such proceeds, regardless of whether the Secretary on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.
>
> (4) Any payments by a trust fund described in section 917 of this title shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a) of this section. Such lien shall have priority over a lien under paragraph (3) of this subsection.

STATEMENT

Petitioner Simon was an employee subject to protections of the LHWCA. Longnecker Properties Incorporated was a LHWCA employer. Petitioner Simon did not authorize undersigned counsel to settle his civil lawsuit against third party Tri-Drill but only to negotiate. The tentative settlement was rescinded on October 16, 2015, when the employer appeared at the mediation and refused to consent to any settlement, prior to signature or payment. As of today, Petitioner Simon has not been compensated for his injuries or restored to physical health so that he can once again be gainfully employed to support his family.

Question I. Is a longshore worker permanently disqualified from receiving any benefits from his employer because his counsel, who lacked actual or apparent authority to finalize a settlement on the worker's behalf, reached a tentative third-party settlement?

Question II. If 33 U.S.C. § 933(g) was written to allow employers to offset liability by the amount of a

third-party settlement, may all compensation be denied to an injured worker who did not accept the third-party offer, did not sign a release, and did not receive any funds?

Question III. Was the Jones Act, General Maritime Law, 905(b), or other legal regime that may have been applicable in the district court, the third party case, sufficiently independent of the more specific requirement of § 933(g) so that a finding of a settlement by the district court was neither collateral estoppel nor binding on the administrative judge or the BRB and the doctrine was erroneously applied?

THE FACTS STATED BY THE FIFTH CIRCUIT

The Fifth Circuit rendered an abbreviated opinion:

> Clarence Simon appeals from an adverse decision of the Benefits Review Board, which affirmed an administrative law judge ruling that Simon is barred from recovering benefits because he previously settled his claim with a third party without obtaining the employer's (Longnecker's) prior written approval. See 33 U.S.C. § 933(g). The administrative law judge held the settlement existed and was valid based on collateral estoppel, and the estoppel derived from an earlier federal court case. *See Simon v. Longnecker Properties, Inc.*, 671 Fed App'x. 277 (Mem.) (5th Cir. Dec. 7, 2016). Our review considers whether the Benefits Review Board "correctly concluded that the [ALJ's] order was supported by substantial evidence on the record as a

> whole and is in accordance with the law." *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 991 F.2d 163, 165 (5th Cir. 1993). We have carefully reviewed the record in this case, together with the parties' briefs. Having done so, we find no error of fact or law.

A full discussion of the underlying fact and procedural history is contained in the BRB decision, which is quoted extensively in the "STATEMENT of the CASE," *infra.*

Undersigned counsel, who understands 33 U.S.C. § 933(g),[1] suffered a serious automobile accident with traumatic brain injury on July 6, 2011, had recently undergone surgery, and was handicapped by a fistula repair of his right ear on August 13, 2015. This led him to mistakenly **consider** the Tri-Drill settlement which both he and Tri-Drill rejected when they eventually realized the possible consequences of § 33(g) and the employer's unwillingness to consent.

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[1] See *Venable v. Louisiana Workers' Compensation Corp.*, 740 F.3d 937 (2013).

THE CIRCUIT CONFLICTS

In *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 561-62 (9th Cir. 1990), under similar factual circumstances, the court stated:

> The Supreme Court has observed that the LHWCA is a humanitarian act and "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 92, 98 L.Ed. 5 (1953); *accord, Director, O.W.C.P. v. Perini North River Assocs.,* 459 U.S. 297, 315–16, 103 S.Ct. 634, 646, 74 L.Ed.2d 465 (1983).
>
> We therefore hold that a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section 33(g)(2).

In *Hale v. BAE Sys. San Francisco Ship Repair, Inc.*, 801 F. App'x 600, 601–02 (9th Cir. 2020), the employer, as here, argued that the widows of longshore claimants forfeited their benefits under §933(g). This was rejected by the court, which concluded that "the forfeiture provision was not triggered, . . ." and rejected the claim that anyone but the claimant or his legal representative could enter into "a settlement with a third person" such that the forfeiture provision was triggered. 33 U.S.C. § 933(g)(1).

In *Mallott & Peterson v. Dir., OWCP [Stadtmiller]*, 98 F.3d 1170, 1172 (9th Cir. 1996),

overruled on other grounds by Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820 (9th Cir. 2012) (en banc) (where, as here, only the attorney, who was not "a representative" agreed to a settlement,") the court concluded:

> In short: neither the "person entitled to compensation" nor any relevant "representative" entered into a third-party settlement in either of these cases. *See* 33 U.S.C. § 933(g)(1). Consequently, § 3(g)'s forfeiture provision was never triggered.

O'Neil v. Bunge Corp., 365 F.3d 820, 38 BRBS 7 (CRT) (9th Cir. 2004) supports this conclusion: if the claimant does not sign, there is no settlement. The court could not have stated it more clearly: "[b]ecause Raymond O'Neil did not sign the settlement application here, there is no enforceable settlement between O'Neil and Bunge." *O'Neil*, 365 F.3d at 827.

THE CONFLICT WITH THIS COURT'S PRECEDENT

This case is one in which the employer's controversial participation in the third-party settlement may come within the contention in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992) that the employer's participation in the Transco [third-party] settlement brought this case outside the terms of § 33(g)(1)." This case certainly exemplifies:

> 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. It also provides a

> powerful tool to employers who resist liability under the Act. Counsel for respondents stated during oral argument that he had used the Transco settlement as a means of avoiding Nicklos' liability under the LHWCA.

STATEMENT OF THE CASE

The following is taken from the opinion of the Board of Benefits Review:

> On November 1, 2011, while working for employer as a rigger, claimant slipped and fell from a drill pipe and twisted his left ankle. Claimant alleges this work injury resulted in permanent total disability.1 On May 7, 2012, claimant filed a suit in federal district court against employer under the Jones Act, 46 U.S.C. §688(a), seeking damages for his injuries. Claimant subsequently amended his complaint six times to include additional third-party defendants, including United Vision Logistics, LLC (UVL), and Tri-Drill, LLC (Tri-Drill), and employer filed cross-claims against UVL and Tri-Drill. The district court found that claimant was not a Jones Act seaman and dismissed his claims under the Jones Act while reserving his claims under general maritime law. *Simon v. Longnecker Properties, Inc.,* No. 12-1178, 2014 WL 2579980 (W.D.La. June 9, 2014); *see also* W.D. La. Docket No. 6:12-cv-1178, Document 235. Thus, despite the dismissal of claimant's Jones Act claims,

the action proceeded in district court as a civil proceeding, and employer remained a party to the case. Claimant subsequently pursued a claim under the Act. *See* 33 U.S.C. §913(d).

On August 18, 2015, several third-party defendants, including UVL and Tri-Drill, filed motions for summary judgment in district court. On September 4, 2015, claimant and UVL filed a "Motion to Consent Judgment Granting Motion for Summary Judgment Filed by UV[L]." The district court issued an order granting the motion and dismissing UVL from the case on September 17, 2015. On or about October 5, 2015, while the remaining motions for summary judgment were pending and it was reviewing claimant's response to the motions, employer first learned that claimant settled his claims against UVL and Tri-Drill without its prior written approval.[2] Employer contacted counsel for UVL and Tri-Drill on the same date to inquire about any settlements, and employer learned that claimant had agreed to a consent judgment dismissing claimant's claims against UVL in exchange for $2,500. With respect to Tri-Drill, employer learned that claimant agreed not to oppose Tri-Drill's motion for summary judgment in exchange for $8,000. The next day, employer subpoenaed the records of claimant, Tri-Drill, and UVL,

requesting all documents regarding the settlements.[3]

On October 6, 2015, employer moved to dismiss claimant's Longshore claim as barred by Section 33(g), 33 U.S.C. §933(g). On October 20, 2015, the administrative law judge denied employer's motion to dismiss, finding there was a genuine factual dispute regarding whether any fully-executed third-party settlements existed. CX 3 at 5; Order at 5.

On October 20, 2015, employer received Tri-Drill's response to its subpoena request in the district court action. On October 23, 2015, based on the email records contained in the subpoena responses, employer filed with the district court a motion to confirm settlement and to dismiss, as moot, Tri-Drill's motion for summary judgment. Specifically, employer argued that, under Louisiana law, the email records between claimant's counsel and counsel for Tri-Drill demonstrate a meeting of the minds with regard to all settlement terms and, therefore, confect a valid settlement.[4] On December 28, 2015, finding that the correspondence between Tri-Drill and claimant's counsel constituted a settlement, the district court granted employer's motion to confirm settlement and dismissed Tri-Drill's motion for summary judgment with prejudice. CX 4 at 4; *Simon v.*

Longnecker Properties, No. 12-1178, 2015 WL 9482899 at *2 (W.D. La. Dec. 28, 2015).[5] In so doing, the court disposed of claimant's claim against Tri-Drill. Claimant appealed the court's order to the United States Court of Appeals for the Fifth Circuit.

On September 22, 2016, with regard to claimant's claim under the Act, employer again moved to dismiss claimant's claim as barred under Section 33(g). Claimant opposed the motion, asserting there was no enforceable settlement agreement with any third parties. At the October 2016 hearing, the parties consented to the administrative law judge's postponing a ruling on employer's motion until after the Fifth Circuit ruled on claimant's appeal of the district court's order.

On December 7, 2016, the Fifth Circuit affirmed the district court's December 2015 order, finding "no reversible error of law or fact." *Simon v. Longnecker Properties, Inc.,* 671 F. App'x 277 (5th Cir. 2016). On December 20, claimant petitioned the Fifth Circuit for a panel rehearing regarding whether its December 7 summary affirmance affects claimant's claim under the Act. On January 9, 2017, the Fifth Circuit denied claimant's petition for rehearing. CX 8; *Simon v. Longnecker Properties, Inc.,* No. 15-31113 (5th Cir. Jan. 9, 2017).

On April 10, 2017, finding that

claimant had exhausted his avenues for appeal in his tort claim, the administrative law judge considered the merits of employer's motion to dismiss claimant's Longshore claim pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1). The administrative law judge found that claimant consented to UVL's motion for summary judgment in exchange for $2,500, and this did not constitute a "settlement" under Section 33(g)(1), as the money exchanged was for costs and was not given in consideration for a settlement. However, the administrative law judge found claimant was collaterally estopped from asserting he did not enter into a settlement agreement with Tri-Drill because all of the prerequisites for application of collateral estoppel were satisfied: 1) the issue presented regarding whether claimant and Tri-Drill executed a settlement agreement is identical to the issue in the third-party suit in state court; 2) the issue was actually litigated in the prior litigation; 3) the determination of the issue was a critical and necessary part of the district court's judgment; and, 4) the legal standards used to evaluate the issue are the same under the Act as they were in the district court proceedings. Order at 7, 9. Thus, the administrative law judge found no genuine issue of material fact existed as to whether claimant and Tri-Drill

entered into a settlement agreement. Further, the administrative law judge found the $8,000 settlement is less than claimant's lifetime entitlement to compensation under the Act.6 Therefore, as it was undisputed that Tri-Drill is a third party and claimant did not obtain employer/carrier's written approval prior to settling with Tri-Drill, the administrative law judge found claimant's claim under the Act is barred by Section 33(g)(1), and he granted employer's motion to dismiss claimant's claim. Order at 15. The administrative law judge denied claimant's motion for reconsideration, specifically rejecting his assertions that collateral estoppel is inapplicable and that employer inappropriately engaged in forum shopping. Decision and Order on Recon. at 4-6.

On appeal, claimant contends the administrative law judge erred in applying collateral estoppel to the district court's determination that a valid settlement exists between him and Tri-Drill and that his Longshore claim is barred by Section 33(g)(1). Claimant contends that none of the criteria for application of collateral estoppel have been satisfied in this case, and that he did not enter into settlement with Tri-Drill. Employer responds, urging affirmance.[7] Pursuant to the Board's Order dated May 17, 2018, the Director,

> Office of Workers' Compensation Programs (the Director), filed a brief on the matter,[8] stating that there is no basis to conclude that Section 33(g) preempts state law when determining whether a settlement agreement exists. The Director further asserts there is no obvious error in the administrative law judge's application of collateral estoppel in this case.

The BRB's opinion fails to state that during the October 18, 2015 mediation at which the undersigned proposed to broach the proposed settlement to his client and ask for his consent, counsel for the Employer/Carrier **immediately** announced that the Employer/Carrier did not consent to this or any other settlement. As a result, the tentative settlement was rescinded by mutual agreement and consequently never came to fruition. Claimant/Petitioner Simon, who had not yet even been asked to give consent, testified that he had no knowledge of the said proposed settlement and had not consented [APP-4, p.5].

REASONS FOR GRANTING THE PETITION

A. Case Law

In the cited decisions, *Bethlehem Steel Corp.*, 920 F.2d at 561-62, *Hale*, 801 F. App'x at 601–02, *Mallott & Peterson,* 98 F.3d at 1172, and *O'Neil,* 365 F.3d 820, the claimant did not sign so there was no settlement and no forfeiture of benefits.

B. The Most Authoritative Commentators Agree

As analyzed by Force and Norris, in 1 The Law of Maritime Personal Injuries § 7:8 (5th ed.) Settlement for less than the amount of compensation due.

> If, in fact, there has been no settlement, the rule that terminates or disqualifies a claimant from receiving benefits does not come into play. The employer petitioned to set aside the decision of the Benefits Review Board that held that the employer and its insurer owed death benefits to the claimant, the widow of the deceased employee. It was alleged that a settlement had made of the claim against a third party without the approval of the employer and that the settlement was ratified by claimant, who was the "legal representative of the deceased." Rather it appeared that counsel for the claimant has worked out a settlement. An Administrative Law Judge found that claimant had not ratified the settlement proposed by the lawyer. This decision was approved by the Benefits Review Board. Held, the petition was denied. The Director's interpretation of "representative" in § 933(g) to mean the "legal representative of the deceased" and to exclude legal counsel acting within the attorney-client relationship is reasonable … . In sum, the Board properly applied the substantial evidence standard when it affirmed the ALJ's finding that claimant rejected rather than ratified any settlement agreement."[5]

As stated by Engerrand &, A Tedious Balance: Third-Party Claims Under the Longshore and Harbor

Workers' Compensation Act, 10 Loy. Mar. L.J. 1, 42–43 (2011):

> An injured employee's express repudiation of the settlement after learning of it and an employee's refusal to accept settlement monies have been actions deemed to represent an injured employee's denial of a third-party settlement agreement to prevent the application of Section 933(g).[208]
>
> [208] *Stadtmiller v. Mallott & Peterson*, 28 Ben. Rev. Bd. Serv. (MB) 304 (1994), *aff'd sub nom. Mallott & Peterson v. Dir., OWCP*, 98 F.3d 1170 (9th Cir. 1996), cert. denied, 520 U.S. 1239 (1997).

CONCLUSION

Considering the conflict between the courts of appeal and the doctrinal consensus that failure to obtain the claimant's signature and lack of receipt of funds is fatal to the application of 33 U.S.C. § 933(g), this Court should grant review to provide guidance on the proper standards for the application of 33 U.S.C. § 933(g) when the settlement, which may or may not have been binding under law applicable to the third party actions, was not binding under this totally different statutory regime.

Inasmuch as the Employer/Carrier was the only entity who sought to confirm the settlement and inasmuch as counsel for Tri-Drill did not file a motion to confirm the settlement but rather allowed it to be rescinded, the Employer/Carrier *ipso facto* consented within the meaning of 33 U.S.C. § 933(g) to the settlement, making forfeiture of benefits inappropriate, a windfall to the Employer/Carrier, and a tragedy for Mr. Simon and his family.

The petition should be granted.

Respectfully submitted,
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Counsel for Petitioner,
Clarence J. Simon

January 19, 2021

APPENDIX A. OPINION OF THE UNITED STATES COURT OF APPEAL FIFTH CIRCUIT DATED AUGUST 18, 2020.

Clarence J. SIMON, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; Longnecker Properties, Incorporated; Seabright Insurance Company, Respondents.

No. 19-60215

FILED August 20, 2020

Petition for Review of an Order of the Benefits Review Board, BRB No. 17-0579

Before Jolly, Jones, and Willett, Circuit Judges.

Per Curiam:*

Clarence Simon appeals from an adverse decision of the Benefits Review Board, which affirmed an administrative law judge ruling that Simon is barred from recovering benefits because he previously settled his claim with a third party without obtaining the employer's (Longnecker's) prior written approval. See 33 U.S.C. § 933(g). The administrative law judge held the settlement existed and was valid based on collateral estoppel, and the estoppel derived from an earlier federal court case. *See Simon v. Longnecker Properties, Inc.*, 671 Fed App'x. 277 (Mem.) (5th Cir. Dec. 7, 2016). Our review considers whether the Benefits Review Board "correctly concluded that the [ALJ's] order was supported by substantial evidence on the record as a whole and is in accordance with the law." *Ingalls Shipbuilding, Inc. v. Director, OWCP,* 991 F.2d 163, 165 (5th Cir. 1993). We have carefully reviewed the record in this case, together with the

parties' briefs. Having done so, we find no error of fact or law. **AFFIRMED**.

APPENDIX B.
Denial of Rehearing, October, 16, 2020

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United States Court of Appeals for the Fifth Circuit

No. 19-60215

Clarence J. Simon,
Petitioner,
versus
Director, Office of Workers' Compensation Programs, United States Department of Labor; Longnecker Properties, Incorporated; Seabright Insurance Company,
Respondents.

Petition for Review of an Order of the Benefits Review Board, Agency No. 17-0579

ON PETITION FOR REHEARING

Before Jolly, Jones, and Willett, *Circuit Judges*.

Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

/s/
EDITH H. JONES
United States Circuit Judge

APPENDIX C. BRB DECISION.

Clarence J. Simon, Claimant-Petitioner, No. BRB No. 17-0579, 2018 WL 6017792, at *1–7 (DOL Ben. Rev. Bd. Oct. 11, 2018)

Benefits Review Board

United States Department of Labor

CLARENCE J. SIMON, CLAIMANT-PETITIONER

v.

LONGNECKER PROPERTIES, INCORPORATED

AND

SEABRIGHT INSURANCE COMPANY, EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

BRB No. 17-0579

October 11, 2018

DECISION and ORDER

Appeal of the Order Granting Employer/Carrier's Motion to Dismiss and the Decision and Order Denying Claimant's Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Granting Employer/Carrier's Motion to Dismiss and the Decision and Order Denying Claimant's Motion for Reconsideration (2015-LHC-0110) of Administrative Law Judge Clement J. Kennington rendered on a

claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 1, 2011, while working for employer as a rigger, claimant slipped and fell from a drill pipe and twisted his left ankle. Claimant alleges this work injury resulted in permanent total disability.1 On May 7, 2012, claimant filed a suit in federal district court against employer under the Jones Act, 46 U.S.C. §688(a), seeking damages for his injuries. Claimant subsequently amended his complaint six times to include additional third-party defendants, including United Vision Logistics, LLC (UVL), and Tri-Drill, LLC (Tri-Drill), and employer filed cross-claims against UVL and Tri-Drill. The district court found that claimant was not a Jones Act seaman and dismissed his claims under the Jones Act while reserving his claims under general maritime law. *Simon v. Longnecker Properties, Inc.,* No. 12-1178, 2014 WL 2579980 (W.D.La. June 9, 2014); *see also* W.D. La. Docket No. 6:12-cv-1178, Document 235. Thus, despite the dismissal of claimant's Jones Act claims, the action proceeded in district court as a civil proceeding, and employer remained a party to the case. Claimant subsequently pursued a claim under the Act. *See* 33 U.S.C. §913(d).

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September 4, 2015, claimant and UVL filed a "Motion to Consent Judgment Granting Motion for Summary Judgment Filed by UV[L]." The district court issued an order granting the motion and dismissing UVL from the case on September 17, 2015. On or about October 5, 2015, while the remaining motions for summary judgment were pending and it was reviewing claimant's response to the motions, employer first learned that claimant settled his claims against UVL and Tri-Drill without its prior written approval.2 Employer contacted counsel for UVL and Tri-Drill on the same date to inquire about any settlements, and employer learned that claimant had agreed to a consent judgment dismissing claimant's claims against UVL in exchange for $2,500. With respect to Tri-Drill, employer learned that claimant agreed not to oppose Tri-Drill's motion for summary judgment in exchange for $8,000. The next day, employer subpoenaed the records of claimant, Tri-Drill, and UVL, requesting all documents regarding the settlements.3

On October 6, 2015, employer moved to dismiss claimant's Longshore claim as barred by Section 33(g), 33 U.S.C. §933(g). On October 20, 2015, the administrative law judge denied employer's motion to dismiss, finding there was a genuine factual dispute regarding whether any fully-executed third-party settlements existed. CX 3 at 5; Order at 5.

On October 20, 2015, employer received Tri-Drill's response to its subpoena request in the district court action. On October 23, 2015, based on the email records contained in the subpoena responses, employer filed with the district court a motion to confirm settlement and to dismiss, as moot, Tri-Drill's motion for summary judgment. Specifically, employer

argued that, under Louisiana law, the email records between claimant's counsel and counsel for Tri-Drill demonstrate a meeting of the minds with regard to all settlement terms and, therefore, confect a valid settlement.4 On December 28, 2015, finding that the correspondence between Tri-Drill and claimant's counsel constituted a settlement, the district court granted employer's motion to confirm settlement and dismissed Tri-Drill's motion for summary judgment with prejudice. CX 4 at 4; *Simon v. Longnecker Properties*, No. 12-1178, 2015 WL 9482899 at *2 (W.D. La. Dec. 28, 2015).5 In so doing, the court disposed of claimant's claim against Tri-Drill. Claimant appealed the court's order to the United States Court of Appeals for the Fifth Circuit.

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On December 7, 2016, the Fifth Circuit affirmed the district court's December 2015 order, finding "no reversible error of law or fact." *Simon v. Longnecker Properties, Inc.,* 671 F. App'x 277 (5th Cir. 2016). On December 20, claimant petitioned the Fifth Circuit for a panel rehearing regarding whether its December 7 summary affirmance affects claimant's claim under the Act. On January 9, 2017, the Fifth Circuit denied claimant's petition for rehearing. CX 8;

Simon v. Longnecker Properties, Inc., No. 15-31113 (5th Cir. Jan. 9, 2017).

On April 10, 2017, finding that claimant had exhausted his avenues for appeal in his tort claim, the administrative law judge considered the merits of employer's motion to dismiss claimant's Longshore claim pursuant to Section 33(g)(1), 33 U.S.C. §933(g)(1). The administrative law judge found that claimant consented to UVL's motion for summary judgment in exchange for $2,500, and this did not constitute a "settlement" under Section 33(g)(1), as the money exchanged was for costs and was not given in consideration for a settlement. However, the administrative law judge found claimant was collaterally estopped from asserting he did not enter into a settlement agreement with Tri-Drill because all of the prerequisites for application of collateral estoppel were satisfied: 1) the issue presented regarding whether claimant and Tri-Drill executed a settlement agreement is identical to the issue in the third-party suit in state court; 2) the issue was actually litigated in the prior litigation; 3) the determination of the issue was a critical and necessary part of the district court's judgment; and, 4) the legal standards used to evaluate the issue are the same under the Act as they were in the district court proceedings. Order at 7, 9. Thus, the administrative law judge found no genuine issue of material fact existed as to whether claimant and Tri-Drill entered into a settlement agreement. Further, the administrative law judge found the $8,000 settlement is less than claimant's lifetime entitlement to compensation under the Act.6 Therefore, as it was undisputed that Tri-Drill is a third party and claimant did not obtain employer/carrier's written

approval prior to settling with Tri-Drill, the administrative law judge found claimant's claim under the Act is barred by Section 33(g)(1), and he granted employer's motion to dismiss claimant's claim. Order at 15. The administrative law judge denied claimant's motion for reconsideration, specifically rejecting his assertions that collateral estoppel is inapplicable and that employer inappropriately engaged in forum shopping. Decision and Order on Recon. at 4-6.

On appeal, claimant contends the administrative law judge erred in applying collateral estoppel to the district court's determination that a valid settlement exists between him and Tri-Drill and that his Longshore claim is barred by Section 33(g)(1). Claimant contends that none of the criteria for application of collateral estoppel have been satisfied in this case, and that he did not enter into settlement with Tri-Drill. Employer responds, urging affirmance.7 Pursuant to the Board's Order dated May 17, 2018, the Director, Office of Workers' Compensation Programs (the Director), filed a brief on the matter,8 stating that there is no basis to conclude that Section 33(g) preempts state law when determining whether a settlement agreement exists. The Director further asserts there is no obvious error in the administrative law judge's application of collateral estoppel in this case.

Section 33(g) is intended to ensure that an employer's rights are protected in a third-party settlement and to prevent the claimant from unilaterally bargaining away funds to which the employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *Parfait v. Director, OWCP*, ___ F.3d ___, No. 16-60662, 2018 WL 4326520 (5th Cir. Sept.

11, 2018); *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). Section 33(g)(1) requires that a person entitled to compensation obtain prior written consent from his employer and its carrier where he "enters into a settlement" with a third party for an amount less than the compensation to which he would be entitled under the Act.9 *See Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). Absent this approval, the employer is not liable for disability or medical benefits.10 *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002). Claimant does not challenge the administrative law judge's findings that: he is "a person entitled to compensation"; Tri-Drill is a third-party defendant; claimant would be entitled to more than $8,000 under the Act; and employer did not give prior written approval of a settlement between claimant and Tri-Drill.11 As the district court found that a settlement was entered into between claimant and Tri-Drill, the question presented by this case is whether the administrative law judge properly applied collateral estoppel to resolve this issue.

Collateral estoppel is an equitable doctrine under which a court gives preclusive effect to findings of fact or law made in previous court proceedings. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v.*

United States, 440 U.S. 147, 154 (1979); *see also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 12 BRBS 828 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). Application of collateral estoppel is discretionary and may be found to preclude relitigation of a particular factual issue when: 1) the issue to be addressed is identical to one previously litigated; 2) the issue was fully litigated/actually determined in the prior proceeding; 3) the issue was a necessary part of the prior judgment; and 4) the prior judgment is final and valid. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992), citing *Terrell v. DeConna*, 877 F.2d 1267 (5th Cir. 1989); *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000); *see generally Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313 (1971); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322 (1955). The point of collateral estoppel is that the first determination is binding not because it is right but because it is first and was reached after a full and fair opportunity between the parties to litigate the issue. *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 22, 31 BRBS 109, 112(CRT) (1st Cir. 1997). Collateral estoppel effect may be denied where differences in legal standards between the two forums preclude such full and fair opportunity. *Acord*, 125 F.3d at 21, 31 BRBS at 111(CRT); *Plourde*, 34 BRBS 45; *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997). Relitigation of an issue is not precluded by the doctrine of collateral estoppel where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the

first. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Jenkins],* 583 F.2d 1273, 1278, 8 BRBS 723, 732 (4th Cir. 1978), *cert. denied* 440 U.S. 915 (1979); *see also Plourde*, 34 BRBS 45.

We reject claimant's assertion that the administrative law judge erred in applying collateral estoppel in this case as all criteria have been satisfied. Contrary to claimant's assertion, and with respect to the first criterion, the issue before the district court was whether claimant and Tri-Drill executed a valid settlement such that Tri-Drill's motion for summary judgment was moot.12 Therefore, as the issue raised in the district court proceeding is identical to that raised in the administrative proceeding, we affirm that the first prerequisite for application of collateral estoppel is satisfied. *See Benn*, 976 F.2d 934, 26 BRBS 107(CRT).

With respect to the second prerequisite, claimant asserts that the existence of a third-party settlement was not "actually litigated" because the district court summarily granted employer's motion without discussing claimant or Tri-Drill's opposing arguments. Cl. Br. at 17. We disagree. Under Louisiana law, issues "actually litigated" include those matters actually pleaded and decided in a court of law. *Sewell v. Argonaut Southwest Ins. Co.,* 362 So.2d 758, 760 (La. 1978). "It is evident from a decree which expressly grants or rejects a thing demanded that the matter has been adjudged." *Id.* Issues presented by the pleadings, and on which evidence has been offered, are considered to be disposed of by a final judgment in the case. *R. G. Claitor's Realty v. Juban*, 391 So.2d 394, 398 (La. 1980); *see also J.R.A. Inc. v. Essex Ins. Co.*, 72 So.3d 862 (La. Ct. App. 2011). As the district court granted employer's "motion to

confirm settlement," stating there is "clear evidence of settlement between Tri-Drill and [claimant] filed into the record by [employer]," we reject claimant's assertion that the existence of a settlement with Tri-Drill was not litigated in district court. CX 5 at 4; *see R. G. Claitor's Realty,* 391 So.2d at 398; *Sewell,* 362 So.2d at 760. As this issue was fully litigated and determined in the prior proceedings, the second prerequisite for application of collateral estoppel is satisfied. *See Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (9th Cir. 1995); *Esposito*, 36 BRBS 10.13

With regard to the third prerequisite, we reject claimant's assertion that the existence of a valid a settlement was non-critical to the district court's judgment in the matter because it did not bar his claims against all defendants. Cl. Br. at 20-21. Claimant's focus on his claims against other defendants is misplaced as the judgment at issue here concerned his claim against Tri-Drill. As the district court's finding of a valid settlement was a necessary part of its granting employer's motion to confirm settlement, which disposed of claimant's claim against Tri-Drill, the administrative law judge properly found the issue was critical to the judgment. *See Benn*, 976 F.2d 934, 26 BRBS 107(CRT); *see also Cia Anon Venezolana De Navegacion v. Harris,* 374 F.2d 33, 35 (5th Cir. 1967); *Theatre Time Clock Co. v. Motion Picture Adver. Corp.*, 323 F. Supp. 172, 174 (E.D.La. 1971). We therefore affirm the finding that the third prerequisite for application of collateral estoppel is satisfied.

The fourth prerequisite, that the prior judgment is final and valid, is also satisfied. Under Louisiana law, declaratory judgments have the force and effect of a final judgment or decree, La. Code Civ.

Proc. art. 1871, and settlement of a disputed liability is as conclusive as a judgment following litigation. *Cia Anon Venezolana De Navegacion,* 374 F.2d at 35. Further, claimant appealed the district court's adverse decision to the Fifth Circuit, which affirmed the judgment. *See Acord*, 125 F.3d 18, 31 BRBS 109(CRT). As the district court's judgment is final and valid, the administrative law judge properly found all criteria for application of collateral estoppel are satisfied in this case.

Claimant next asserts that application of collateral estoppel is inappropriate due to differences in legal standards between the two forums.14 We disagree; the burden of proof in both forums is identical. The district court applied Louisiana law. In Louisiana, one who asserts a fact in a civil action must carry the burden of proving that fact by a preponderance of the evidence, i.e., evidence which is of greater weight, or more convincing, than that which is offered in opposition to it. *Town of Slidell v. Temple*, 164 So.2d 276 (La. 1964); *Artificial Lift, Inc. v. Production Specialties, Inc.,* 626 So.2d 859 (La. Ct. App.1993), *writ denied,* 634 So.2d 394 (La. 1994). Thus, in the district court proceeding, it was employer's burden to convince the factfinder that a valid settlement agreement existed between claimant and Tri-Drill. Similarly, under the Act, because Section 33(g) is an affirmative defense, it is employer's burden to persuade the factfinder that claimant entered into a fully-executed settlement with a third party.15 *Barnes v. General Ship Service*, 30 BRBS 193 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994) (proponent of a rule bears the burden of persuasion by a preponderance of evidence); *Santoro v. Maher*

Terminals, Inc., 30 BRBS 171, 173 (1996) (defining "preponderance of the evidence" as "the greater weight of the evidence, or evidence which is more credible and convincing to the mind"). There being no difference in the burdens of proof, we reject claimant's assertion that applicat ion of collateral estoppel is inappropriate in this case. *See Acord*, 125 F.3d at 22, 31 BRBS at 112(CRT); *Jenkins,* 583 F.2d at 1278, 8 BRBS at 732; *See Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

As the issue under consideration in this case is identical to the one in the district court case, was fully litigated in the prior proceeding, was a necessary part of the judgment, and as the prior judgment is final and valid, claimant has not established that the administrative law judge's application was contrary to law or based on an abuse of his discretion. Consequently, we affirm the administrative law judge's finding that claimant is collaterally estopped from asserting that he did not enter into a third-party settlement with Tri-Drill.16 *Acord*, 125 F.3d at 22, 31BRBS at 112(CRT); *see Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156 (La. 1978) (Louisiana's doctrine of res judicata precludes litigation of the object of the judgment when there is an identity of the parties, the "cause," and the thing demanded). We thus affirm the administrative law judge's finding that claimant's claim for benefits under the Act is barred by Section 33(g)(1), as well as the dismissal of claimant's claim under the Act. *Parfait*, 2018 WL 4326520 at *4.

Accordingly, the administrative law judge's Order Granting Employer/Carrier's Motion to Dismiss and the Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.
BETTY JEAN HALL
Chief Administrative Appeals Judge
JUDITH S. BOGGS
Administrative Appeals Judge
JONATHAN ROLFE
Administrative Appeals Judge

1 Claimant alleged he sustained resulting neck and back injuries which required surgeries. Tr. at 12-13 (Oct. 17, 2016).

2 Claimant did not oppose Tri-Drill's motion for summary judgment, and specifically stated in his response to the pending motions that, "Tri-Drill, UV [L], and plaintiff have compromised their differences." EX 1A at NP 66; *see also Simon v. Longnecker Properties*, No. 12-1178, 2015 WL 9482899 at *2 (W.D. La. Dec. 28, 2015).

3 On October 8, 2015, employer filed with the district court an opposition to Tri-Drill's motion for summary judgment, asserting that a genuine issue of fact existed as to Tri-Drill's liability and that it would be inappropriate to enter a judgment in Tri-Drill's favor rather than dismiss the case because the parties settled their dispute. *See* Opposition of Clarence Simon to Motion to Dismiss (October 19, 2015) exh. 3 at 2.

4 Tri-Drill opposed employer's motion, asserting that employer lacked standing to seek dismissal of Tri-Drill's motion and lacked standing to enforce a compromise between other parties. In so doing, Tri-Drill explicitly noted, ""Tri-Drill does not concede that the agreement between Plaintiff and Tri-Drill is an unenforceable compromise, and it expressly reserves the right to pursue any and all available

relief it may be entitled to, including enforcement of agreements with any party." CX 6 at 1 n.1. Claimant also opposed employer's motion on procedural grounds. CX 7.

5 Specifically, the court stated:

Finally, before the Court is the Motion for Summary Judgment filed by Tri-Drill (Doc. 244), which is unopposed by plaintiff, but opposed by [employer,] and the Motion to Dismiss and Confirm Settlement (Doc. 277) by [employer], referring to said summary judgment motion. Based on the clear evidence of settlement between Tri-Drill and [claimant] filed into the record by [employer], the Motion to Dismiss and Confirm Settlement is **GRANTED**. The Motion for Summary Judgment by Tri-Drill is **DISMISSED** with prejudice.

Simon, 2015 WL 9482899 at *2 (emphasis in original).

6 Assuming, arguendo, that claimant is permanently totally disabled and earned approximately $1,100 per week, Tr. at 12-13, the administrative law judge found that claimant would be entitled to $19,533.33 as of the end of 2016. The administrative law judge further found that, even if employer's liability was to be calculated using the lowest possible estimate of temporary total disability benefits, the $8,000 settlement amount would be eclipsed within approximately eleven weeks. Order at 14.

7 Employer contends claimant's Petition for Review and brief was untimely filed and "should be disregarded." The Board acknowledged claimant's appeal on August 7, 2017. Although claimant's brief was due within thirty days of his receipt of the acknowledgement, it was not until September 21,

2017, that the Board received claimant's brief dated September 18, 2017. Notwithstanding employer's objection, we accept claimant's brief as part of the record. 20 C.F.R. §§802.211, 802.217.

8 The Board's May 2018 Order requested that the Director address the issues raised in claimant's appeal and that he also address "whether, and, if so, to what extent Section 33(g) modifies or pre-empts state law for determining whether a person entitled to compensation has 'entered into a settlement' with a third party." *Simon v. Longnecker Properties, Inc.*, BRB No. 17-0579 (May 17, 2018). We accept this brief, which is accompanied by a motion to accept it out of time. 20 C.F.R. §§802.215, 802.217.

9 Section 33(g)(1) of the Act states:

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

33 U.S.C. §933(g)(1).

10 As the proponent of the Section 33(g) defense, the employer bears the burden of establishing that the claimant entered into a third-party settlement for less than his compensation

entitlement. *Edwards v. Marine Repair Services, Inc.*, 49 BRBS 71, 75 n.9 (2015), *modified in part on recon*, 50 BRBS 7 (2016).

11 We affirm these findings as unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

12 The Act does not define "settlement" and is silent with regard to what it means to have "entered into a settlement" with a third party. Consequently, the Board agrees with the Director that Section 33(g) does not preempt the use of state law in determining whether a settlement has been entered into. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); *Hale v. BAE Systems San Francisco Ship Repair*, ___ BRBS ___, BRB No. 17-0523 (Oct. 10, 2018); *see also Mallot & Peterson v. Director, OWCP [Stadtmiller],* 98 F.3d 1170, 1174, 30 BRBS 87, 89(CRT) (9th Cir. 1996) (applying state law in interpreting settlement agreement), *cert. denied*, 520 U.S. 1239 (1997) *overruled on other grounds by Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012); *Williams v. Ingalls Shipbuilding*, 35 BRBS 92, 95 (2001) (Act does not define "settlement").

13 In *Esposito*, the Board rejected the claimant's assertion that his third-party settlement was not executed until he received the settlement proceeds from the third-party defendant. The Board held that the settlement was fully executed when claimant signed a general release in return for $60,000 and filed a stipulation of dismissal with prejudice because the parties could not rescind the agreement and return to the *status quo ante. Esposito*, 36 BRBS 10. Although claimant, here, has yet to accept any settlement funds, he fully executed the settlement with Tri-Drill in acquiescing to its motion

for summary judgment. Claimant never withdrew this "consideration." Further, as the district court confirmed the settlement and dismissed Tri-Drill's motion for summary judgment with prejudice, there can be no question that the parties are unable to return to the *status quo ante*. *See Cia Anon Venezolana De Navegacion v. Harris,* 374 F.2d 33, 35 (5th Cir. 1967) (an agreement of the parties settling a disputed liability is as conclusive of their rights as a judgment would be if it had been litigated instead of compromised); *Theatre Time Clock Co. v. Motion Picture Adver. Corp.*, 323 F. Supp. 172, 174 (E.D.La. 1971) (voluntary settlements of civil controversies are highly favored by courts and a valid settlement agreement once entered into cannot be repudiated by either party).

14 Contrary to claimant's assertion, the provisions of Section 8(i), 33 U.S.C. §908(i), are not applicable to third-party settlements.

15 Contrary to claimant's assertion, the true doubt rule is no longer good law and is therefore inapplicable under the Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). In any event, the burden here is on employer.

16 We reject claimant's assertion that employer engaged in "forum shopping" by raising the existence of a settlement agreement in the district court proceedings after the administrative law judge denied, as premature, employer's initial motion to dismiss claimant's claim as barred under Section 33(g). As the administrative law judge stated on reconsideration:

Before the issuance of the October 2015 Order, Employer/Carrier served subpoenas on various entities and persons in the district court matter to

clarify whether any settlement between Claimant and Tri-Drill existed. The district court action was a separate, simultaneous pending case filed by Claimant in which the disputed settlement occurred.

Decision and Order on Recon. at 5. Further, to the extent claimant argues that employer is estopped from asserting a settlement exists based on the administrative law judge's October 2015 Order, which denied employer's initial motion to dismiss, we also reject this assertion. The administrative law judge's October 2015 Order was not a final decision, and it predates employer's receipt of evidence used to establish in district court that a confected settlement existed.