No. 20-1013

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, INC., AND SEABRIGHT INSURANCE COMPANY,

Respondents

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question I. Did the Fifth Circuit correctly uphold the Benefit Review Board's determination that collateral estoppel barred Petitioner from relitigating the existence of a third-party settlement agreement?

Question II: Does the Fifth Circuit's decision conflict with any decision of this Court or of any other Court of Appeals?

Question III: Did the Employer/Carrier meet its burden of proof showing that an executed settlement existed within the meaning of 33 U.S.C. 933(g)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER

SUMMARY OF THE ARGUMENTS FOR GRANTING CERTIORARI

In all points raised in their Oppositions, Federal Respondents, Longnecker Properties, Inc. and Seabright Insurance Company [hereinafter "Respondents"] misstate facts, quote without analysis the factually and legally erroneous judgments of the ALJ, BRB and Fifth Circuit, and rely on procedural misapplications and empty technicalities in order to support denial of certiorari.

RESPONSE TO RESPONDENTS' ARGUMENTS

Respondents make the following contentions:

I. Collateral Estoppel

Respondents' arguments merely quote the erroneous decisions below in support of application of collateral estoppel to factual circumstances that disregarded the requirements of 933(g) and improperly construed the facts, particularly those **found** by the ALJ showing an absence of settlement between Petitioner and third-party, Tri-Drill. It is undisputed that Simon's counsel was **not** authorized to enter into **any** agreement. Settlement also had to be approved by the employer prior to consummation. It was not approved The settlement was not authorized, much less signed by Clarence Simon. These arguments are addressed in the Petition.

Respondents, however, continue to urge the correctness of erroneous judgments of the BRB and Fifth Circuit and even of the ALJ inappropriately applying collateral estoppel. They ignore the factual f**indings** of the ALJ in its order denying the

Employer/Carrier's motion to dismiss.[1] These factual findings are totally inconsistent with these erroneous lower court decisions. The ALJ stated:

> Section 33(g) is an affirmative defense that must be raised and pleaded by an employer who bears the burden of showing that the claimant entered into a: 1) fully-executed settlement; 2) with a third person; 3) without obtaining prior written approval from his employer and its carrier. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015). Thus, the employer must first show that a fully-executed settlement exists.[2]

The ALJ then found that no valid settlement existed between Petitioner and Tri-Drill, stating:

> In determining whether settlements have been fully executed, the Board held, in *Williams v. Ingalls Shipbuilding, Inc*., 35 BRBS 92 (2001), that the ALJ must consider, on a case-by-case basis, numerous factors, including, *inter alia*, whether the claimant agreed to a settlement; whether he signed a release; whether the claimant's counsel had the authority to settle a claim on his behalf; whether any third-party suits had been dismissed; and/or whether any settlement had been rescinded, thereby

1 Appendix D.
2 Appendix D, p. D6.

> returning the parties to the status quo ante.[3]

Thus, the ALJ, finding that "legitimate issues of fact remain as to whether a fully-executed settlement exists so as to meet Employer's first requirement for obtaining a bar to compensation and medical benefits under Section 33(g),"[4] accurately detailed the prerequisites for a settlement under 33(g), the burden of proof, application of Louisiana law and 33(g) law.

Without analysis, the Federal Respondents simply cite the Restatement (Second) of Judgments § 27, at 250 (1982) stating that under the doctrine of collateral estoppel, "the general rule is that when [1] an issue of fact or law is [2] actually litigated and [3] determined by a valid and final judgment, and [4] the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties […]." Both Respondents ignore the fact that the issue before the district court required a different and much lower legal standard of proof or persuasion than under 933(g) before the ALJ

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3 Appendix D, p. D7.
4 Appendix D. p. D10.

or presumably the Board. The first and second elements were not met since, despite having similar issues of fact and law, the ALJ was not expected to **appreciate** the facts in the same manner as the district court did under tort/maritime law. The proper standard of consideration of the stringent LHWCA §933(g) requirements resulted in a denial of the motion to dismiss by the ALJ and should have resulted in an altogether different finding and decision. Respondents, understanding the force of this argument, contend that "**more stringent LHWCA requirements under 933(g) [are] not an issue in this case**." This, as done below, (mis)applies collateral estoppel by **contending** erroneously that all elements of the doctrine are met. Respondents attempt to distinguish *O'Neil v. Bunge Corp.*, 365 F.3d 820 (9th Cir. 2004) because it involved a settlement under Section 908(i) instead of Section 933(g). However, the form requirements under both sections present the same legal issue: collateral estoppel is not proper where different and more stringent requirements are involved than under tort or maritime law. Courts must defer to the BRB's interpretation of the statute where such

interpretation is reasonable and reflects the policy underlying the statute. *Id.* at 822. The Ninth Circuit stated that the "main purpose 'clearly is protection of the claimants', and the public's, interest in preserving them and their families from destitution and consequent reliance on the taxpaying public.'" *Id.* at 823 (quoting *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 781 (5th Cir.1988)).

The language of 933(g) is and should have been paramount to the decisions below:

> (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) 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) only if written approval of the settlement is obtained from the employer and the employer's carrier, **before the settlement is executed**, *(emphasis added)* 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.

In *Kelly v. Red Fox Companies of New Iberia Inc.*, 123 F. App'x 595, 597 (5th Cir. 2005), referencing a Fourth Circuit decision, the Fifth Circuit found that:

> In *I.T.O. Corp. of Baltimore v. Sellman*, the Fourth Circuit refused to impose a complete bar on future compensation in the absence of a written approval, finding that an employer's failure to provide written approval of a third party settlement agreement did not serve to terminate the employer's obligation to provide compensation under the LHWCA when the employer directly and fully participated in both the third party action and the settlement negotiations leading to the execution of

what amounted to a "joint" settlement agreement.

Here, the facts show that Simon counsel and counsel for third-party Tri-Drill commenced negotiations toward a possible settlement. This settlement was tentatively agreed to — subject to Petitioner's consent which was never given. At the mediation and on the very day that Mr. Simon would have been presented with the offer, the Employer/Carrier, who was already aware of the settlement negotiations and would have been a necessary party to the settlement, announced its lack of consent. Mr. Simon was never presented with the offer and did not give consent. The Employer/Carrier then immediately but prematurely sought to enforce negotiations by a motion directed to the ALJ claiming the unconsummated agreement to be a valid settlement under 933(g). This motion was denied by the ALJ because there had been no actual settlement, no release, and no compensation to Simon. These facts have never varied. The burden, not there met, was on the employer.

No actual settlement had occurred when the Employer/Carrier, thwarted by the ALJ, filed its

motion in the district court. As stated above by both the Fifth Circuit and the Fourth Circuit, the employer/carrier's complete participation in a settlement between claimant/worker and a third-party can "serve to obviate the need for written approval of the agreement under § 933(g)(1)." *Id.* Once again, the facts unequivocally show that Petitioner Simon did not agree to the settlement, did not sign a release, that his counsel disclosed the **proposed** settlement, that the Employer/Carrier did not consent, that settlement was not consummated or fully "**executed**" under 933(g), and that the Employer/Carrier sought its own enforcement of that uncompleted and rejected settlement despite opposition by both Tri-Drill and Simon.

This Court, in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483 (1992), did not have before it or consider whether an employer's participation in a third-party settlement brought the case procedurally outside the realm of 933(g) nor what happened when no money passed hands and no releases were signed by the employee, here Simon. The question remains open.

Even though Cowart, the employee, did receive a settlement and did execute a release, there was a powerful dissent:

> The Court recognizes "the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute." *Ibid.* It attempts to justify the "harsh effects" of its decision on the ground that it is but the faithful agent of the Legislature, and "Congress has spoken with great clarity to the precise question raised by this case." *Ibid*. In my view, Congress did not answer the question in the way the Court suggests, let alone did it do so "with great clarity." The responsibility for today's unfortunate decision rests not with Congress, but with this very Court." *Id.* at 503.

Here, Clarence Simon was not then receiving and **had never received any benefits** from the Employer/Carrier either voluntarily or through judgment. The Employer/Carrier not only had notice of the tentative settlement between Petitioner and Tri-Drill, but also sought to enforce and succeeded in enforcing the settlement in the district court after being rebuffed by the ALJ. Clear guidance from this Court is therefore appropriate as to whether such

situations effectively place injured workers outside of the forfeiture of 933(g).

The decision below is inconsistent with other circuit decisions involving settlements by injured employees. The settlement issue was not "actually litigated" for purposes of collateral estoppel. Restatement (Second) of Judgments § 27 cmt. d, at 255. Under the more particularized and stringent requirements of 933(g), the facts are to be presented, construed, and **appreciated** differently than in a tort/maritime action. The district court's finding that a settlement was concluded between Petitioner and Tri-Drill was based on factors that were construed differently by the ALJ — until collateral estoppel was urged based on the district court's decision and the Fifth Circuit's affirmance without opinion. Whether the district court's judgment is final or valid is inconsequential to Petitioner's Longshore claim. His claim to this Court is solely based on the language of 933(g). Its requirements were admittedly unmet.

II. Existence of a Settlement

Absent approval from the ALJ of a completed settlement application, there is no enforceable settlement. As there was no settlement application

made to the ALJ and no consummated settlement, no payment of funds and no release, the strict terms of 33 U.S.C. 933(g) were not met, and Simon is entitled to compensation. Misstating the facts, as done by Respondents, does not change them.

Respondents make a half-hearted attempt to distinguish *Hale v. BAE Systems San Francisco Ship Repair, Inc.*, 801 Fed. Appx. 600 (9th Cir. 2020) and *Mallott & Peterson v. Director*, 98 F.3d 1170, 1173-1174 (9th Cir. 1996). They properly identify the question (which was identical to the question in this case): whether the person who entered into the settlement was "the person entitled to compensation" or "the person's representative" as required to trigger Section 33(g)'s forfeiture provision. 33 U.S.C. 933(g)(1); *Hale*, 801 Fed. Appx. at 601- 602; *Mallott*, 98 F.3d at 1172. However, Respondents do not address undisputed evidence that Clarence Simon, Jr., was unaware of and did not consent to an agreement with Tri-Drill.[5] Based on erroneous decisions, Respondents contend that "there is no question that petitioner was the 'person entitled to compensation' and the person

5 See Petition p. 14.

the district court determined had entered into a settlement with Tri-Drill." Respondents do not address Petitioner's unchallenged evidence that his counsel lacked authority to finalize a settlement on his behalf. Therefore, no third-party settlement "agreement" was reached by either "the person entitled to compensation" or "the person's representative." Here, 933(g) cannot be applicable because no release was signed, and no money ever passed hands.

Simply stating that Petitioner's declarations are self-serving without quoting even one example cannot suffice, particularly since the employer has the burden of proof. As found by the ALJ (whose approval would have been needed for an actual settlement), no settlement papers existed, no money passed hands, and no release was signed. Accordingly, 33 U.S.C. 933(g) is inapplicable. The BRB, referencing the ALJ only in part, stated that "[t]he 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." [6] (Emphasis added). Moreover, in denying the Employer/Carrier (Longnecker)'s original motion to dismiss, the ALJ found that "[i]n this case, Employer has asserted that Claimant settled tort claims with Tri-Drill for $8,000 and UV Logistics for $2,500, but it did not submit evidence of a fully-executed settlement with its motion and has not carried its burden that a fully-executed settlement exists." The ALJ further cited the *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997), where the BRB found that:

> Section 33(g) did not apply in a situation involving court costs. When the claimants did not succeed in the third-party suit, the district court granted summary judgment in favor of the defendants and then assessed court costs of $12,000 against the claimants. The claimants' election to forego an appeal in return for the defendants' agreement to waive their right to costs was not a settlement under 33(g) because the parties did not compromise the third-party case, the claimants did not receive settlement proceeds, and the money which the defendants waived was not

6 See Petition, Appendix C, p. D8.

> settlement funds in which the employer would be entitled to credit.[7]

The later decisions to erroneously apply collateral estoppel cannot not change the fact that there was evidence, according to the facts in the record as found by the ALJ and not disputed, that 933(g) was not met. There was no valid settlement between Petitioner and Tri-Drill. Respondents actually admit that the ALJ correctly interpreted Louisiana law. Yet the ALJ, despite having found that no executed settlement existed prior to the Employer/Carrier's motion to enforce the settlement in the district court, flinched by applying collateral estoppel to a decision rendered under law other that 933(g).

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7 Appendix D, p. 9. See also decisions quoted in Appendix D, p. 8.

CONCLUSION

The petition for a writ of certiorari to the United Stated Court of Appeals for the Fifth Circuit is both important and meritorious and should be granted.

Respectfully submitted,

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APPENDIX D. ADMINISTRATIVE LAW JUDGE ORDER DENYING EMPLOYER/CARRIER'S MOTION TO DISMISS

DATED OCTOBER 20, 2015

Clarence J. SIMON, Claimant,
v.
LONGNECKER PROPERTIES, INC., Employer
and
SEACOR MARINE, LLC,
and
SEABRIGHT INSURANCE COMPANY, Carrier

Case No.: 2015-LHC-110
OWCP No.: 07-194509
Before Clement J. Kennington, Administrative Law Judge

On October 6, 2015, Longnecker Properties, Inc. (Employer) and SeaBright Insurance Company (Carrier) filed a Motion to Dismiss in the instant claim pursuant to 29 C.F.R § 18.70(c) on the ground that Clarence Simon (Claimant), without obtaining prior written approval, entered into third-party settlements in violation of Section 33(g) of the Longshore and Harbor Workers' Compensation Act. ("The Act').

A. Background

Employer asserts that during the pendency of the present claim, Claimant filed a third-party lawsuit in the United States District Court for the Western District of Louisiana against several parties, including Tri-Drill, LLC, and United Vision Logistics,

LLC ("UV Logistics") seeking damages for the same injury for which this present claim was filed. In early October 2015, Employer apparently learned that Claimant entered into "settlements" with Tro-Drill and UV Logistics without its approval. (Emp. Mot., EX-A). Further, counsel for UV Logistics confirmed that a settlement agreement was entered into for $2,500 in exchange for Claimant agreeing to a consent judgment dismissing it with prejudice in the district court action. (*Id.* at 1-2; EX-A). Regarding Tri-Drill, Employer asserts that Claimant agreed to not oppose Tri-Drill's Motion for Summary Judgment in exchange for a settlement of $8,000, which was also not approved by Employer. (*Id.* at 2). Further, Employer included a recent court filing by Claimant where he noted that "Tri-Drill, UV and plaintiff have compromised their difference." (*Id.*; Cl. Opp., EX-3, p. 3). Therefore, under Section 33(g), Claimant's rights to compensation and benefits must be terminated. Employer cited a Fifth Circuit case, *Nicklos Drilling v. Cowart*, 907 F.2d 1552, 1554 (5th Cir. 1990) and an administrative law judge case, *Guidry v. Total Instrument & Electrical Servs., Inc.*, ALJ No. 2007-LHC-1645 (Dec. 11, 2008), for support of its motion.[1]

On October 16, 2015, Claimant filed an Opposition of Clarence Simon to Motion to Dismiss.

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1 On October 9, 2015, Employer filed a letter with the undersigned urging a dismissal, although the 14-day period for Claimant to file an opposition or response had not yet passed. *See* 29 C.F.R. § 18.33(d).

Claimant recited his version of the events leading up to Employer's motion.[2]

Regarding an apparent settlement with UV Logistics, Claimant's Counsel determined that no legitimate action existed between Claimant and UV Logistics, and thus the parties agreed to a Rule 41(a) dismissal under the Federal Rules of Civil Procedure, wherein each party agreed to bear its own costs. The parties agreed to a consent judgment, and, "without any prompting from Claimant," counsel for UV Logistics sent a check to Claimant's Counsel for costs in recognition that he prepared the motion and ensured that it was properly filed. (Cl. Opp., p. 2; EX-2). Thus, Claimant contends that the $2,500 was for costs and was not given in consideration for a settlement. Counsel added that the money has since been returned, and he is seeking to set aside the consent judgment because of Employer's contention that it is also a "settlement" under Section 33. (*Id.* at 2).

Regarding an apparent settlement with Tri-Drill, Counsel acknowledged that an agreement had been reached prior to his realization that Section 33(g)

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2 Claimant's Counsel also stated that he was retained as counsel in 2014 to assist James MacManus, Claimant's initial Longshore counsel, in the personal injury action. MacManus has since died. Also, Counsel underwent ear surgery that left him disabled for several months, and he included a letter from his treating physician requesting to have him excused from court appearances for the next three to six months. (Cl. Opp., EX-1).

applied; he stated that an LS-33 form would have been tendered to Employer to provide notice of the settlement. (Cl. Opp., pp. 2-3). On October 7, 2015, Employer and Claimant had an unsuccessful mediation, where Employer indicated that it would not approve any third-party settlement. On October 8, 2015, Employer filed an opposition to Tri-Drill's Motion for Summary Judgment in the district court action, where it stated that counsel for Tri-Drill has changed his position that a settlement exists between Tri-Drill and Claimant, and that it opposes the motion in part "[b]ecause the record is currently unclear" as to whether a settlement actually exists. (*Id.* at EX-3, pp. 1-2).

B. Law and Discussion

1. Motion to dismiss

Under 29 C.F.R. § 18.70, any party may move for disposition of the pending proceeding when consistent with statute, regulation, or executive order. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.

2. Section 33(g)

a. Generally

Section 33(g) of the Act (33 U.S.C. § 933(g)) provides a bar to claimant's receipt of compensation where the "person entitled to compensation" enters into a third-party settlement for an amount less than

his compensation entitlement without obtaining employer's prior written approval. The section is intended to ensure that the employer's rights are protected in a third- party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *I.T.O. Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT), *vacated in part on other grounds on reh'g*, 967 F.2d 971, 26 BRBS 7(CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev'd on other grounds*, 784 F.2d 644, 18 BRBS 67(CRT) (5th Cir. 1986). Failure to obtain prior written approval, when required to do so, results in the forfeiture of disability and medical benefits under the Act. 33 U.S.C. §933(g)(2); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015); *Esposito v. Sea- Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R. §702.281(b).

Interpreting the phrase "person entitled to compensation" in Section 33(g)(1) in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992), the Supreme Court held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests and not when an employer admits liability. The Supreme Court also held that an employee is not required to get prior written approval of third-party settlements from the employer in two situations: (1) where the employee obtains a judgment, rather than a settlement, against a third party; and (2) where the

employee settles for an amount greater than or equal to the employer's total liability under the Act.[3]

In *Harris*, 28 BRBS 254 (1994), the Board held that in situations where multiple third- party lawsuits have been filed, the third-party settlements should be analyzed in the aggregate, and not individually, in making the comparison between the amount of the settlement and the amount of compensation so as to correspond to employer's aggregate Section 33(f) credit. The Board reaffirmed its use of the aggregate total on reconsideration in *Harris*, 30 BRBS 5 (1996). Thus, in order to determine whether the Section 33(g)(1) bar applies, the ALJ should use the amount of the aggregate third-party settlements entered into by the time of the formal hearing in comparison to the amount of compensation to which the claimant is entitled over his lifetime. *Harris*, 30 BRBS at 15-16.

Section 33(g) is an affirmative defense that must be raised and pleaded by an employer who bears the burden of showing that the claimant entered into a: 1) fully-executed settlement; 2) with a third person; 3) without obtaining prior written approval from his employer and its carrier. *Newton-Sealey v. ArmorGroup Services (Jersey)*, Ltd., 49 BRBS 17 (2015). Thus, the employer must first show that a fully-executed settlement exists.

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3 Under these circumstances, the claimant must give notice under subsection (g)(2). Cowart, 505 U.S. at 482, 26 BRBS at 53(CRT).

b. Existence of settlement

In determining whether settlements have been fully executed, the Board held, in *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), that the ALJ must consider, on a case-by-case basis, numerous factors, including, inter alia, whether the claimant agreed to a settlement; whether he signed a release; whether the claimant's counsel had the authority to settle a claim on his behalf; whether any third-party suits had been dismissed; and/or whether any settlement had been rescinded, thereby returning the parties to the *status quo ante*.

In *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990), *aff'd in pert. part sub nom. Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992), the Board affirmed the ALJ's finding that no settlement of a third-party suit occurred because there was no acceptance, surrender, mutual consent, or consideration present. The ALJ properly relied on parol evidence to find that while extensive settlement negotiations had occurred, no actual settlement or compromise existed, and thus Section 33(g) was not applicable. The Ninth Circuit agreed that no settlement occurred despite the appearance of the claimant's name on a settlement order, and that the ALJ did not err in relying on extrinsic evidence to prove the non-existence of a settlement. *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992). *See also Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom. Mallott*

& Peterson v. Director, OWCP, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997) (although Board need not reach the issue, the evidence showed no settlement occurred; the order dismissing the third-party suit in light of an alleged settlement was vacated).

In *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002), the claimant signed a "General Release" which released third party A.G. Ship in return for $60,000 on August 24, 1999 and filed a stipulation of dismissal with prejudice in the court on the same day. Later, he tried to argue that the settlement was not fully executed until October 4, 1999, the date he received the settlement proceeds from the third-party defendant; as of April 6, 2000, the date of the hearing before the ALJ, the claimant's attorney still had possession of the A.G. Ship check and had not cashed it. However, the Board held that settlement was fully executed as of August 24, 1999.

Casey v. Georgetown University Medical Center, 31 BRBS 147 (1997), is also instructive. In *Casey*, the Board affirmed the ALJ's determination that Section 33(g) did not apply in a situation involving court costs. When the claimants did not succeed in the third-party suit, the district court granted summary judgment in favor of the defendants and then assessed court costs of $12,000 against the claimants. The claimants' election to forego an appeal in return for the defendants' agreement to waive their right to costs was not a settlement under 33(g) because the parties

did not compromise the third-party case, the claimants did not receive settlement proceeds, and the money which the defendants waived was not settlement funds in which the employer would be entitled to credit.

In this case, Employer has asserted that Claimant settled tort claims with Tri-Drill for $8,000 and UV Logistics for $2,500, but it did not submit evidence of a fully-executed settlement with its motion and has not carried its burden that a fully-executed settlement exists. Claimant demonstrated through email correspondence that the $2,500 received from UV Logistics was for costs, and the money was not given by UV Logistics in consideration for a settlement. See *Chavez, supra*; *Williams, supra*; *Casey, supra*[4]; *Esposito, supra*. As Claimant identified in his opposition, Employer acknowledged through its opposition to Tri-Drill's summary judgment motion, filed on October 8, 2015 in the district court action, that counsel for Tri-Drill, its source for information on the existence of a settlement, has since changed his position on whether a settlement actually exists

4 The undersigned recognizes that, at this time, *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997) is slightly distinguishable because the district court had issued summary judgment as opposed to this matter, where Claimant and a third-party defendant, UV Logistics, agreed to a consent judgment because Claimant concluded he had "no good grounds to oppose the meritorious summary judgment filed by UV." (Cl. Opp., pp. 1-2). However, Claimant's Counsel stated that he is seeking to set aside the consent judgment and will file a statement of no opposition of UV Logistics' summary judgment motion. (Id. at 3).

purportedly because the funds have not yet been transferred. Employer also stated the record is "unclear" on whether a settlement exists; it has served subpoenas on various entities and persons to clarify the issue. Therefore, legitimate issues of fact remain as to whether a fully-executed settlement exists so as to meet Employer's first requirement for obtaining a bar to compensation and medical benefits under Section 33(g). Dismissal of this action at this time would be premature.

C. Order

Accordingly, Employer's Motion to Dismiss is hereby **DENIED.**

IT IS FURTHER ORDERED that the hearing in this matter will take place on **October 29, 2015 at 9 a.m. in Covington, Louisiana** as scheduled.

SO ORDERED this 20th day of October, 2015 at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

No. 20-1013

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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day emailed a copy of the Reply Brief in support of Application for Writ of Certiorari, Appendix, Certificate of compliance, and this Certificate of Service to Longnecker Properties and Seabright Insurance Company through its attorney, Henry LeBas, LeBas Law Office 2 Flagg Pl. #1, Lafayette, LA 70508 and to Elizabeth Prelogar, Acting Solicitor General of the United States, Room 5616, DEPARTMENT OF JUSTICE, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001

Executed on June 23, 2021.

Louis R. Koerner, Jr.
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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Reply Brief in Support of Petition for a Writ of Certiorari contains 2516 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2021.

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